

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

In the matter of:

Intuit Inc.,
a corporation,

Respondent.

Docket No. 9408

**COMPLAINT COUNSEL'S
POST-TRIAL REPLY BRIEF**

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COMPLAINT COUNSEL’S POST-TRIAL REPLY BRIEF¹

I. Introduction

The hearing record, as well as the parties’ post-trial filings, highlight something that has always been true in this case: There is little dispute on the key facts. Significantly, for example, Intuit and Complaint Counsel agree:

- **The ads are the ads.** *See, e.g.*, JX-1 ¶¶ 22–63; IFF-214—IFF-218, IFF-223, IFF-242—IFF-244, IFF-247—IFF-252, IFF-260—IFF-262, IFF-265—IFF-269, IFF-272—IFF-275, IFF-280—IFF-282, IFF-284, IFF-287—IFF-290, IFF-293—IFF-294, IFF-296—IFF-299 (each citing to ads in the record without questioning their authenticity).²
- **The ads were widely disseminated.** *See, e.g.*, Br. at 2 (“the parties agree [there] was a multiyear, multi-channel, multi-modal advertising campaign where the challenged ads were served to consumers *billions* of times” (emphasis in original)); Br. at 28 (“the challenged ads ran frequently—an undisputed fact”); Br. at 85–86 (over a six-year period, “the challenged ads were distributed tens of *billions* of times” (emphasis in original)).

What is left to do, then, is apply the law to Intuit’s “multiyear, multi-channel, multi-modal advertising campaign” for TurboTax, in which “the challenged ads were served to consumers *billions* of times.” Br. at 2. The question is: Which law should the Court apply?

On the one hand, there is well-established and fundamental Federal Trade Commission deception caselaw from this Court, the Commission, and the federal courts. Under that law, the

¹ References to the existing post-trial filings are abbreviated as follows:

FF – Complaint Counsel’s Proposed Findings of Fact

IFF – Intuit’s Proposed Findings of Fact

RCL – Complaint Counsel’s Reply to Intuit’s Proposed Conclusions of Law

RFF – Complaint Counsel’s Reply to Intuit’s Proposed Findings of Fact

Br. – Respondent Intuit Inc.’s Post-Trial Brief

² This is a welcome development from Intuit’s stance at the summary decision hearing that “[t]here are disputes over whether some of the ads [the Commission] saw, in fact, ran.” *See* <https://kvgo.com/ftc/oral-argument-october-31>, at 33:05.

evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119; *see* Complaint Counsel’s Post-Trial Brief, Proposed Findings of Fact, and Proposed Conclusions of Law.

On the other hand, there is Intuit’s brave new world, in which the FTC’s deception caselaw is diluted by inapposite cases and sometimes even turned on its head to condone deception. Under that incorrect interpretation of the law, disclaimers that consumers do not read or understand are a cure-all to deception because “just the *existence* of noticeable qualifications—regardless of whether consumers read or understood them . . . put reasonable consumers on notice that the offer was qualified.” Br. at 45 (emphasis in original). According to Intuit: “That alone is enough to decide this case.” *Id.* Gone are the days, apparently, when “[s]uch small-print disclaimers at the bottom of advertisements are insufficient.” *In re Daniel Chapter One*, 148 F.T.C. 832, 1012–14 (2009) (initial decision adopted by the Commission) (Chappell, C.A.L.J.); *see also* *FTC Policy Statement on Deception*, 103 F.T.C. 174, 180 (1984) (“Qualifying disclosures must be legible and understandable.”) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”); *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006); *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989); *FTC v. Fleetcor Techs., Inc.*, 620 F. Supp. 3d 1268, 1295–96 & n.6 (N.D. Ga. 2022). In another twist on the law created by Intuit out of whole cloth, Intuit argues that such insufficient disclaimers are okay as long as they’re close enough to the “top” of the “marketing funnel,” Br. 60, or if sufficient disclaimers would be “overwhelming,” Br. at 67–68. And, in a bold change of tack from the current law, Intuit says that “by directing consumers to the TurboTax website, the ads Incorporated the information on the website.” Br. at 43. Apparently, it’s no longer true that the FTC Act “is violated if [Respondent] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract.” *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975); *see also* *Deception Policy Statement*, at 180 & n.37; *Fleetcor*, 620 F. Supp. 3d at 1298–99 (citing cases);

FTC v. OMICS Grp. Inc., 374 F. Supp. 3d 994, 1010 (D. Nev. 2019), *aff'd* 827 F. App'x 653 (9th Cir. 2020); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001). The new legal regime that Intuit needs this Court to embrace in order to avoid liability—more examples of which are discussed in the Argument below—is essentially a modern revival of *caveat emptor*, so long as consumers can find the truth online at some point before purchase. *Contra FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003) (“*caveat emptor* is simply not the law”). It is a license for advertisers to lie to consumers, so long as consumers can Google search for the truth, or go to a website where they have to click on a link or scroll to the bottom to get the full story. There is simply no room within the FTC Act for this backwards interpretation, and endorsing it would contravene the FTC’s mission of protecting consumers by ensuring truth in the marketplace.

But Intuit does not stop at core FTC deception caselaw in its requests that this Court change the law—its quest also extends into corollary issues. For example, Intuit argues at length that it did not *intend* to deceive anyone. Br. at 46–49, 107–10. Intuit apparently believes this Court got it wrong when it held that “it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *In re POM Wonderful LLC*, 153 F.T.C. 964, 1334–35 (2012) (initial decision) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). In another example, Intuit gleefully lambasts Complaint Counsel for not putting forward more than a few hundred Consumer Sentinel Network complaints against it. Apparently, courts were wrong to find that “failure by consumer victims to file a complaint with the FTC does not indicate that the Defendant has complied with the Act.” *United States v. Lasseter*, No. 3:03-1177, 2005 WL 1638735, at *4 (M.D. Tenn. June 30, 2005); *see also FTC v. Voc. Guides, Inc.*, No. 3:01-cv-170, 2006 U.S. Dist. LEXIS 82308, at *40 (M.D. Tenn. 2006) (“The meaning of a lack of complaints to the BBB is indeterminate.”); *In re Brake Guard Prods., Inc.*, 125 F.T.C. 138, 247 (1998) (“The number of consumer complaints has no bearing on whether the public is being harmed by the respondents’ false or unsubstantiated claims.”).

Moreover: “The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception.” Deception Policy Statement, at 176. Elsewhere, Intuit argues that because it voluntarily chose to stop running certain ads and to enter into a settlement with the States, this action is moot—or at least, no cease and desist order is warranted. Intuit would have the Commission set aside long-standing precedent from itself and courts rejecting assurances of voluntary compliance “when the discontinuance is after the commencement of investigation, i.e., when the Commission’s ‘hand is on one’s shoulder.’” *In re Lovable Co.*, 67 F.T.C. 1326, 1332–33 (1965); *see also United States v. W. T. Grant Co.*, 345 U.S. 629, 630–33 & n.5 (1953); *Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964). Again, Intuit asks this Court to contort the law to benefit itself, to the detriment of the consumers it has been lying to for years.

Intuit also asks this Court to remake the law to fit its affirmative defenses. It says that “Section 5 claims should be subject to a three-year statute of limitations.” Br. at 8; *see also id.* at 113–15. Evidently the Commission was wrong when, in just one example, it adopted an Initial Decision holding: “No statute of limitations attaches to administrative proceedings brought under Section 5 of the Federal Trade Commission Act.” *In re Rentacolor, Inc.*, 103 F.T.C. 400, 418–19 (1984); *see In re Simeon Mgmt. Corp.*, 87 F.T.C. 1184, 1222 (1976) (initial decision adopted by the Commission); *see also E. I. Du Pont De Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924) (“an action on behalf of the United States in its governmental capacity ... is subject to no time limitation, in the absence of congressional enactment clearly imposing it”). Intuit also invokes the doctrine of laches. Br. at 115–16. Again, the Commission must have made a mistake in holding that “neither equitable estoppel nor laches is a defense to an action brought by the government in the public interest.” *Rentacolor*, 103 F.T.C. at 418–19; *see Simeon Mgmt.*, 87 F.T.C. at 1222; *see also United States v. Summerlin*, 310 U.S. 414, 416 (1940). In the arena of constitutional defenses, Intuit argues that the Commission’s structure is unconstitutional, Br. at 119–21—a finding which would require this Court to overturn no less than *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). (At least here, Intuit admits that, at best, it can “preserve[] that argument for further review.” Br. at 119.) Intuit also argues that *Withrow v. Larkin*, 421 U.S.

35 (1975), “which held that the combination of a federal agency’s investigative and adjudicative functions, ‘without more,’ does not violate due process,” was “wrongly decided.” Br. at 118. Apparently even the Supreme Court gets things wrong in Intuit’s eyes.

In addition to seeking to change almost every aspect of the applicable law, another prominent theme of Intuit’s arguments is simply pounding the table. To Intuit, Complaint Counsel’s theory is “baffling,” and Complaint Counsel only “carp[s].” Br. at 1, 42. Intuit’s arguments, on the other hand, “doom[.]” and “devastate[.] Complaint Counsel’s deception claim,” at least one aspect of which is “a total bust.” Br. at 50 & 64. *Contra infra* Parts II.A–B. In Intuit’s eyes, Complaint Counsel have treated the materiality element with “substantial neglect.” Br. at 99. *Contra infra* Part II.C. On expert evidence, according to Intuit, one of Complaint Counsel’s expert witnesses offers only “feeble rebuttal.” Br. 92. *Contra infra* Part II.B.4.c. Taking on an almost conspiratorial glint, Intuit accuses Complaint Counsel’s other expert witness of undertaking a study “clearly designed to reach its desired outcomes.” Br. at 71. *Contra infra* Part II.B.4.a. Similarly, Intuit mounts an unfounded attack on Complaint Counsel’s investigator—Intuit thinks she is only “styled as an FTC ‘investigator’” for an extra shot of belittlement, though that is her job (Shiller (Complaint Counsel) Tr. 139)—because she worked a part-time job for a competitor years ago while in college, Br. at 27 (this, however, after her service in the United States Marine Corps). Further, Intuit concludes, on the basis of a retweet and a public mention of the case, that Chair Khan is so “entrench[ed]” in an anti-Intuit position that she has “prejudged” the matter, and erred in a purported “decision not to recuse herself from this matter.” Br. at 124–25. This, despite the fact that Intuit never asked for her recusal under the Rules, and the fact that this Court and the Commission have already ruled against this argument. *See infra* Part II.F.4. Unfortunately for Intuit, its bluster, cynicism, and derision can’t overcome the fact that its conduct was, in fact, deceptive under long-standing FTC law.

Indeed, Intuit’s overzeal starts with the very first words of its Post-Trial Brief, wherein Intuit accuses Complaint Counsel of seeking a “do-over” of the federal court preliminary relief phase of this matter. Br. at 1. But Intuit knows how Section 13(b)(2) of the FTC Act works—the

Commission issues an administrative complaint and authorizes staff to seek a TRO and preliminary injunction in federal court at the same time. 15 U.S.C. § 53(b)(2). Or at least it should know, because the Judge in the federal court case, the Honorable Charles R. Breyer, explained it in his order denying preliminary relief: “[T]he FTC has brought an administrative proceeding against Intuit An Administrative Law Judge (ALJ) with expertise in these matters will hear [the case].” *FTC v. Intuit Inc.*, No. 22-cv-1973, 2022 WL 1601403, at *1 (N.D. Cal. Apr. 22, 2022) (citing *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1346 (2021) as “detailing the administrative process”). The FTC Act created the administrative proceedings that this Court oversees as a separate forum for adjudication of FTC Act matters. 15 U.S.C. § 45(b). Judge Breyer considered this case on an emergency basis under the standard for preliminary relief in federal court. *See Intuit*, 2022 WL 1601403, at *1. This Court undertakes its own examination of a more complete record. 16 C.F.R. § 3.51(c)(1). Intuit also consistently forgets to mention its other matter before Judge Breyer, in which he rejected a proposed settlement in a class action, which included false advertising claims—similar to those alleged here—on the basis that it “provide[d] class members with inadequate compensation.” (FF-930). On another issue: Intuit argues repeatedly that TurboTax customers who come back year after year could not have possibly been deceived. *E.g.*, Br. at 57–58 & 91. But as Judge Breyer observed: “A person induced into paying for services that the person initially expected to get for free, and who continues to pay for those services annually, can trace the cumulative harm suffered back to the initial deception.” (FF-932; *see also* RFF-15).

Finally, and most sweepingly, Intuit shrugs off Complaint Counsel’s evidence as “merely ... introducing advertisements into the record, establishing that those advertisements ran, and arguing to the Court why *they* think the ads are deceptive.” Br. at 1. But “[t]he primary evidence of what representations an advertisement conveys to reasonable consumers is the advertisement itself.” *In re Telebrands Corp.*, 140 F.T.C. 278, 290 (2005), *aff’d*, 457 F.3d 354 (4th Cir. 2006); *see also In re Novartis Corp.*, 127 F.T.C. 580, 680 (1999), *aff’d*, 223 F.3d 783 (D.C. Cir. 2000). Intuit insists that a finding of deception must be “proven” through “extrinsic evidence.” Br. at 1.

“Both the Commission and the courts, however, have squarely rejected the notion that extrinsic evidence is always necessary in order to prove an implied claim.” *Daniel Chapter One*, 148 F.T.C. at 1014–17 (Chappell, C.A.L.J.); *see also id.* at 1015 (“Courts, including the Supreme Court, have uniformly rejected imposing such a requirement on the FTC, and we decline to do so as well. We hold that the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement.” (quoting *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992) (citing cases))). Intuit’s contempt for Complaint Counsel’s “mere[]” evidence is little more than another request that this Court change the law. *Contra FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965). Moreover, there are also *express* claims in this case, *see infra* Part II.A.1, and Complaint Counsel’s theory *is* supported by extrinsic evidence—no less than the *only* expert study in this case that actually asked consumers whether they thought they could file for free with TurboTax and why, *see infra* Parts II.A.2, II.B.4.a. Intuit is wrong on both the law and the facts.

Regardless of Intuit’s reframing of the law and its bombastic rhetoric, this Court is well acquainted with its true charge:

In determining the meaning of individual advertisements, [the Court] primarily relie[s] on [its] knowledge and experience to determine what impression or impressions an advertisement as a whole is reasonably likely to convey to a consumer. When [its] initial determination is confirmed by the expert testimony of complaint counsel or respondent, [it] rest[s]. When [its] initial determination disagree[s] with that of expert testimony, which [is] often conflicting, [the Court] reexamine[s] the advertisement in question, and further consider[s] other record evidence such as copy tests and other consumer research before reaching a final determination. [The Court does] not rel[y] on such extrinsic evidence when, after careful study and reflection, [the Court finds] it to be unpersuasive and contrary to the weight of evidence.

POM Wonderful, 153 F.T.C. at 1334–35 (Chappell, C.A.L.J.) (quoting *In re Thompson Medical Co., Inc.*, 104 F.T.C. 648, 688 at ¶ 79 (1984) (initial decision), *aff’d* 791 F.2 189 (D.C. Cir. 1986)). Complaint Counsel respectfully submit that, for the reasons discussed below, when this Court undertakes this straightforward examination guided by the applicable law, it will find that

the preponderance of the evidence demonstrates that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that is likely to deliver the message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. A preponderance of the evidence also shows that this claim was false, and that it was material to consumers, and that a cease and desist order is warranted. The Court should not indulge Intuit’s many requests that the law be rewritten in its favor. Following the evidence and the actually applicable law results in one conclusion: Intuit is liable on this one-count Complaint for its deceptive acts and practices in violation of Section 5 of the FTC Act. 15 U.S.C. § 45.

II. Argument

The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years by claiming that: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119.

Intuit Made Free TurboTax Claims. The evidence shows that many TurboTax advertisements include a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence also shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax.³ Intuit argues that “Complaint Counsel have not established that any of the challenged ads expressly or implicitly conveyed any of the deceptive claims Complaint Counsel allege.” Br. at 36–49. In doing so, Intuit elides that its ads made claims such as: “[Y]ou can file on TurboTax for absolutely nothing,” “At least your taxes are free,” and “Free free, free free, free free! ... That’s right, TurboTax Free is free. Free, free free free.” Intuit argues that these claims are either too old to be actionable (not true, *see infra* Part II.E), or constitute neither express nor implied claims that TurboTax is free because the ads: (1) also conveyed that they were advertising a particular TurboTax SKU, (2) included language conveying that not all consumers would qualify to use TurboTax for free, and (3) directed consumers to the TurboTax

³ (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740).

website for more information. Br. at 38–49. As discussed *infra* Part II.A, Intuit’s arguments do not hold up:

First, distinction between TurboTax SKUs in Intuit’s advertising is a red herring. *See infra* pg. 18–19. The Complaint describes the claim as “consumers can file their taxes for free using TurboTax,” Compl. ¶ 119, because “editions” and “SKUs” don’t register with consumers—as Intuit’s own documents show. Intuit also offers three free SKUs, increasing the possibility for confusion among Intuit’s twelve free and paid SKUs. Further, a claim that “TurboTax Free Edition is free” is as deceptive as “TurboTax is free” because a significant minority of ineligible consumers think that they qualify for the Free Edition offer.

Second, Intuit’s “language conveying that not all consumers would qualify for the free TurboTax product,” Br. at 41–43, was simply not effective. *See infra* pg. 19–20. As an initial point, in no way were the purported disclaimers readable, let alone clear and conspicuous, in many ads. Further, assuming readability, the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s experts have much to say about the adequacy of Intuit’s disclaimers—e.g., irrelevantly comparing them to those of other companies and analyzing a flawed disclosure efficacy survey that showed consumers two different deceptive ads (both containing free claims identical to the free claims in challenged ads) and found them equally deceptive. But as the Commission has noted: “[M]ost of the extrinsic evidence proffered by Respondent does not focus on the meaning of the ads. . . . Rather, much of Respondent’s extrinsic evidence concerns peripheral issues This type of evidence does not address what message the ads conveyed to reasonable consumers and would not override findings based on a facial analysis. Conclusory statements by experts that consumers were not deceived based on that same peripheral evidence are similarly inadequate.” *In re Intuit Inc.*, 2023 FTC LEXIS 18, at *31 (Jan. 31, 2023). On the other hand, Complaint Counsel’s expert has put forward the only scientifically valid study showing that consumers did not understand the term “simple tax returns.”

Third, directing consumers to the TurboTax website is also not legally sufficient to cure the deceptive free claims put forward in Intuit’s free TurboTax ads. *See infra* pg. 20. Accepting Intuit’s unprecedented argument that, “by directing consumers to the TurboTax website, the ads incorporated the information on the website,” Br. at 43 (citing no legal precedent), would mean a sea change in FTC deception law. For example, the Deception Policy Statement, at 180, notes: “[P]oint-of-sale material will not necessarily correct a deceptive representation or omission. Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.” The 1984 Deception Policy Statement anticipated Intuit’s argument about the TurboTax website curing the deception because that is where people buy and use the product.⁴ The internet wasn’t available in 1984, but the principles have not changed. Deception is not cured at the “point-of-sale.”

Intuit also argues that its ads could not have conveyed a deceptive meaning because it did not intend to do so. Br. at 46–49. As discussed, this is an argument for a change in the law because Intuit’s intent is irrelevant. *POM Wonderful*, 153 F.T.C. at 1334–35 (Chappell, C.A.L.J.).

Intuit’s Free TurboTax Claims Are False. The evidence shows that Intuit’s free TurboTax claims, as consumers understand them, are not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). Intuit disputes what the correct denominator for this analysis should be, and further asserts that consumers in the market for tax services know, or could easily find out, that TurboTax isn’t really free. Br. at 49–62. As discussed *infra* Part II.B, Intuit’s arguments do not hold up. Intuit also revisits its arguments on “SKU identification,” “simple tax returns only,” and “see if you qualify at turbotax.com” or “see details at turbotax.com.” Br. at 62–71. Once again, these arguments fall flat. *See infra* pg. 18–20. It also bears remembering that: “When a seller’s representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.” Deception Policy Statement, at 178

⁴ *E.g.*, Br. at 21 (“The website is the online equivalent of an Intuit brick-and-mortar store, where consumers can learn information about and purchase (or use for free, depending on their tax situation) every TurboTax SKU.”).

In further support of Intuit’s contention about whether its ads could have delivered a deceptive message to reasonable consumers, Intuit attacks Complaint Counsel’s expert and consumer evidence. Br. at 71–95. As discussed *infra* Part II.B.4, Intuit’s attacks fail. Intuit also revisits its website again. Br. 96–98. But again, that is no help. *See infra* Part II.B.5.

Intuit’s Free TurboTax Claims Are Material. The evidence shows, and common sense makes clear, that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). Intuit argues that Complaint Counsel have not shown materiality. Br. at 98–101. As discussed *infra* Part II.C, Intuit’s arguments miss the mark.

The Proposed Order is Warranted. The Court should enter a cease and desist order because the facts show a “cognizable danger of recurrent violation,” which merits a cease and desist order. *W. T. Grant*, 345 U.S. at 633. Intuit argues to the contrary because: (1) its current ads are supposedly not deceptive, (2) its State Consent Order purportedly moots this action, (3) it did not intend to deceive anyone, and (4) the proposed order would allegedly harm consumers. Br. at 101–13. But as discussed *infra* Part II.D, Intuit’s ads are still deceptive because they continue to make free claims and continue to rely on the same faulty disclaimers, the State Consent Order has impermissible loopholes, Intuit’s intent is irrelevant and the evidence contraindicates Intuit’s position, and the proposed order would not harm consumers. A cease and desist order is necessary and appropriate

Intuit’s Affirmative Defenses Fail. Finally, Intuit argues that its timeliness and constitutional defenses bar some or all of this action. Br. at 113–25. As discussed *infra* Parts II.E & II.F, none of these arguments carry any legal weight. Intuit’s arguments are largely requests that this Court make wholesale changes to long-standing law.

* * *

Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. Deception Policy Statement, at 176. The challenged

ads are deceptive and widely disseminated. For the reasons discussed herein, the Court should enter the proposed cease and desist order.

A. Intuit’s TurboTax Ads Conveyed the Free Claims (Replying to Br. § I)

Count I of the Complaint alleges Intuit “represents, directly or indirectly, expressly or by implication, that consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. This is precisely what the hearing record shows (FF-47 & FF-49—FF-454) and Intuit is mistaken when it argues otherwise. Br. at 36–46.

Ignoring the obvious and singular focus of its ads on “free” TurboTax, Intuit denies that “*any of the challenged ads conveyed any of the alleged claims.*” Br. at 37. Specifically, Intuit argues “the free offers being advertised were qualified, those qualifications were tied to the complexity of your tax return, additional information was available on the TurboTax website, and the free offers were limited to the specific product named.” Br. at 37. In making these arguments, Intuit ignores the power of the primary claim conveyed by the challenged TurboTax ads: “TurboTax is free.” Proper ad interpretation requires determining the overall net impression left by the ad on reasonable consumers. *See FTC v. Nat’l Urological Grp., Inc.*, 645 F. Supp.2d 1167, 1189 (N.D. Ga. 2008), *aff’d*, 456 F. App’x 358 (11th Cir. 2009) (“When assessing the meaning and representations conveyed by an advertisement, the court must look to the advertisement’s overall, net impression rather than the literal truth or falsity of the words in the advertisement.”). The first step in any such analysis requires consideration of the primary message conveyed by the ad. Only then should the analysis turn to whether the disclaimers that attempt to qualify or modify the primary claim are adequate. Instead of including the primary claim in its analysis (as it should), Intuit jumps straight to the disclosures and disclaimers that purport to qualify the primary free claim. This is the central flaw with Intuit’s analysis as it ignores the obvious and primary claim made in all the challenged TurboTax ads. No disclosure can cure a false claim—it “can only qualify or limit a claim to avoid a misleading impression.” *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (Mar. 2013), at 5,

available at [ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising](https://www.ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising); see also Deception Policy Statement at 180–81.

1. The TurboTax Ads Contain Express Free Claims (Replying to Br. § I.A)

Intuit is wrong when it argues “[t]he [c]hallenged [a]ds [m]ade [n]one [o]f [t]he [e]xpress [c]laims Complaint Counsel [a]llege.” Br. at 37. “Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way.” *Kraft*, 970 F.2d at 318 n.4. Even advertisements that do not use the specific terms alleged in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax ads. (See, e.g., FF-66—FF-466; see also e.g., RFF-210; RFF-219; RFF-226; RFF-242; RFF-260; RFF-273; RFF-284; RFF-289).

There is nothing oblique or indirect about Intuit’s ads. They directly represent that TurboTax is free. For example, in 2015, Intuit told the television audience of Super Bowl XLIX: “[Y]ou can file on TurboTax for absolutely nothing.” (FF-66—FF-67). Intuit repeated this messaging in its 2016 Super Bowl Ad featuring Sir Anthony Hopkins (as himself) and claiming, “I would never tarnish my name by selling you something. Now, if I were to tell you to go to turbotax.com, it’s because TurboTax Absolute Zero lets you file your taxes for free.” (FF-70—FF-71). In 2018, Intuit told consumers: “At least your taxes are free.” (E.g., FF-74—FF-75 & FF-80). In 2019, Intuit’s message to consumers was: “Free free, free free, free free! ... That’s right, TurboTax Free is free. Free, free free free.” (FF-99—FF-100 & FF-104). In 2020, Intuit told consumers Googling “free file taxes ONLINE” that the “TurboTax® Official Site” offered “100% Free Online Tax Filing.” (FF-445). And in 2021, Intuit told TikTok users that the energetic dance of its “Dance Workout” ad was: “What it feels like to file your taxes for free, aka the TurboTax #FreeFileDance.” (FF-214). These are a few among many similar ads containing

express free claims or the functional equivalent. (*See, e.g.*, FF-66—FF-466; *see also e.g.*, RFF-210; RFF-219; RFF-226; RFF-242; RFF-260; RFF-273; RFF-284; RFF-289). The representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax.

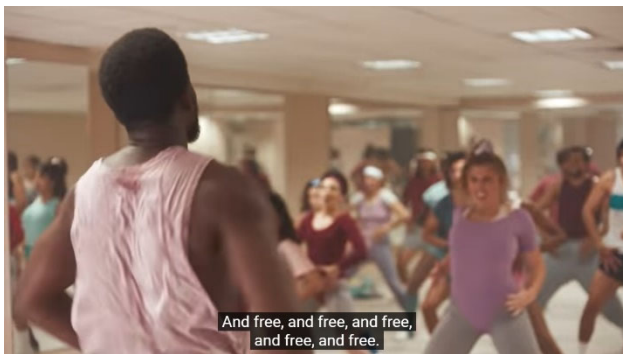
The Complaint does not, as Intuit seems to believe, allege that Intuit represented that TurboTax was free for *everyone*. Much of Intuit’s Post-Trial Brief engages in a straw man fallacy, arguing against an imagined version of the Complaint premised upon this non-existent allegation. (*See e.g.*, Br. at 38). Thus, pointing to testimony from FTC Investigator Diana Shiller where she confirms the challenged ads did not literally “‘say all TurboTax products are free’ or that ‘everyone can file for free using TurboTax Free Edition’” (Br. at 38) does nothing to rebut Complaint Counsel’s case. (*See* RFF-306). Instead, the hearing record establishes what the Complaint alleges: The evidence shows that consumers understand Intuit’s free claims to mean that they can file their taxes for free using TurboTax. (*See* Complaint Counsel’s Post-Trial Brief at 2; RFF-205). The evidence supports such a finding. (*See, e.g.*, (FF-47 & FF-49—FF-454; FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740).

2. At a Minimum, the TurboTax Ads Contain Implied Free Claims (Replying to Br. § I.B)

Intuit is also mistaken when it argues Complaint Counsel “have not proven that any of the challenged ads implied that ‘TurboTax is free,’ that ‘TurboTax is free for them,’ or any other claim suggesting that all TurboTax products are free or that any TurboTax products was free to consumers not eligible to use it.” Br. at 39. As explained above, the Complaint **does not** allege that Intuit claimed **all** TurboTax products are free. Instead, the Complaint alleges, and the hearing record establishes, Intuit’s ads conveyed that “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. While Complaint Counsel maintains that most, if not all, of Intuit’s free claims were made expressly (*see, e.g.*, FF-66—FF-466; *see also e.g.*, RFF-210; RFF-219; RFF-226; RFF-242; RFF-260; RFF-273; RFF-284; RFF-289), implied claims can be

equally deceptive. *Fedders Corp. v. FTC*, 529 F.2d 1398, 1402–03 (2d Cir. 1976). Whether the TurboTax claims were technically express or implied, there is no doubt they leave reasonable consumers with the impression they can file their taxes for free using TurboTax.

Even if “free” were technically considered to be an implied claim, the meaning of the TurboTax ads and other marketing communications can be determined “through an examination of the representation itself.” Deception Policy Statement, at 176; *see also Fleetcor*, 620 F. Supp. 3d at 1289–90, 1295–96; *Fanning v. FTC*, 821 F.3d 164, 170 (1st Cir. 2016); *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994); *Kraft*, 970 F.2d at 319 (“[W]hen confronted with claims that are implied, yet conspicuous, extrinsic evidence is unnecessary because common sense and administrative experience provide the Commission with adequate tools to makes its findings.”). The Court may also find deception “based on the ‘net impression’ created by a representation.” *In re Pom Wonderful LLC*, 155 F.T.C. 1, 12 (2013), *aff’d* 777 F.3d 478 (D.C. Cir. 2015); *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (quoting *Cyberspace.com*, 453 F.3d at 1200). The meaning and net impression of the representation in Intuit’s “free” ads is clear, in no small part because in many ads, including in widely disseminated television commercials that aired until this case commenced in March 2022 (*see, e.g.*, FF-161—FF-184; FF-909—FF-910), Intuit repeats the key word endlessly. For example:



DANCE WORKOUT INSTRUCTOR: And free! Free, free. And free, and free. And freeeeeeeeeee. And free, and free, and free, and free, and free. And free. And free, free. And free.

VOICEOVER: That’s right, TurboTax Free Edition is free. See details at TurboTax.com.

(FF-171—FF-172; GX342 (Complaint Counsel) ¶ 137–40, at CC-00006968–70; [GX206](#)

(Complaint Counsel) (30-second “Dance Workout” TurboTax ad); *see also, e.g.*, [GX200](#)

(Complaint Counsel) (30-second “Auctioneer” TurboTax ad); [GX326](#) (Complaint Counsel)

(TY2018 “Crossword” TurboTax Ad) ; [GX327](#) (Complaint Counsel) (TY2018 “Big Kick” TurboTax Ad); [GX332](#) (Complaint Counsel) (TY2018 “Spelling Bee” TurboTax Ad)).

Such ads require no complicated parsing to decipher. No extrinsic evidence is needed to divine the message conveyed by the ads. Intuit agrees that its ads “speak for themselves.” Answer ¶¶ 5, 24, 26; *see Daniel Chapter One*, 148 F.T.C. at 1014–17 (Chappell, C.A.L.J.); *see also Fleetcor*, 620 F. Supp. 3d at 1289–90, 1295–96; *Telebrands*, 140 F.T.C. at 290; *In re Novartis Corp.*, 127 F.T.C. 580, 680 (1999). There is nothing to read between the lines, because the lines contain the likes of “freeeeeeeeee,” and “free, and free, and free, and free, and free.” (FF-171—FF-172). Intuit’s message is comically obvious—and indeed the comedic simplicity is part of Intuit’s appeal to consumers through these ads. They are catchy, funny, simple, and omnipresent during tax season. They are also deceptive. Thus, even with regard to implied claims, plain meaning, common sense, and administrative experience interpreting advertising allow the Court to determine the unmistakable meaning of Intuit’s ads: that TurboTax is free. *See Kraft*, 970 F.2d at 319; *see also* Deception Policy Statement, at 176.

But even despite the well-established rule that it is **not** “necessary for the Commission to conduct a survey of the viewing public before it [can] determine that the commercials had a tendency to mislead,” *Colgate-Palmolive*, 380 U.S. at 391–92; *see also Fleetcor*, 620 F. Supp. 3d at 1295, in fact, survey evidence supports the Complaint. A consumer perception survey conducted by Professor Novemsky, an expert in the psychology of judgment and decision-making, showed that “taxpayers who do not qualify to use TurboTax Free Edition under Intuit’s criteria have the misimpression that they can file their income taxes for free using TurboTax.” (FF-475; FF-480). Ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (FF-481). A vast majority of these taxpayers identify Intuit’s TurboTax advertisements and its website as playing a role in forming their misimpression. (FF-483—FF-484). The Commission also received numerous complaints about Intuit, including its “free” claims. (FF-676—FF-678). Moreover, Professor Novemsky’s findings are further corroborated by the deposition testimony of multiple consumers

(FF-663—FF-675), Intuit’s own marketing research (FF-596—FF-610), Intuit’s internal complaint tracking and customer review data (FF-619—FF-662), Intuit’s internal marketing strategy documents (FF-611—FF-615), and multiple advertising strategy documents prepared for Intuit by its advertising agency (FF-616).

Citing *Telebrands*, 140 F.T.C. at 429, Intuit argues the challenged ads make no deceptive claim implicitly because “the interaction of all the constituent elements in the challenged ads makes plain that Intuit’s free offers are not unqualified.” Br. at 40 (cleaned up). However, as explained above, the interaction of all the constituent elements in the challenged ads leave at least a significant minority of consumers with the net impression that they can file their taxes for free using TurboTax even though they are ineligible for Intuit’s free offers. (See FF-481; FF-484; FF-486-FF-487; see also FF-619; FF-620; FF-623; FF-635—FF-662; FF-664; RFF-470).

a. The Qualifying Phrases & Disclaimers in the Challenged Ads Were Inadequate

Intuit relies on a mangled and incomplete reading of the Deception Policy Statement (and related caselaw) in arguing that certain “qualifications” contained in the challenged ads were sufficient to prevent reasonable consumers from being deceived. Br. at 40–45; see also Br. at 63. Instead of focusing on the “overall net impression” left by the ads as the caselaw and the Deception Statement require, Intuit asks the Court to focus on certain qualifying phrases. In other words, Intuit’s analysis relies on the very “disputatious dissection” it accuses Complaint Counsel of engaging in.


In doing so, Intuit ignores the fact that the TurboTax free claims are so powerful that they overwhelm the less interesting, less prominent, less conspicuous, less understandable qualifying phrases and disclaimers deployed in the challenged ads. See e.g., *In re Book-of-the-Month Club*, 48 F.T.C. 1297, 1312 (1952) (“The word ‘free’ is a lure. It is the bait. It is a powerful magnet that draws the best of us against our will ‘to get something for nothing.’”), as modified, 50 F.T.C. 778;⁵ Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251.1

⁵ Compare *In re Book-of-the-Month Club*, 48 F.T.C. at 1312 (quoted above) with FF-616

(continued)

(“Because the purchasing public continually searches for the best buy, and regards the offer of “Free” merchandise or service to be a special bargain, all such offers must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived.”) (*see also* FF-488 & FF-489). “Free” is the key message that emerges from the TurboTax ads for a significant number of consumers (and certainly a significant minority) (*see* FF-481; FF-484; FF-486-FF-487; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618—FF-620; FF-623; FF-635—FF-662; FF-666—FF-668; FF-740—FF-741). “Free TurboTax” is the overall net impression even though it is possible to dissect the challenged ads and find certain qualifying phrases and disclaimers. The problem is that Intuit’s qualifying phrases and disclaimers don’t register with consumers in a meaningful way. The result is a significant number of consumers (at least to a significant minority of consumers) left with the misimpression that they can file their taxes for free using TurboTax when, in truth and in fact, they are ineligible to do so.

The first “qualification” Intuit focuses on is the “specific TurboTax SKU,” product name or offer names (e.g., TurboTax Free Edition, Absolute Zero, or TurboTax Live Basic) (Intuit’s copy testing refers to the TurboTax SKUs as “sub brands,” FF-609) identified in the challenged ads. Br. at 41. But the evidence shows that specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish among SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU.



(RFF-212 (for example, consumer testimonials often do not specify a SKU, for example stating “I have been using TurboTax for years...” and “TurboTax is way better than HR Block”)).

Even if a consumer could recall that a challenged ad was for a specific sub brand or SKU such as Free Edition, that fact does nothing to convey the terms, conditions, and obligations upon which receipt and retention of the “free” online tax preparation product being offered are contingent. An ineligible consumer might remember that “TurboTax Free Edition is Free” (*see e.g.*, FF-166 (describing TurboTax Auctioneer ad)) but could still be under the misimpression that TurboTax Free Edition was free for them. Thus, an ad that claims “TurboTax Free Edition is Free” is no less deceptive than an ad that claims “TurboTax is Free” if the ad does not otherwise clearly and conspicuously convey the eligibility requirements. (*See* RFF-319).

The second “qualification” Intuit points to is the phrase “simple tax returns only” Br. at 41. Even if consumers could find and read—or hear—Intuit’s purported qualification,⁶ it would also require them to understand the term “simple tax returns only”—which they do not. What “simple” means is subject to Intuit’s reinterpretation nearly every tax season. (*See* FF-13, FF-15—FF-18 & FF-20). Beyond Intuit’s inconsistent and ever-changing use of the phrase, “simple returns” does not have a consistent meaning in the tax preparation industry. (FF-697). Intuit’s competitors use the term “simple returns” differently from how Intuit uses it. (FF-697). This inconsistency in the industry may contribute to consumer confusion about its meaning. (FF-698). Moreover, Professor Novemsky’s survey speaks to the inadequacy of the “simple” disclaimer. A 55% majority of people who did not have a “simple” tax return, as defined by Intuit, and who had not used TurboTax in the last three years, thought that their tax return was indeed “simple.” (FF-496). As Professor Novemsky opines, consumers are cognitive misers and are unlikely to conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-498—FF-503). Using a qualification or

⁶ Disclaimers must be “prominent and unambiguous to change the apparent meaning and leave an accurate impression.” *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989); *see also Daniel Chapter One*, 148 F.T.C. at 1012–14 (Chappell, C.A.L.J.); *Policy Statement on Deception*, at 180; *Cyberspace.com*, 453 F.3d at 1200 *Fleetcop*, 620 F. Supp. 3d at 1295–96 & n.6.

disclaimer that many people do not correctly apply to their own tax situation is not effective at mitigating deception. (FF-695).

The third set of qualifications Intuit points to in its defense are “see if you qualify” or “see details” at the TurboTax website. Br. at 43. These qualifying phrases are even less informative than “simple returns only.” The evidence shows that Intuit’s purported disclaimers, including “see if you qualify” and “see details at TurboTax.com,” were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-471, FF-480, FF-491—FF-503; FF-635—FF-662; FF-669—FF-670). Based on his consumer perception survey, Professor Novemsky opined that consumers not eligible for the TurboTax Free Edition have the misimpression that they can file their taxes for free with TurboTax. (FF-480). According to the perception survey, ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (FF-481). These results from the consumer perception survey measured all the information in the marketplace in mid to late March 2022 when the survey was in the field, including any supposed curative effect of the “see if you qualify” or “see details at TurboTax.com” disclaimer language as used in the challenged ads. (Novemsky (Complaint Counsel) Tr. 1826–27) (testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey)).

Furthermore, Professor Hauser’s disclosure efficacy survey is consistent with the results of the consumer perception survey in terms of the inadequacy of the “see if you qualify” disclaimer. (RFF-323). Even making purported “enhancements” to ads and website pages intended to mimic TurboTax’s, where the phrase “see if you qualify” was used more prominently (though still not very prominently), similar to the way Intuit uses the phrase now, survey respondents showed no change in their consideration of the fictional Vertax brand and showed an *increase* in considering using the free Vertax option. (RFF-323). Professor Novemsky opined: “Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left

by the “free” claims left in both stimuli.” (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Thus, Intuit’s recent changed use of the qualifying phrase “see if you qualify” in its TurboTax advertising is unlikely to have a material impact on consumers.

Seeming to recognize that their “simple returns,” “see if you qualify” and “see details” qualifications are inscrutable, Intuit argues that these phrases “conveyed that there was *some* limitation, i.e., unmistakably did *not* convey that ‘TurboTax is free for everyone...’” Br. at 42. Conveying “some limitation” is not sufficient under the FTC Act. Qualifying disclosures must be understandable. Deception Policy Statement, 103 F.T.C. at 180. To prevent an ad from being misleading, disclosures must convey material information in clear language “understandable to the intended audience.” *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013),⁷ at 21 (“For disclosures to be effective, consumers must be able to understand them.”).

This is especially important when the central claim in the advertisement is a free claim. Claims that a product or service is free require a heightened standard of disclosure of all material terms, and all such offers must be made with extreme care to avoid any possibility that consumers will be misled or deceived. “Free” claims are hard to disclaim, are powerful, and draw consumers. (FF-488 & FF-489). Thus, when a product or service is offered for free, all the terms and conditions of the offer should be made clear at the outset. *See* Guide Concerning Use of the Word “Free” and Similar Representations 16 C.F.R. § 251.1(c) (“[C]onditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be 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. Stated differently, all of the terms, conditions and obligations should appear in close conjunction with the offer of ‘Free’ merchandise or service. For example, disclosure of the terms of the offer set forth in a footnote of an advertisement to

⁷ [ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising](https://www.ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising)

which reference is made by an asterisk or other symbol placed next to the offer, is not regarded as making disclosure at the outset”); *FTC v. Johnson*, 96 F. Supp. 3d 1110,1146 (D. Nev. 2015) (holding that websites advertising “free” products were deceptive for failing to disclose negative option membership and upsells and reasoning that “[t]he mere fact that the sites contained disclosures in smaller print and described the upsells as ‘bonuses’ and trials at the bottom of the order pages, does not alter the deceptive net impression as to the cost and nature of the product because consumers would not be inclined to seek out this information”). Further, hidden or poorly disclosed costs or conditions are deceptive. *FTC v. Willms*, No. 11-cv-828, 2011 WL 4103542, at *6 (W.D. Wash. Sept. 13, 2011) (holding that the FTC was likely to prevail on the merits where “enrollment fees and recurring costs [were] poorly disclosed” when they appeared only after the consumer had seen the landing page and four additional webpages after that); *see also United States v. Adteractive, Inc.*, 07-cv-5940 (N.D. Cal. Nov. 26, 2007) (GX355) (consent case alleging that defendants deceptively advertised “free” merchandise without disclosing in their advertising or landing page that consumers had to accept and pay for a certain number of goods in order to be eligible for the “free” merchandise, which many consumers only discovered after spending significant time trying to qualify for the product); *see also Book-of-the-Month Club*, 48 F.T.C. at 1311 (“A seller may not make one representation in one part of his advertisement and withdraw it in another part since there is no obligation on the part of the customer to protect himself against such a practice by pursuing an advertisement to the bitter end.”). The new standard proffered by Intuit: “Notice that the offer was qualified,” (Br. at 45) contravenes the law.

Intuit also point to Professor Golder’s benchmarking analysis in arguing that its disclaimers were adequate. Br. at 45. But, Professor Golder’s analysis (which is uninformative) ignores basic advertising law principles, cited above, and key guidance contained in the FTC’s “.com Disclosures” guidelines. (RFF-234—RFF-235; RFF-237—RFF-238). For example, the.com Disclosures guidelines make clear that basic principles of advertising law apply to online ads including that “[a]dvertising must be truthful and not misleading.” .com Disclosures:

How to Make Effective Disclosures in Digital Advertising (Mar. 2013), at 4, *available at* [ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising](https://www.ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising). The.com Disclosures guidelines also make clear that disclosures “cannot cure a false claim.” *Id.* at 5. The guidelines further state that “[i]f a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive.” *Id.* And that “[w]hether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad.” *Id.* at 6. Professor Golder did nothing to measure how consumers actually perceive the TurboTax ads and understand the disclosures within that context. (FF-687; FF-693—FF-694). He did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694). Professor Golder also did not make any determination about whether consumers could see or understand the disclaimers contained in ads by benchmark companies, or whether those ads complied with the law. (FF-702; FF-704; FF-706). The comparative study or benchmarking conducted by Professor Golder is therefore irrelevant to determining whether Intuit’s ads were misleading because Professor Golder made no effort to determine whether consumers saw or understood Intuit’s purported disclaimers, or anyone else’s. (FF-693; FF-702; FF-704). Therefore, Professor’s Golder’s analysis is not responsive to Complaint Counsel’s primary criticism of the TurboTax ads—that it leaves a significant minority of consumers with the misimpression they can file their taxes for free using TurboTax when they are not eligible to do so.

b. Lack of Intent Is No Defense to An Action for Deceptive Advertising; Yet Intuit Acted With Scienter

Intuit argues it never intended to deceive consumers by pointing to the testimony of Intuit’s executives. Br. at 46–49. However, “[i]t is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *POM Wonderful*, 153 F.T.C. at 1334–35 (Chappell, C.A.L.J.) (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *Chrysler Corp.*

v. FTC, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121 (1991)).

“Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged. It would be incongruous, at best, if intent could be used as a sword but not a shield.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill 1998)).

Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent to the truth. The evidence relevant to Intuit’s knowledge includes:

- Intuit’s own marketing research (FF-597—FF-610);
- Feedback Intuit received directly from consumers (FF-619—FF-623; FF-635—FF-662);
- Intuit’s marketing strategy plans (FF-611—FF-618);
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website” (FF-917—FF-918);
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-927);
- A multi-state investigation starting in 2019 (FF-906, FF-909—FF-910);
- Complaint Counsel’s own investigation (FF-906; FF-909—FF-910).

Knowingly engaging in deceptive advertising demonstrates intentionality.

Based on its Intuit’s own marketing research, Intuit knew that a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That I can file my tax es [sic] for free” with the ad) & FF-607 (“About half of

viewers take away the ‘free’ offering in Spelling Bee ...”). In copy testing four TurboTax “free” video ads⁸ for its “TY20 Campaign,” Intuit found that a single exposure to any one of these ads “result[ed] in significant lifts for all ads on perceptions around ... allows you to file your taxes for free.” (FF-601). In fact, after exposure to a single ad during the TY20 Campaign Copy Testing, 45% to 57% of consumers took away the free message. (FF-604). And Intuit’s research shows that a significant number of consumers (between 22-49%) were confident that TurboTax was free for them. (FF-597—FF-598) even though Intuit knew that most taxpayers can’t file for free with TurboTax. (FF-21—FF-23).

Based on feedback it received from consumers, Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...)” (FF-619), and that a number of consumers complained about Intuit’s pricing, for example:

⁸ Each of the four ads included in Intuit’s “TY20 Campaign Copy Testing” was a version of Intuit’s “Free, Free, Free, Free” marketing campaign wherein nearly every word in a given commercial is “free.” (FF-601).

PLU Verbatims From PRS

Required Upgrades

.....

it was very predatory. i came for a free file, but needed to upgrade to the delux edition, after refusing to upgrade 5 times before. My "particular" situation required the delux. so i have to shell out 35 for that. then, since i want to pay the 35 out of my tax return, you're charging 35 to take 35 out of my refund! 100% mark up. I signed in for free and ended up paying 70 bucks.

Because it wasn't until I was nearly finished with my filling that I was told I couldn't file without paying fees that amounted to 111. I find this absolutely ridiculous considering there wasn't anything special about my filling status. everything was nearly the same as last year and last year I was able to file for free. To make matters worse the explanation for why my tax situation required me to pay was cryptic at best basically saying there was an additional medicare form that magically caused me to have to pay all these fees. I would have tried another service if I hadn't been so far along with this service. I will only use turbo tax next year as an absolute last resort.


ever thing i needed to do required upgrading to the next level costing me 110 dollars

it gets more expensive every year. I should be required to pay just because i have a 1099-MISC form. Additionally, it's not mentioned up front that there is a \$34.99 charge if you want the fees deducted from refund, that's extremely misleading because most people would likely click right past that considering you have to scroll to clearly see the charge. Luckily, I caught it and wasn't gouged the extra charge. Just put it on the page where you select method of payment.

I was required to pay extra unexpected fees that totaled around \$100 after constantly reading and hearing that I would be able to file for free.

Because the site required me to upgrade my account, then it didn't make a difference in how I filed. Then charged me for an additional \$70 to file, and somehow 1380 - 106 = 1080 in TurboTax land and I lost \$300 in your fees that don't actually add up.

The pricing seems sketchy and devious. I understand the need for marketing and upselling, but this year Turbo Tax seemed even worse with the required "upgrades" to the next higher service offering. I don't even think the price I paid is unreasonable, but the way I got to that price made me feel cheated and deceived. I will not be using TurboTax next year even though I have used it the last several years in a row.

3 Intuit Proprietary & Confidential 

(FF-619).

In 2019, when TurboTax changed its Free Edition eligibility criteria, many consumers complained about being required to upgrade to a paid product when they were previously eligible to file for free. (FF-620 (*citing* GX415 (Intuit) at CC-00007582 to -00007583) (showing that, by January 21, there were around 500 posts about new upgrade requirements, 69% of which were negative)). Additionally, a 2019 Intuit study showed that [REDACTED]

[REDACTED] (FF-621). Intuit determined that, in 2019, [REDACTED]

[REDACTED]. (FF-622). In a different 2019 study, [REDACTED]

[REDACTED] (FF-623).

Intuit also received consumer feedback directly from consumers to Intuit’s customer service team, as well as from reviews left by consumers who completed their taxes using TurboTax. (FF-624—FF-634). Communications to Intuit’s customer service team include, for example, entries such as, [REDACTED] (FF-638), [REDACTED] (FF-639), and [REDACTED] (FF-641). Another consumer wrote: [REDACTED] (FF-636).

Intuit’s customer reviews similarly include, for example, customer feedback such as: “[t]hey advertise \$0 to file a basic W2 and end up charging you,” (FF-644), “ADVERTISESES FREE, FREE, FREE, BUT ITS ACTUALLY FEE, FEE, FEE!,” (FF-643), “... they keep promoting that it is free free free and yet it is NOT NOT NOT,” (FF-645), and “[i]t’s not free, has never been free, stop lying about how it’s free.” (FF-661). Another Intuit customer wrote: “Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.” (FF-642). Yet another consumer wrote: “However, my only complaint was that you originally advertise the tax program to be free. Once you reach the end of the tax form however, you come to find out that it is indeed not free, but is going to cost at least a minimum of \$39 or more. So that’s not cool. False advertising if you ask me.” (FF-657). In fact, Intuit’s customer review data includes *thousands* of examples that indicate consumers may have been, and in many cases were, deceived by Intuit’s practices. (FF-662 (*citing* RX816 (Intuit) and identifying over 3,800 examples from TY21 alone of customer feedback consistent with Complaint Counsel’s allegations)). In fact, [REDACTED] (RFF-167).

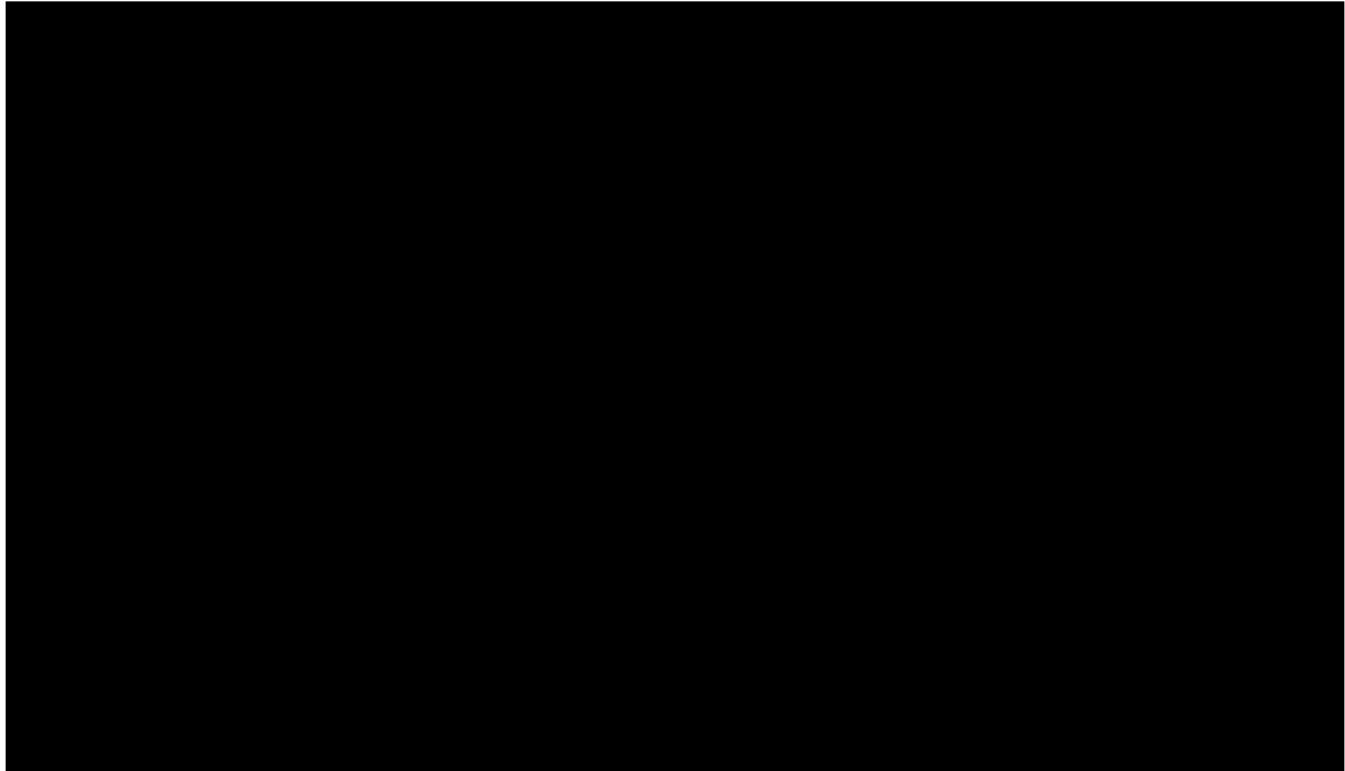
Intuit’s internal marketing strategy documents reflect a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615). Intuit’s FY’19 GTM (“Go-To-Market”) White Paper [REDACTED], (FF-611). As Intuit Director of Marketing Elizabeth Berger explained during her deposition, “every team cross-functionally provides some input” on the FY’19 GTM White Paper and it is designed to provide a detailed view of Intuit’s “go-to-market plans for fiscal year 2019.” (FF-611). The FY’19 GTM White Paper admits that:

- [REDACTED] (FF-612).
- [REDACTED] (FF-613) (emphasis in the original).
- [REDACTED] (FF-614).

The fact that “free” is compelling and attracts customers is not new to Intuit. (FF-615). For example, a 2014 marketing strategy document found that “Free/Free offer is compelling enough to drive considerable (1.2M) incremental customer growth.” (FF-615). Other marketing documents [REDACTED] and [REDACTED].” (FF-615).

Similarly, creative briefs, presentations and other advertising strategy documents prepared for Intuit by advertising agency Wieden+Kennedy also show the impression the TurboTax “free” ads would leave with consumers. (FF-616). For example, a March 18, 2020 presentation developed by Wieden+Kennedy for Intuit titled [REDACTED] contains slides recognizing that:

- [REDACTED] (FF-616).



- [REDACTED] (FF-616).
- [REDACTED] (FF-616).
- [REDACTED] (FF-616).
- [REDACTED] (FF-616).

While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit's TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached

simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). Between 2018 and 2022, the total number of “free” TurboTax mass marketing TV advertising impressions exceeded 19 billion (FF-553—FF-557), which, when distributed across 160 million, results in dozens and dozens of views per taxpayer, regardless of what tax preparation method they may have used or considered. (RFF-544). Consumer complaints and testimony also illustrate that consumers not eligible for Intuit’s free products and offers nonetheless saw the free advertising. (See, e.g., FF-635—FF-637; FF-642—FF-647; FF-649—FF-651; FF-655—FF-650; FF-643 (“ADVERTISES FREE, FREE, FREE, BUT ITS ACTUALLY FEE, FEE, FEE!”)). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603).

2019 litigation commenced by the L.A. City and Santa Clara County put Intuit on notice that its “free” TurboTax advertising campaign was deceptive. On May 6, 2019, the People of the State of California, by and through the Los Angeles City Attorney, filed a Complaint for Injunctive Relief, Restitution, and Civil Penalties for Violations of the Unfair Competition Law (Bus. & Prof. Code §§ 17200 et seq.) (“L.A. City Complaint”) against Intuit. (FF-917). Among other averments, the L.A. City Complaint alleged Intuit engaged in unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-918).

On September 6, 2019, the People of the State of California, by and through the Santa Clara County Counsel, filed a Complaint for Violations of California False Advertising Law, Seeking Restitution, Civil Penalties, and Injunctive Relief (“Santa Clara County Complaint”) against Intuit. (FF-919). Among other averments, the Santa Clara County Complaint alleged: “Intuit deliberately implemented a scheme to draw taxpayers to TurboTax’s revenue-producing URL with false representations that they could file their taxes for free using TurboTax and then to charge taxpayers significant sums to file through additional false and misleading statements.”

(FF-920). The Santa Clara County Complaint also alleged: “Intuit made and disseminated myriad statements that are likely to deceive members of the public on its website and in advertisements.” (FF-921). The Santa Clara County Complaint further alleged “Examples of Intuit’s false or misleading statements include ... Falsely representing in numerous television advertisements that if taxpayers used TurboTax Free Edition they would be able to file for free, including in an ad campaign using the tagline: ‘Free, free free free,’” and “Falsely representing in extensive online advertisements that if taxpayers used the TurboTax Free Edition they would be able to file for free.” (FF-922).

Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising put Intuit on notice. On September 13, 2019, a Consolidated Class Action Complaint was filed against Intuit in the matter captioned *In re Intuit Free File Litigation*, in the United States District Court for the Northern District of California (“Consolidated Class Action Complaint”). (FF-923). Among other averments, the Consolidated Class Action Complaint alleged that: “Intuit implemented a pervasive, nationwide marketing and advertising campaign during the 2018 tax filing season promoting its offering of ‘free’ tax filing services, even though the vast majority of users would actually be charged to file their returns.” (FF-924). Count II of the Consolidated Class Action Complaint alleged fraudulent business acts and practices and deceptive advertising in violation of California Business & Professions Code § 17200, *et seq.*; specifically, the Complaint plead that:

Intuit’s deceptive advertising and fraudulent conduct included affirmative misrepresentations, active concealment of material facts, and partial representations paired with suppression of material facts. Intuit’s conduct violative of the fraudulent prong includes at least the following acts and omissions: ... In a pervasive nationwide advertising campaign, Intuit falsely advertised its TurboTax commercial website as being free, causing confusion and deceiving Class members, eligible for free tax filing, into paying Intuit for tax-filing services.

(FF-925).

Between October 1, 2019, and October 23, 2020, approximately 127,000 current and former Intuit customers filed demands for individual arbitration against Intuit with the American

Arbitration Association (AAA) through counsel with the firm Keller Lenkner LLC. (FF-926). Each arbitration claimant alleged “that while Intuit created a free tax filing service for low- and middle income taxpayers, it also steered these consumers away from the free option and toward its paid products.” (FF-927). These consumers further alleged they “were lured to Intuit’s website with promises of its Free Edition, only to learn later that they were ineligible for that free product and would have to pay to use TurboTax.” (FF-928).

By 2021, a federal judge put Intuit on notice that its deception had likely caused substantial consumer harm. On March 5, 2021, Judge Charles R. Breyer of the United States District Court for the Northern District of California denied a Motion for Preliminary Approval of Class Action Settlement in the *In re Intuit Free File Litigation*, Case No. 19-cv-02546 (N.D. Cal. Mar. 5, 2021). (FF-929). Among other reasons, Judge Breyer denied preliminary class settlement because “the proposed settlement provides class members with inadequate compensation.” (FF-930). Judge Breyer noted that, because the plaintiffs had not provided an estimate of Intuit’s potential exposure in the matter, “[t]he Court is left to do a back-of-the-envelope calculation: for a projected class of 19 million people, who paid an average of \$100 per-year for at least one year, a conservative estimate of Intuit’s potential liability is \$1.9 billion.” (FF-931). Judge Breyer further noted:

Strangely, the proposed settlement provides for the same award regardless whether a class member paid fees for more than one year. Plaintiffs’ argument that “eligible free-filers who paid a TurboTax fee in more than one year . . . arguably should have known they would be charged in the subsequent year,” Mot. for Preliminary Approval at 14, hardly resolves the matter. Plaintiffs have characterized this action as “a bait-and-switch case.” Hearing Tr. at 32. A person induced into paying for services that the person initially expected to get for free, and who continues to pay for those services annually, can trace the cumulative harm suffered back to the initial deception. Without that deception, the person would have known they could file for free from the start, and presumably would have done so each year.

(FF-932).

While the above-mentioned litigations and arbitrations were ongoing, Intuit also knew that Bureau of Consumer Protection staff along with several state Attorneys General's offices were concerned about and investigating the same deceptive advertising. (FF-906—FF-908).

Throughout the course of the litigations and arbitrations instigated by the L.A. City Complaint, the Santa Clara County Complaint, the Consolidated Class Action Complaint, the demands for individual arbitration against Intuit discussed above, and investigations by Bureau of Consumer Protections staff and several state Attorneys General's offices, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Despite this knowledge, it persisted with its deceptive advertising. In doing so, Intuit's deception became intentional, dishonest, and fraudulent.

B. A Significant Number of Reasonable Consumers were Likely Deceived (Replying to Br. § II)

Intuit and Complaint Counsel agree: advertising “is misleading [only] if at least a significant minority of reasonable consumers are likely to take away [a] misleading claim” from it. Br. 49 (quoting *Telebrands*, 140 F.T.C. at 291). The parties also agree that significant minority of deceived consumers can be as few as ten percent. Br. 82 (citing *Telebrands*, 140 F.T.C. at 446–48). The record is clear on these matters, and extrinsic evidence from experts, consumers, and Intuit itself shows that at least a significant minority, if not a majority, of reasonable consumers were misled by “free” TurboTax ads.

1. TurboTax's Free Ads are Illegal Deceptive Door Openers (Replying to Br. § II.A)

As this Court heard in ad after ad played at trial, the message of Intuit's free advertising is strikingly clear: consumers, including *you*, the reasonable viewer of Intuit's advertising can file taxes for free with TurboTax. *See supra* Parts II.A. & II.B. The message, however, is not true for two-thirds of taxpayers. (FF-22—FF-23; RFF-94). While false, this prominent, pervasive “free”

claim is effective, driving consumers to visit the TurboTax website, which received approximately [REDACTED] views in TY21 alone. (FF-851).

These facts are straightforward, and damning. Intuit, pounding the table, accuses Complaint Counsel of “proceed[ing] from an egregious misconception” of who the relevant consumers are in this case, arguing that the correct denominator is not all taxpayers, but only consumers in the market for an online tax preparation product. Br. at 49. The relevant consumer here, of course, is the American consumer writ large, who is (and has been for years) awash in TurboTax’s free advertising. (See FF-47—FF-465; RFF-463—RFF-464). In fact, Intuit understands that the method by which consumers file their taxes is not static, and seeks to entice consumers from brick-and-mortar tax stores to the online tax preparation market, which itself is growing. (See RFF-127 (citing, as an example, [REDACTED]); [REDACTED]); RFF-464). The audience for the *billions* of impressions of Intuit’s ads (and therefore the relevant consumer base), is therefore correctly the American taxpayer.⁹

Even if Intuit’s argument were credited—the market for online tax preparation software was adopted as the correct denominator (and it shouldn’t be, *see* RFF-464), and “most” consumers in the market for online tax preparation software qualify to file for free—Intuit can’t cogently explain why this “devastates Complaint Counsel’s deception claim.” *See* Br. at 50. The core question, the Parties agree, is whether the ads convey to a significant *minority* of consumers that they can file for free when they cannot. *See* Br. at 49 (setting out that advertisements are misleading “if at least a significant minority of reasonable consumers are likely to take away [a] misleading claim’ from it” (quoting *Telebrands*, 140 F.T.C. at 291)). Even assuming *arguendo* that the denominator is limited to the online tax preparation market, not all consumers in the

⁹ Intuit’s citation to a remark from this Court that the larger sample of all American taxpayers “makes [Complaint Counsel’s] number pretty much meaningless,” made to Complaint Counsel during opening argument, should not be given weight. The exchange occurred before any witnesses were called, including expert witnesses, before evidence about the distribution and contents of Intuit’s ads was in the trial record, and before no less than three Intuit witnesses confirmed that two thirds of American taxpayers are not eligible to file for free with TurboTax. (See RFF-463).

online tax preparation market are eligible for free TurboTax. Intuit's advertising would still be deceptive as to the remainder of consumers in the purported online tax preparation market for whom Intuit's advertisements lead them to believe they can file their taxes with TurboTax for free when they cannot. Intuit, however, does not attempt to calculate this figure; rather, it conclusorily, and wrongly, assumes that something less than a significant minority is left. (*See* RFF-464—RFF-466). Without factual support, Intuit's argument should be disregarded. In its place, the Court can look to the only expert witness that actually asked consumers whether they thought they could file for free with TurboTax and why—Professor Novemsky's perception survey. He found that 52.7% of consumers who were not eligible to use TurboTax for free and had not used TurboTax in the previous three years erroneously believed that they could use TurboTax for free. (FF-480—FF-488). This fact displaces idle speculation about the number of potentially deceived consumers in any slice of the taxpaying public.

Turning from who the consumers at issue are, Intuit next asks this Court to consider where those consumers land: the TurboTax website. Specifically, Intuit has concocted a legal theory that, if it were credited, would boil down to this: Intuit and companies like it that create and disseminate deceptive ads that trick consumers into arriving at their websites under a false promise, are not liable for their deception as long as their websites in some way (no matter how clear (or not), understandable (or not) or effective (or not)) informs consumers that they may not qualify for the offer. *See* Br. at 50–51 (arguing that consumers have “a full and fair opportunity to learn of the qualifications to file for free on [the] TurboTax” website). Intuit's asserted license to deceive in advertising would toss out decades of law holding that FTC Act “is violated if [Respondent] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract.” *Resort Car Rental*, 518 F.2d at 964; *see also* Deception Policy Statement, at 180 & n.37; *Fleetcor*, 620 F. Supp. 3d at 1298–99 (citing cases); *OMICS Grp.*, 374 F. Supp. 3d at 1010; *Gill*, 71 F. Supp. 2d at 1044. Instead, Intuit would usher in a new regime where anything goes, as long as consumers go through a website first—*caveat emptor* as

long as you can Google it to find the truth. *Contra Tashman*, 318 F.3d at 1277 (“*caveat emptor* is simply not the law”).

In providing a balm to that abrasive conclusion, Intuit curiously concludes that Complaint Counsel’s presentation of Intuit’s “bait and switch” tactic was a “total bust, with no evidence adduced to support it.” Br. at 50. Intuit’s apparent amnesia, however, forgets ample evidence adduced at trial and otherwise in the evidentiary record that consumers were deceived by TurboTax ads (the “bait”) into coming to the TurboTax website, *supra* Part II.A, where they spent substantial time and effort before learning that filing their taxes would not be free (the “switch”), including, for example: testimony by Intuit expert Bruce Deal regarding the amount of time consumers spent on the TurboTax website before encountering an upgrade screen (FF-865), consumer depositions taken by Intuit (FF-671—FF-673), and Intuit’s own internal complaint tracking and data, where consumers left verbatims such as: “This process is very misleading. It promotes free, free, free until it’s time to checkout, and then all of a sudden there is a fee that was more than the return itself,” (FF-651, cleaned up) and “Once you reach the end of the tax form however, you come to find out that it is indeed not free, but is going to cost at least a minimum of \$39 or more. So that’s not cool. False advertising if you ask me.” (FF-657). Intuit also ignores the unrebutted testimony and report of Dr. Erez Yoeli, who explains that Intuit *can* benefit from such deceptive practices, for example where consumers stay and file with TurboTax because they don’t know they were deceived (they instead blame themselves for misunderstanding the offer) or their sunk costs are too high. (FF-841—FF-843). Finally, Intuit’s website is itself deceptive. *Supra* Part II.B.5.

More fundamentally, however, this Court can end its inquiry before even considering the consumer’s experience at the TurboTax website, as Intuit’s free advertising functions as a deceptive door opener. And “[m]isleading door openers,” like Intuit’s free claims that lure consumers to its website under the pretense that filing their taxes would be free for them, are illegal. *Resort Car Rental*, 518 F.2d at 964 (“The Federal Trade Act is violated if [Respondent] induces the first contact through deception, even if the buyer later becomes fully informed before

entering the contract.”); *see, e.g., In re Encyc. Britannica, Inc.*, 87 F.T.C. 421, 495–97, 531 (1976), *aff’d*, 605 F.2d 964 (7th Cir. 1979), *as modified*, 100 F.T.C. 500 (1982); *see also In re Grolier, Inc.*, 99 F.T.C. 379, 383 (1982), *aff’d*, 699 F.2d 983 (9th Cir. 1983), *as modified*, 104 F.T.C. 639 (1984); *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 304 (S.D.N.Y. 2008) (citing *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961)); *Gill*, 71 F. Supp. 2d at 1044 (“[B]ecause each representation must stand on its own merit, even if other representations contain accurate, non-deceptive information, th[e] argument [that later disclaimers cured advertising misrepresentations] fails”).

Intuit’s only real effort to address head on the FTC caselaw on deceptive door openers is to distinguish itself on the facts from *Resort Car Rental System Inc.* In that case, the Ninth Circuit found that a rental-car company calling itself “Dollar-A-Day” did not, in fact, offer any cars at that price, violated the FTC Act. Br. at 53–54 (discussing *Resort Car Rental*, 518 F.2d at 964). Without engaging with the legal reasoning or policy behind the *Resort Car Rental System*, Intuit instead cherry picks a few factual differences between the cases, such as the fact that the consumer had to travel to a brick-and-mortar store to learn the true price of the car rental, or that consumers in the 1970’s could not comparison shop simultaneously as one can in web browsers. Br. at 53–54. Because determining whether advertisements are deceptive is a “fact intensive” exercise, *Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 478 (7th Cir. 2020), it is unsurprising that Intuit can draw distinctions on the facts to a case that existed before the internet. In effect, Intuit asks that this Court deem its ads permissible not based on what occurs when the Intuit “knocks” (TurboTax ads), but on the basis of what happens inside the “house” (here, its website). Citing to cases that are not directly on point, Intuit argues that court should “take into account all the information available to consumers,” and, where there is ambiguity about a claim, “consider[] other information readily available to the consumer that could easily resolve the alleged ambiguity.” Br. at 52 (citing *Bell*, 982 F.3d at 477; *Moore v. Trader Joe’s Co.*, 4 F.4th 874, 882 (9th Cir. 2021)). Here, of course, the additional information available to consumers is the website. Br. at 52–53.

Intuit seeks no less than a license to lie. It seeks to change black letter law. The online marketplace, however, is not a palliative for offline deception. Nothing about the online age we live in makes irrelevant (or less binding) the progeny of cases on deceptive door openers. “[P]oint-of-sale material will not necessarily correct a deceptive representation or omission. Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.” Deception Policy Statement, at 180 & n.37; *see also OMICS Grp.*, 374 F. Supp. 3d at 1010; *Fleetcor*, 620 F. Supp. 3d at 1298–99 (citing cases). As courts have recognized, in applying Section 5 of the FTC Act, “[t]he law is violated if the first contact is secured by deception, even though the true facts are made known to the buyer before he enters into the contract of purchase.” *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961).

The FTC’s mission is to ensure information in all marketplaces is truthful and accurate, which promotes competition and consumer confidence. Deception is illegal. Allowing deceptive door openers would operate to encourage deception, not dissuade or halt it. (*See* FF-827—FF-831 (setting out economic incentives for deception)). Specifically, Intuit asks that this Court deem its ads permissible not based on what occurs when the Intuit “knocks,” (TurboTax ads) but on the basis of what happens inside the “house” (here, its website). Citing to cases that are not directly on point, Intuit argues that court should “take into account all the information available to consumers,” and, where there is ambiguity about a claim, “consider[] other information readily available to the consumer that could easily resolve the alleged ambiguity.” Br. at 52 (*citing Bell*, 982 F.3d at 477; *Moore*, 4 F.4th at 882). Here, of course, the additional information available to consumers is the website. Br. at 52–53.

Notwithstanding Intuit’s full page discussing the ways in which consumers can arrive at the TurboTax website from its ads,¹⁰ it doesn’t cite a *single* case where disclosures on a website are held to cure a deceptive door opener.

¹⁰ Intuit, loose with the truth, tells the Court that Complaint Counsel expert Dr. Yoeli, “recognized ... that once on the website it takes only ‘five to ten seconds’ to encounter full eligibility information for free TurboTax offers.” Br. at 52. What Intuit leaves out, however, is
(continued)

Instead, *Bell v. Publix Super Markets*, for example, undermines Intuit's case instead of supporting it. In *Bell*, the Seventh Circuit overturned a district court's order and permitted to go forward a case brought under several state consumer protection laws alleging that a "100% Parmesan Cheese" front label was deceptive, overruling the argument by defendant that its accurate ingredient list on the back of the package defeated the claim. *See Bell*, 982 F.3d at 475–76. In doing so, the Seventh Circuit acknowledged that "what matters most is how real consumers understand and react to the advertising." *Bell*, 982 at 476. It held: "Consumer-protection laws do not impose on average consumers an obligation to question the labels they see and to parse them as lawyers might for ambiguities." *Id.* The court in *Bell* also acknowledged that "where an advertisement conveys more than one meaning, one of which is false, the advertiser is liable for the misleading variation." *Bell*, 982 at 478 (collecting cases, overruling the district court's holding to the contrary). If anything, *Bell* supports Complaint Counsel's case.

Intuit's other cases are no more on point. In *Moore v. Trader Joe's*, for example, the court was asked to resolve whether the labeling on a jar of honey sold at Trader Joe's as "100% New Zealand Manuka Honey" was deceptive in violation of state law. 4 F.4th at 876–80. Because the claim in *Moore* itself was found to be ambiguous (was the honey 100% from New Zealand, 100% from the nectar of the Manuka flower, or something else), other information (such as the low price of the honey or the fact that honey, by its nature, is produced by bees that pollenate various kinds of flowers) was considered in determining how a reasonable consumer might interpret the label. *Moore*, 4 F.4th at 882. There is no ambiguity about Intuit's claim, however; as it has said the likes of: "[Y]ou can file on TurboTax for absolutely nothing" and "That's right, TurboTax Free is free. Free, free free free." *See supra* Parts II.A. & II.B. (setting out express and implied claims). More fundamentally, the Ninth Circuit in *Moore* never

the remainder of the quote. Dr. Yoeli, who had been handed a phone by Intuit's lawyer and directed where to go in a browser, qualified his answer that it assumes consumers, who would not have the company's lawyer across the table directing them, both see the disclaimer and click on it, because, until Intuit's counsel showed Dr. Yoeli the hyperlink, he had not seen it. (RFF-790 (citing RX1396 (Yoeli (Complaint Counsel) Dep.) at 34-35 ("Probably a -- I don't know -- ten -- five to ten seconds, assuming somebody actually does click on 'See if you qualify' and notices it, because until you asked me, I didn't see it."))).

considered whether the label on the honey was a deceptive door opener, and its *dicta* isn't persuasive.

Still seeking caselaw to support its effort to overturn black letter law on prohibiting deceptive door openers because “the online context is different,” Br. at 54, Intuit looks to yet more inapposite cases for support. First, Intuit points to *Washington v. Hyatt Hotels Corp.*, where a district court interpreting a state law found that a resort fee, disclosed during the purchasing process, was not deceptive. No. 1:19-cv-4724, 2020 U.S. Dist. LEXIS 101118 (N.D. Ill. June 9, 2020). There, the court concluded that because the Hyatt point of sale (website or app): (1) advertised on the first screen a consumer saw prices as starting “*from*” a certain dollar amount (thereby disclosing in the initial offer that the price may be higher), (2) included the resort fee in the summary of charges displayed to the consumer on the second screen, and then (3) again disclosed the resort fee and offered the consumer the opportunity to “see [the] full breakdown,” on the third and final screen before a consumer paid, it therefore was “implausible that a reasonable consumer would be deceived under these circumstances” by the inclusion of the resort fee in the final price of the hotel. *Id.* at *7–9. Likewise, in *Harris v. Las Vegas Sands LLC*, another hotel resort fees case, the court made a factual determination that there “simply [was] no ambiguity, and no reasonable consumer could be misled” by the resort fees disclosed during booking. No. 12-cv-10858, 2013 U.S. Dist. LEXIS 185587, at *13–17 (C.D. Ca. Aug. 16, 2013).¹¹ These cases do not support the proposition that the analysis of a deceptive door opener is fundamentally different on a website as compared to a brick-and-mortar store. They interpret different statutes, in different factual contexts, ruling on different legal principles.

¹¹ Confusingly, Intuit refers to these two cases as examples where “courts have *rejected* deception claims even where consumers had to spend significant time on a website before encountering price disclosures.” Br. at 51 (emphasis in original). Of course, whether an ad is deceptive turns upon a facial analysis and net impression. Further, filing one’s taxes is a far cry from booking a hotel room. In *Hyatt Hotels*, for example, the court was considering a checkout process that took the consumer three clicks through a website or app to identify, select, and then confirm a booking. If Intuit is correct that these three clicks represent a “significant” amount of time, than it is fundamentally at odds with Mr. Deal’s analysis of the Turbo tax upgrade screen data, in which he argues that for the 50% of consumers who do not encounter an upgrade screen for at least 30 minutes, this is a “small amount of time.” (See FF-866—FF-867).

Next, Intuit points to *FTC v. DirecTV, Inc.*, an unreported case from a federal district court wherein the court held that the “deceptive door opener” concept was inapplicable to a printed flyer for DirecTV’s satellite television services because (1) “nothing in [the advertisement] contradicts the true terms of DirecTV’s provision of services” and (2) “for a complex product like subscription satellite television services, a reasonable consumer would understand the limitations of how information is presented in a one- or two-page flyer.” No. 15-cv-1129, 2018 U.S. Dist. LEXIS 139192, at *44 (N.D. Cal. Aug. 16, 2018). In reaching this conclusion, the court noted:

[T]he advertisement contains a large amount of information about various programming packages, pricing and equipment options, product quality and installation logistics. Roughly the middle third of the advertisement describes three tiers of programming packages: the Entertainment Package, the Choice Package and the Xtra Package. Each package includes a different number of channels and a different number of on demand titles....

The price in the red bubble has a caret next to it, which directs the viewer to the following bolded text in the first line of a section of disclosures in black text against a white background at the bottom of the page: “BILL CREDIT/PROGRAMMING OFFER: IF BY THE END OF PROMOTIONAL PRICE PERIOD(S) CUSTOMER DOES NOT CONTACT DIRECTV TO CHANGE SERVICE THEN ALL SERVICES WILL AUTOMATICALLY CONTINUE AT THE THEN-PREVAILING RATES.” Because most of the text in the disclosure box is not bolded, not in all capital letters, and not partially underlined, this information stands out visually. *See* Ex. 1119 (FTC ‘.com Disclosures’ guidance) at 17 (“A disclosure in a color that contrasts with the background emphasizes the text of the disclosure and makes it more noticeable.”)....

Because the advertisement adequately discloses the details that the FTC claims were omitted due to a lack of prominent disclosure, the net impression of the advertisement on its face would not be likely to mislead a reasonable consumer.

Id. at *23–27. Unlike the flyer in *DirecTV*, Intuit’s ads *do not* disclose detailed information about, for example, each of the various programming packages, promotional and non-promotional pricing, and equipment options, nor do its disclosures “stand out visually.” *See*

Complaint Counsel’s Post-Trial at Part II.C. Far from ushering in new law on deceptive door openers in the online context, these two cases, at best, stand for the non-controversial proposition that courts may consider how a reasonable consumer will interpret challenged advertising, including price disclosures, when determining whether an ad is deceptive.

Finally, in a single paragraph, Intuit makes the sweeping statement that the “door-opener theory is also refuted by the record.” Br. at 55–56. The *only* evidence in the record that Intuit points to, however, is its own expert Dr. Hauser’s flawed Disclosure Efficacy Survey. Br. at 55–56. Even by Intuit’s interpretation, however, the Disclosure Efficacy Survey is “inconsistent with,” but does not rule out, that Intuit’s ads “served as misleading door openers.” *Compare* Br. at 55–56, *with* RFF-737—RFF-738. As Professor Novemsky points out, the results of Dr. Hauser’s survey are actually consistent with the results of the consumer perception survey to show the inadequacy of the “see if you qualify” disclaimer. *Supra* Part II.A.2.a.; *infra* Part II.B.4.d. Without more, Intuit has not shown that its ads are not, as they appear on their face to be, *supra* Part II.A, deceptive door openers.

2. A Significant Number of Reasonable Consumers Were Under the Misimpression that TurboTax was Free for Them When in Truth They Were Ineligible and Did Not Understand the Limitations of TurboTax’s Free Offers (Replying to Br. § II.B)

Intuit argues that Complaint Counsel have not established what reasonable consumers in the tax preparation market believe, claiming such consumers “deserve far more credit” than Complaint Counsel has given them. Br. 5, 56. But Intuit’s ignores that the record is based on evidence from and related to taxpayers (RFF-470) as it attempts to improperly shift responsibility for its deceptive advertising to consumers. *See Book-of-the-Month Club*, 48 F.T.C. at 1311 (“A seller may not make one representation in one part of his advertisement and withdraw it in another part since there is no obligation on the part of the customer to protect himself against such a practice by pursuing an advertisement to the bitter end.”); *Goodman v. FTC*, 244 F.2d 584, 603 (9th Cir. 1957) (“There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well

as the suspicious.”); *Bell*, 982 F.3d at 475–76 (cited by Intuit).¹² Further, consumer reliance on express claims is presumptively reasonable. *FTC v. Int’l Computer Concepts, Inc.*, No. 5:94-cv-1678, 1995 U.S. Dist. LEXIS 22702, at *7 (N.D. Ohio Oct. 24, 1994); *FTC v. Five Star Auto Club*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000). Intuit has not provided, nor can it provide, any evidence rebutting that reasonable consumers relied on Intuit’s express claims that TurboTax is free. (RFF-210; *see also* FF-47—FF-466; FF-958—FF-987).

Intuit’s contention that Complaint Counsel has provided no evidence about reasonable consumers’ familiarity with the tax preparation industry, Br. 56, is simply not true, and belied by the rich record specific to taxpayers, including a perception survey asking a representative sample of taxpayers about their perceptions of the tax preparation industry (FF-467—FF-545; RFF-554), consumer testimony (FF-663—FF-667), consumer feedback (*see* FF-635—FF-662), swaths of internal Intuit documents (*see, e.g.*, FF-597—FF-600; FF-604; FF-606—FF-608; FF-612—FF-614), and surveys that tend to show the power of Intuit’s free claims. (FF-767—FF-768; RFF-737; RFF-756). As one former Intuit executive put it, in the context of Intuit’s advertising for tax preparation services, “when you start talking about free, that’s what people hear. They hear free. You can say a lot of other things, but what they hear is free.” (FF-618). The evidence amassed clearly shows that at least a significant minority of reasonable consumers believe that TurboTax is free, when that is not true for a significant number of consumers. (FF-480—FF-484; RFF-470).

Intuit relies on *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016)—a case about whether consumers understood how a tube of lip balm worked—for the proposition that consumers are

¹² Additionally, the concept of a *cognitive miser* is not, as Intuit suggests, an “offensive” term; nor does Complaint Counsel ever refer to consumers as “lazy”—that derision is supplied by Intuit. Br. at 5. Rather, cognitive misery is a “well established” psychological principle holding that people “process[] as little information as possible to navigate their decisions, even in very high dollar-value decisions.” (*See* RFF-927 (GX749 (Novemsky Rebuttal Expert Report) ¶ 227 (citing Daniel Kahnemann, *Thinking Fast and Slow* (New York, NY: Farrar, Straus and Giroux, 2011), pp. 31–49; Melissa A. Z. Knoll, *The Role of Behavioral Economics and Behavioral Decision Making in Americans’ Retirement Savings Decisions*, 70 Soc. Sec. Bull. 1 (2010); Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New York, NY: Penguin, 2009), pp. 179–97, 218–49) (cited in FF-499—FF-503))).

unlikely to be misled by TurboTax because of their experience with and understanding of the tax preparation industry. Br. 56. But tax preparation is more complicated than figuring out how much lip balm is in a tube. Intuit's reliance on *Marksberry v. FCA US LLC*, 606 F.Supp.3d 1075, 1081 (D. Kan. 2022), a case dealing with a Kansas statute related to deception predicated on willfulness, is similarly misplaced.¹³ Complaint Counsel has provided evidence directly related to consumers in the tax preparation market, including evidence of entirely free tax preparation offers in the tax preparation market (or at least, online tax preparation options that *Intuit itself* considered to be entirely free before this trial (RFF-494—RFF-498)) that may have contributed to consumer beliefs about free tax filing.

Intuit claims that it has provided evidence that reasonable consumers understand that free offers are qualified, even if those qualifications are not provided, specifically because Intuit's competitors use similar models. Br. 57. But Intuit has done nothing to test consumer understanding of its *competitors'* free offers, or even to determine whether competitor ads comply with the law and is drawing conclusions based on speculation and assumptions without accounting for the fact that Intuit's competitors use different qualification criteria than Intuit does. (See RFF-459—RFF-460; RFF-481; RFF-483—RFF-484; FF-684; FF-696—FF-698; FF-702; FF-706). If anything, different eligibility limitations across the market heighten the need for market participants to be truthful and clear in their advertising. As the evidence shows, this ideal is not being met—at least a significant minority, if not a majority, of taxpayers not qualified for free TurboTax thought they could use TurboTax for free. (RFF-488—RFF-490). Even assuming consumers knew of the existence of limitations for free tax preparation offers, reasonable consumers could still have been deceived because they may not understand the limitations, as the perception survey evidence and consumer testimony clearly shows. (RFF-460; FF-491—FF-492; FF-496—FF-497; *see also* FF-669—FF-670).

¹³ Compare *Marksberry*, 606 F. Supp. 3d at 1083 (“The Kansas Supreme Court has found that the use of ‘willful’ in the KCPA includes an intent to harm the consumer.” (cleaned up)), with *POM Wonderful*, 153 F.T.C. at 1334–35 (“it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged”) (Chappell, C.A.L.J.) (citing cases).

And while Intuit argues that “unrebutted evidence” shows that consumers understand that free offers generally have limitations, Br. 58, Intuit’s “evidence” amounts to no more than speculation on the part of its expert. (RFF-473—RFF-477; RFF-480—RFF-481; RFF-483; FF-680—FF-681; FF-689—FF-690), in sharp contrast with Complaint Counsel’s reliable perception survey evidence that very directly measures what consumers understand about the *TurboTax* free offer. Although Intuit points to a variety of examples of free offers in the marketplace to establish that consumers understand that the free offers are limited, Intuit and its expert have done no testing or analysis regarding those free offers or consumer understanding regarding the limitations of the offers, or the legality of the ads related to those offers. (*See, e.g.*, FF-701—FF-702; FF-706; RFF-473; RFF-475; RFF-477; RFF-483). All that is left is mere speculation of consumer understanding of free offers in the marketplace, which isn’t conclusive evidence of anything. (*See* RFF-473; RFF-483). The “free” product limitations in the marketplace discussed by Intuit are distinguishable. (RFF-474—RFF-475; RFF-480). For example, “BOGO” offers refer to bundles of products and are thus not applicable to consumers’ perceptions of the advertisement of a standalone product as a free product. (RFF-474—RFF-475).¹⁴

Intuit claims that its evidence shows that consumers are skeptical of free offers, Br. 59, but at best, Intuit’s evidence shows that some significant minority, at least 22% and up to 49%, is *not* skeptical. (RFF-471; RFF-485—RFF-490; FF-597—FF-598). Intuit also claims that the purported skepticism leads reasonable consumers to conduct additional research about free offers, but Intuit provides nothing more than speculation about whether tax product selection is a “high-involvement process,” that would lead to additional research, as its experts claim. (*See* RFF-502).¹⁵ Even if true, this does not grant a license to deceive. Further, it is not clear that tax

¹⁴ Tellingly, BOGO or Buy-One-Get-One free offers have the description of one of its limitations (the requirement of a purchase) in the title of the offer. Br. 58. Perhaps Intuit could consider rebranding its “free” offer as “Free For One Third” Edition.

¹⁵ Intuit’s Professor Golder opines: “Online tax-preparation products are ‘high-involvement products’—i.e., involve considerable consumer engagement—because they relate to significant financial transactions that involve substantial risk for consumers” (IFF-502) but Professor Novemsky testified that “[f]iling taxes is not fun for most people. And so if it’s not fun for you, you’re not going to want to think about it, and if you don’t want to think about it, you’re not

(continued)

preparation is necessarily “high-involvement” since some consumers may not want to think about tax filing or research different tax preparation options, and some consumers delay filing their taxes and may not have time to conduct extensive research prior to the filing deadline. (RFF-502). Moreover, if consumers do conduct research, consumers are likely to encounter more TurboTax marketing materials as they research tax filing options, for example through paid search ads, SEO, and the TurboTax website, reinforcing TurboTax’s deceptive advertising. (RFF-503; RFF-505—RFF-509). Intuit relies on survey evidence from Professor Hauser and Ms. Kirk Fair to prove its point. Br. 59. But Ms. Kirk Fair’s fatally flawed survey, *see* Complaint Counsel’s Post-Trial Brief Part II.E.4, says nothing about the research consumers conduct prior to encountering a hard stop screen (at which point they have invested time and effort entering their tax information) and Professor Hauser’s Purchase Driver Survey, rife with flaws leading to inflated results, *see* Complaint Counsel’s Post-Trial Brief Part II.E.2, shows that the “research activities” consumers are likely to engage with will often lead them to more TurboTax ads and marketing, reinforcing rather than dispelling Intuit’s deceptive claims. (RFF-505—RFF-509; RFF-755; RFF-758; RFF- FF-792—FF-793; *see also* FF-800). More fundamentally, the record shows that, with or without conducting research, consumers are still under the misimpression that they can file for free with TurboTax when that is not the case, based on TurboTax ads. (*See* RFF-513).

Intuit’s arguments that the information it provides to consumers at various stages in the marketing funnel is the appropriate amount, that additional information in advertising would overwhelm consumers, and that consumers can quickly get more information about TurboTax limitations online, Br. 60–61, are all arguments that providing consumers incomplete, misleading information is acceptable because doing otherwise would be difficult. They are also arguments for changes in current FTC deception law. By Intuit’s logic, companies would be permitted to

going to have that kind of mental involvement. You’re not going to be processing a lot of information. You’re not going to be looking at a lot of sources of information for that. [High-involvement is] not to me an obvious characterization of how people approach their tax filing.” (RFF-502).

make any claims they want in television advertisements, since consumers understand that they must seek out additional information online. That is not the law. *Resort Car Rental*, 518 F.2d at 964 (“The Federal Trade Act is violated if [Respondent] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract.”). And as the record shows, consumers who were not eligible to file for free with TurboTax were under the misimpression that they could, based on TurboTax ads, regardless of what additional information Intuit did or did not make available at other places in the “funnel,” particularly when consumers are unlikely to interact with the additional information. (See RFF-511—FF-513; RFF-520—RFF-521; RFF-523—RFF-525).

Further, the purported danger of “overwhelming” consumers with disclosures, Br. 61, is a strawman argument and says nothing about whether ads are deceptive in the first place. The complexity of Intuit’s free eligibility criteria and the free claims themselves are entirely within Intuit’s control. (See IFF-163—IFF-166; RFF-523; FF-12—FF-13; FF-15—FF-18; FF-21). It does not follow that because Intuit makes its products and limitations complicated, it can deceive consumers until those consumers have spent time and effort engaging with TurboTax.¹⁶ This is especially true because Intuit knows that its “free” advertising brings more than just free-eligible taxpayers to its website, to its [REDACTED]. (FF-28).

Lastly, Intuit argues that widely known and commonly used free products identified by Complaint Counsel all have restrictions (and that some are not free because they monetize consumer data). Br. 61–62. But the restrictions identified are distinct from TurboTax restrictions, in that all consumers can use the products for free, though perhaps with advertising or similar inconveniences. (RFF-500).¹⁷ And while Intuit argues that expectations regarding “free” for

¹⁶ See, e.g., FF-14; FF-671—FF-673; FF-865; FF-651 (customer stating “It promotes free, free, free until its [sic] time [sic] to checkout and then all of a sudden there is a fee that was more than the return itself.”)

¹⁷ See IFF-479. Intuit’s argument that the FTC has “rightly argued” in another case that a social media platform does not offer totally unqualified free services, see Br. 62, RFF-501, is another strawman. For purposes of this matter, Complaint Counsel has focused primarily on the pecuniary concept of “free,” rather than the use or monetization of consumer data. However, it’s worth noting that Intuit also may engage in such monetization: Intuit’s own terms and conditions
(continued)

some online products are inapposite for what reasonable consumers believe about tax preparation marketing, Br. 61–62, Intuit simultaneously relies on comparisons to markets even farther removed, like wireless carriers, TV service providers, and auto insurance providers, to establish what reasonable consumers would expect to see in advertising and marketing for tax products. (See RFF-638). Intuit can't have it both ways.

3. TurboTax's Free Ads Failed to Clearly and Conspicuously Communicate the Limitations on TurboTax's Free Offers (Replying to Br. § II.C)

Intuit next argues that “Complaint Counsel have no legally tenable theory of deception,” because the challenged advertisements communicate not only “the *existence* of qualifications, [but] the ads made consumers aware of the category of qualification and where to get more information,” “at the level of detail appropriate for where consumers were in the buying process.” Br. at 63. Specifically, Intuit seeks to indemnify itself from the pervasive free messaging by pointing to three aspects of its ads: (1) SKU identification, (2) “Simple tax returns only” language, and (3) “See If You Qualify At TurboTax.com” or “See Details At TurboTax.com.” Br. 63. This is nothing more than a restyled version of an argument it already made, when Intuit argued that “the challenged ads conveyed that there were qualifications”—naming the identical three features of the advertisements. Br. at 40–46. As such, Complaint Counsel directs the Court to its response, *supra* Part II.A.2.a.

notify customers that to “[b]y using Intuit services, you are instructing us to share your data across our platform for marketing, eligibility and other purposes described in our Global Privacy Statement, consistent with applicable law. This data may include credit information and other information we obtain from third parties.” (RFF-501). In another monetization front, [REDACTED] (RFF-501; *see also* RFF-187). Taking consumer data usage into account, Intuit’s argument seems to imply that even consumers using “free” TurboTax services are not truly receiving a free product or service.

4. The Extrinsic Evidence Reflects Deception of A Significant Number of Consumers (Replying to Br. § II.D)

a. Professor Novemsky's Survey Results Are Reliable Extrinsic Evidence of Deception

Intuit argues at length that Professor Novemsky's survey results and conclusions based on those results are unreliable. Br. 71–82. But Intuit's arguments fail.

In determining whether a consumer survey is methodologically sound, the Court should consider whether it “draws[s] valid samples from the appropriate population, ask[s] appropriate questions in ways that minimize bias, and analyze[s] results correctly.” *Thompson Med.*, 104 F.T.C. at 790. Any questions related to the reliability of survey evidence should be probed through “vigorous cross-examination.” *In re McWane, Inc.*, 2012 WL 3719035, at *3 (F.T.C. Aug. 16, 2012) (cleaned up); see *In re Intuit Inc.*, 2023 WL 2609450, at *6 (F.T.C. Mar. 7, 2023) (Chappell, C.A.L.J.). Intuit had the opportunity for vigorous cross examination in this matter (in fact, the cross exam on Professor Novemsky's affirmative opinions took more than twice as long as his direct examination (RFF-529)). Even with such extensive cross examination, Intuit has been unable to undermine the credibility and scientific validity of Professor Novemsky's survey and conclusions. (See RFF-926). Intuit relies now only on unsupported and inflammatory inuendo and speculation about his objectives regarding the survey.

i. Professor Novemsky's Perception Survey Was Correctly Designed to Not Show Consumers Specific Ads

Intuit argues that the perception survey design was improper because it did not show any survey participants TurboTax advertising, and because consumers had to respond to survey questions from their memory. Br. 72. But these are precisely the survey design elements that allowed Professor Novemsky to reliably measure the effects of Intuit's “multiyear, multi-channel, multi-modal” *free* advertising campaign in which “the challenged ads were served to consumers *billions* of times,” Br. at 2. (See FF-531—FF-540; RFF-531; RFF-534—RFF-535). His survey design had the benefit of being representative of how consumers absorb advertising messages in the marketplace. (FF-537; see RFF-534). Artificial ads projected onto an artificially blank slate in consumers' minds (as is the case in an experimental, test-and-control design)

cannot replicate the effect an ad would have in the context of an existing brand, nor can it replicate the effect of a coordinated marketing campaign that consumers would encounter multiple times and in multiple locations. (FF-537). Unaided survey questions, such as those employed in Professor Novemsky's perception survey, are reliable and broadly used in surveys, including by Intuit's own expert. (RFF-536; *see also* FF- 532; FF-534). Courts also rely on such unaided surveys. *See, e.g., Am. Dairy Queen Corp. v. W.B. Mason Co.*, No. 18-cv-693, 2022 U.S. Dist. LEXIS 124450, at *253 (D. Minn. July 14, 2022) (relying on an unaided association survey). Cases cited by Intuit are distinguishable and are neither analogous to the instant case nor persuasive, as they relate to surveys regarding trademark issues, which are distinguishable because they, by their nature, relate to consumer confusion between two different trademarks. *Instant Media, Inc. v. Microsoft Corp.*, No.07-cv-2639, 2007 WL 2318948 at *15 (N.D. Cal. Aug. 13, 2007) (where, when trying to establish confusion between two trademarks, it was insufficient to show consumers only one of the two trademarks together with the name of the company associated with that trademark); *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 297 (2d Cir. 1999) (where consumers were briefly shown a number of shoes, and subsequently asked to identify the mark of the shoes from memory). The perception survey does not attempt to establish confusion between dueling options. Rather, it measures perceptions currently in the marketplace regarding TurboTax, for which its design is entirely appropriate. (*See* RFF-534; FF-531—FF-533; FF-535—FF-540).

ii. Professor Novemsky's Perception Survey Was Designed to Avoid Bias

Intuit next claims that the perception survey is unreliable because it does not employ a control group, Br. 73, but the absence of a control group does not mean that a survey is unreliable. *See, e.g., Clicks Billiards, Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1262 (9th Cir. June 1, 2001); *see also Moroccanil, Inc. v. Marc Anthony Cosmetics, Inc.*, No. 13-cv-2747, 2014 U.S. Dist. LEXIS 184585, at *25 (C.D. Cal. Oct. 7, 2014). The decision not to employ a control group can be mitigated by "other methods to prevent bias, e.g., including 'none of the above,'

‘don’t know/can’t recall’ and ‘other’ as possible answers to closed-ended questions.” *In re NJOY Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1078 (C.D. Cal. Aug. 14, 2015). These are precisely the measures employed by Professor Novemsky in the design of the Survey. (RFF-539; FF-524; *see also* FF-521—FF-523, FF-525—FF-527). Notably, Intuit itself [REDACTED] [REDACTED]. (RFF-709). As Professor Novemsky testified, while a perception survey does not require test/control design, it is necessary for a test/control design to have a control group. (*See* RFF- 531—RFF-532).

The cases Intuit relies on for this proposition are again distinguishable because they are unique to copyright disputes where a test/control survey design failed to use a control group, *Reinsdorf v. Skechers U.S.A.*, 922 F. Supp. 2d 866, 873, 877–79 (C.D. Cal. 2013) (excluding a survey purportedly measuring “relative audience appeal of the joint authors’ contributions” where the survey showed consumers images, asked them questions about those images, and did not include a quasi-filter “don’t know” answer option), and a trademark dispute—a field wherein test/control design is commonly used to measure consumer perceptions between two trademarks, including “forward confusion” and “reverse confusion,” *Valador, Inc. v. HTC Corp.*, 242 F. Supp. 3d 448, 453, 463 (E.D. Va. 2017) (explicitly addressing test/control design when testing confusion between competing trademarks, and concluding that “a properly constructed likelihood of trademark confusion survey” includes a “control mark”), *aff’d*, 707 F. App’x 138 (4th Cir. 2017). Intuit claims that Professor Novemsky’s prior testimony in an unrelated matter establishes some inconsistency with his methodology and opinions in this matter, Br. 73. Quite the opposite is true. Professor Novemsky previously opined in the context of a survey that employed *experimental design* that a test and control are necessary when using such a design. (RFF-532; *see also* RFF-530—RFF-531). Here, Professor Novemsky did not use an experimental design; he used a perception survey design. (FF-531—FF-534).

Intuit also argues that Professor Novemsky can't exclude the possibility that the survey instrument itself caused certain responses. Br. 73. Again, Intuit is mistaken.¹⁸ First, test and control are not the only way to ensure a non-biased survey, including ensuring that the survey instrument is not causing bias (other methods are, for example, changing the order of questions to avoid "order effect," employing quasi-filters, and pretesting his survey questions). (RFF-539; FF-532; FF-534; FF-780). Second, the perception survey results from open-ended questions show that the survey did not cause bias: less than 1% of respondents mentioned the survey instrument, while many respondents offered thoughtful answers about eligibility for "free" TurboTax that showed that they were considering factors outside of the survey to answer the question. (RFF-539; FF-589).

iii. Professor Novemsky's Perception Survey Used Reliable Questions and Took Appropriate Measure to Avoid Guessing

Intuit next claims that Professor Novemsky employed leading questions that biased survey results. Br. 74 (citing *Fish v. Kobach*, 309 F.Supp.3d 1048, 1060 (D. Kan. 2018)). But *Fish* is distinguishable. There, a survey was excluded because a statement regarding the purpose of the questions was read to survey respondents before they answered a set of questions, and the survey included a "loaded" question. *Id.* at 1060–61.¹⁹ Professor Novemsky employed no "loaded" questions, which he confirmed with his pretest. (FF-523; *see also* RFF-566; RFF-567; RFF-569; RFF-570; RFF-572—RFF-574; RFF-576—RFF-577).

¹⁸ Intuit relies on testimony by Professor Hauser proposing hypothetical alternative survey designs Professor Novemsky could have employed in which he could have compared responses to just the TurboTax brand name to responses where consumers saw both advertising and the brand name. Br. 73, IFF-535. This proposal shows a fundamental misunderstanding of the purpose of the perception survey, which was to measure impressions based on the TurboTax campaign, not any individual ads. (*See* RFF-535; FF-531—FF-533; FF-535—FF-538). Moreover, it is noteworthy that none of Intuit's experts attempted such a survey. (FF-580—FF-581).

¹⁹ The question was "In 2011 because of evidence that aliens were registering and voting in Kansas elections, the Kansas legislature passed a law requiring that people who register to vote for the first time must prove that they are United States citizens before they can become registered. Do you support or oppose this law?" *Id.*

Intuit claims that the phrasing of perception survey questions invited guessing. Br. 74. This ignores the measures Professor Novemsky took to avoid guessing, including instructing respondents not to guess, and requiring survey respondents to agree not to guess. (RFF-569; FF-524; FF-587). The additional measure of requiring respondents to agree not to guess is significant, because “when people check a box and say yes, I’m going to do this thing that you just said, they are more likely to actually do it than if you just say, please do this thing”—this is something “psychology suggests is even more powerful” than merely asking respondents not to guess. (RFF-569). Additionally, the phrasing of the questions used by Professor Novemsky was deliberate and appropriate for the survey. (RFF-569; FF-526). For example, using “I think” or “I don’t think” in answer options was appropriate because the level of certainty of a consumer’s knowledge about the cost of filing with TurboTax does not need to be absolute for that consumer to try using TurboTax for free. (RFF-569; FF-526). Though Intuit claims that questions in the survey may have suggested the answer to respondents, Br. 74, measures taken by Professor Novemsky ensured that survey responses were reliable. (RFF-571—RFF-574; FF-521—FF-527). Intuit points to less than one percent of survey respondents who indicated that the survey instrument may have played a role in their responses. Br. 75. But these results, rather than showing any bias, tends to show that perception survey results for the remaining 99% of survey participants were not affected by any bias and are reliable. (RFF-572—RFF-574; RFF-576—RFF-578; *see also* FF-589).

Intuit also claims that responses to question TAT255, which asked consumers about the source of their misimpressions that TurboTax is free, were unreliable because two answer options included “TurboTax,” and “TurboTax” was also mentioned elsewhere in the survey. Br. 76. But Professor Novemsky employed measures in designing the survey question to avoid bias, including through the design of the question and the answer options presented. (RFF-590—RFF-591; RFF-593; FF-590—FF-591; RFF-593—RFF-598). Intuit further claims that the question is not the kind of question that respondents can answer from memory. Br. 76. However, Intuit has not offered any evidence that respondents who could not remember would not simply respond

“Don’t know/Not sure.” In fact, psychologists regularly ask respondents in similar studies to record the source of their beliefs or impressions, and respondents are able to indicate if they don’t know—as they were with the perception survey—when they do not remember the source. (RFF-603—RFF-606; FF-592). Intuit’s “multiyear, multi-channel, multi-modal advertising campaign where the challenged ads were served to consumers *billions* of times,” Br. at 2, also makes it less likely that consumers would have forgotten its advertising in this instance. (*See* RFF-606).

iv. The Perception Survey Completion Rate Suggests Reliability

Intuit also claims that Professor Novemsky’s survey relied on an unrepresentative and biased survey population. Br. 77. Intuit first argues that the perception survey response rate was too low and that the survey is therefore unreliable. Br. 77. Intuit claims that the response rate was less than 5%, but it misstates the relevant data from the perception survey regarding completion rate. (RFF-542). Intuit reaches a lower “response rate” because it incorrectly includes in the calculation those survey respondents who started the survey but were excluded as ineligible for the survey because they were not part of the target population (for example, because they did not file taxes, or because they were eligible to use TurboTax for free)—that is not a correct calculation for response rates. *Vasquez v. Leprino Foods Co.*, No. 1:17-cv-796, 2023 U.S. Dist. LEXIS 22303, at *19 (N.D. Cal. June 14, 2020) (“nonresponse bias ... is a form of bias that can occur when particular systematic segments of the *target population* or sample do not provide responses to a survey” (emphasis added)); *see also In re Autozone, Inc.*, No. 3:10-md-2159, 2016 U.S. Dist. LEXIS 105746, at *60 (N.D. Cal. Aug. 10, 2016) (noting that nonresponse bias is “a form of bias that can occur when particular systematic segments of the target population or sample do not provide responses to a survey”). Considering only those who qualified for the perception survey, the survey completion rate was 78%. (RFF-542). Courts have found much lower response rates to be reliable. *Cf. Vasquez*, 2023 U.S. Dist. LEXIS 22303, at *25–26 (finding a response rate of 16% reliable) (citing *Nucci v. Rite Aid Corp.*, No. 19-cv-1434, 2020

U.S. Dist. LEXIS 104164, at *20 (N.D. Cal. June 14, 2020)); *see also Wallace v. Countrywide Home Loans Inc.*, No. 08-cv-1463, 2012 U.S. Dist. LEXIS 190575, at *11 (C.D. Cal. Aug. 31, 2012) (“high response rates—80% or higher—generally eliminate the need to address the issue of potential bias from nonresponse” (cleaned up) (quoting Federal Judicial Center’s Reference Manual on Scientific Evidence 361, 384 (3d ed. 2011))).

v. The Perception Survey Population Was Unbiased and Represented the Appropriate Target Population

Intuit next argues that the perception survey population was biased for a variety of reasons, generally accusing Professor Novemsky of shaping the survey population “to include only respondents who were likely unfamiliar with TurboTax’s advertising.” Br. 77–78. Specifically, Intuit complains that the perception survey excluded consumers who: (1) were eligible to use TurboTax for free, (2) filed their taxes in the months before the survey, and (3) used TurboTax to file their taxes in recent years. Br. 77. These criticisms are not supported by the record and underscore Intuit’s fundamental misunderstanding (whether deliberate or not) of the purpose of the perception survey and Complaint Counsel’s theory of deception. (*See* RFF-543, RFF-545).

First, the perception survey population of interest was precisely those consumers who could not file for free with TurboTax, to determine whether they had a misimpression about their eligibility to file for free; including free-eligible consumers would defeat the purpose of measuring whether there were misimpressions among the truly relevant target population. (*See* RFF-543; FF-510). Intuit argues against excluding these consumers, saying that its “free” advertising was targeted towards those eligible for Free Edition; but a significant portion of Intuit’s ads were not, and could not be, targeted to any one group. (FF-617; RFF-544). Even assuming the respondents in the perception survey are the population *least* likely to have seen TurboTax “free” advertising, the wide dissemination of TurboTax advertising means they likely to have seen at least some ads. (*See* RFF-544).

Second, excluding consumers who had already filed their taxes in recent months helped exclude consumers who may have already known for a fact whether they were eligible to use TurboTax for free—for example, by virtue of having used TurboTax. (FF-513). Professor Novemsky instead wanted to survey taxpayers still in the market for tax preparation services. (RFF-548—RFF-549).

Third, Intuit’s criticism about excluding TurboTax users from recent prior years is blunted by the fact that it only pertains to “Group A” of the survey population; “Group B” of the population—consumers who had paid to use TurboTax in recent years and were not eligible to use it for free—still believed, at a rate of over 24%, that they could use it for free. (RFF-553; FF-486—FF-488). Regarding Group A, however, Intuit’s claims that consumers who have not used TurboTax in recent years would be unlikely to see or pay attention to TurboTax ads is a completely unsupported and speculative supposition. (RFF-551—RFF-553). In fact, survey evidence from consumers who *hadn’t* recently used TurboTax but still indicated that their impressions about TurboTax came from TurboTax advertising suggests otherwise. (*See* RFF-551). In addition, between 2018 and 2022, the total number of “free” TurboTax advertising impressions exceeded 19 billion. (FF-553—FF-557; RFF-463; *see also* RFF-530). Distributing those views across 160 million taxpayers (FF-23) results in dozens and dozens of views per taxpayer, regardless of what tax preparation method they may have used. (*See* RFF-463). Though Intuit argues that there is no evidence of whether Group A survey respondents visited the TurboTax website, Br. 77, whether they interacted with the TurboTax website or product has no bearing on the reliability of the survey results, which report on whether consumers thought they could file for free with TurboTax. Additionally, the perception survey explicitly asked consumers about whether their impressions about their ability to file for free came from the TurboTax website, with 46.9% of survey respondents who had not used TurboTax in the last three years indicating that it did. (RFF-551). Finally, while Intuit claims that because survey respondents had filed online with TurboTax’s competitors, they must have been likely influenced by those competitors, Br. 77–78, to the extent Intuit means to imply that survey responses show inflated “I

think I can file for free” responses because of the respondents’ experience with other online tax software, survey data reveals that respondents who used TurboTax’s competitors were actually *less* likely to believe they could file for free, and *less* likely to attribute beliefs to TurboTax marketing. (RFF-552).

vi. Other Criticisms of Professor Novemsky’s Survey Population Are Also Without Merit

Intuit claims that perception survey results are biased because the survey does not exclude litigation aware consumers. Br. 78. But Intuit has no evidence that litigation awareness would bias survey results, and Professor Novemsky confirmed that only one survey participant appeared to be litigation aware, based on open-ended responses. (RFF-560—RFF-564; FF-575, RFF-560). Intuit’s speculation about litigation awareness is based in part on Professor Hauser’s fatally flawed survey questions about litigation awareness, which led to inflated responses.²⁰ (RFF-562).

Intuit also claims that because Professor Novemsky allowed consumers to opt out of the survey and did not record responses by consumers who opted out, the survey responses are biased. Br. 79. This proposition is absurd, as it would necessarily lead to the conclusion that government agencies complying with Privacy Act requirements can never conduct reliable surveys.²¹ Moreover, Professor Novemsky provided analysis in his report and at trial that, even assuming all respondents who opted out did not have the misimpression that they could file for free, the perception survey still establishes significant levels of misimpressions, and any purported bias regarding the opt-out respondents is merely speculative. (RFF-555; RFF-558—RFF-559; FF-542—FF-545). Additionally, courts have found that disclosure of a survey’s

²⁰ In his surveys, Professor Hauser excluded as “litigation aware” all consumers who were “aware of any media reports, investigations, or lawsuits involving a tax preparation website / software provider or accounting company[.]” (RFF-562). This question would be hugely overinclusive, as it is not limited in time and could exclude from his survey, for example, consumers aware of any media reporting, *at any time*, whether positive or negative. (RFF-562).

²¹ Federal law requires federal agencies to provide survey participants information about the purpose of the survey and the option to opt-out of the survey after learning about that purpose. Privacy Act, 5 U.S.C. § 552a(e)(3).

sponsor is not fatal to a survey's reliability. *FTC v. LendingClub Corp.*, No. 18-cv-2454, 2020 U.S. Dist. LEXIS 95703, at *42 (N.D. Cal. June 1, 2020); *see also* Order Re Plaintiff's Motion for Summary Judgment at 7, *FTC v. Kutzner*, No. 8:16-cv-00999 (C.D. Cal. Sept. 5, 2017) (court determining that a survey that disclosed the FTC as the survey sponsor was reliable). What is more, the survey's high completion rate of nearly 80% (RFF-542), may "eliminate the need to address the issue of potential bias from nonresponse" all together. *Wallace*, 2012 U.S. Dist. LEXIS 190575, at *11 (discussing survey response rates). The *Autozone* matter is distinguishable because, in that case, survey respondents were told explicitly that the survey was related to a class action matter—a disclosure the court found likely to create self-interest bias because respondents could have answered in a way to ensure they could benefit from the class action; this is an issue that was not present with the perception survey opt-out question. *Autozone, Inc.*, 2016 U.S. Dist. LEXIS 105746, at *63 (respondents were told: "Your contact information was obtained as part of a class action lawsuit involving individuals who worked at Autozone in the state of California between July 2005 and December 2012. ... The information you provide will be used in connection with this lawsuit to help resolve it.").

Other cases cited by Intuit regarding biased survey populations are distinguishable, which perhaps explains why Intuit makes no effort to apply them to the instant matter. In *Citizens Financial Group, Inc. v. Citizens National Bank of Evans City*, the court held that conducting a survey about a bank in a geographic area in which the bank was not present, outside of the bank's market, was improper. 383 F.3d 110, 118–21 (3d Cir. 2004). There is no question that Professor Novemsky's perception survey population included consumers in the TurboTax market. (FF-510—FF-511; RFF-548—RFF-549). In *Amstar Corp. v. Domino's Pizza, Inc.* (yet another inapposite intellectual property case), the court determined that the survey universe was flawed because it surveyed consumers in cities that did not have a Domino's Pizza location, which was improper because "the appropriate universe should include a fair sampling of those purchasers most likely to partake of the alleged infringer's goods or service." 615 F.2d 252, 264 (5th Cir. 1980). The perception survey sampled consumers who were considering using an online

tax software to file their 2021 taxes (FF-510; RFF-548—RFF-549), and easily could have decided to use TurboTax. In *In re Fluidmaster, Inc., Water Connector Components Product Liability Litigation*, the court found a surveyed population unrepresentative where the product at issue was a toilet primarily purchased by wholesale plumbing companies, but the survey population consisted of individual consumers, a minority of whom would have purchased the toilet directly. No. 14-cv-5696, 2017 WL 1196990, at *28 (N.D. Ill. Mar. 31, 2017). These facts again are distinct from the perception survey population of individual consumers because TurboTax is, by its nature, purchased directly by the consumer. Finally, Intuit misplaces its reliance on *Malletier v. Dooney & Bourke, Inc.* (another IP case), where the Court found that surveying consumers in low- to midscale malls was not the correct population to identify consumers who might purchase a Louis Vuitton handbag. 525 F. Supp. 2d 558, 630–31 (S.D.N.Y. 2007). Once again, the perception survey population of consumers who were considering using an online tax preparation provider (FF-510; *see also* RFF-548—RFF-549) was precisely the group most likely to use TurboTax, making the *Malletier* case entirely distinguishable.

vii. Professor Novemsky’s Perception Survey Results Are Reliably Reported

Intuit next claims that Professor Novemsky’s survey results are overstated and inconsistent with other “metrics,” such as Intuit copy testing and Professor Hauser’s Disclosure Efficacy Survey. Br. 80–82. Intuit first argues that because its own copy tests showed that around [REDACTED], Professor Novemsky’s survey results are comparatively too high. However, Intuit disregards that after Intuit’s TY20 Copy Test and before the fielding of the perception survey, Intuit’s television ads alone aired at least 35,194 times, garnering 7.5 billion impressions. (RFF-610; FF-53), likely influencing consumer perceptions about free TurboTax. Additionally, the TY20 Copy Test had different stimuli, different survey instruments, different measurement metrics, and a different survey design. (RFF-509; *see also* RFF-695). All these differences render the comparison of the results from the two studies inappropriate. (RFF-509). Moreover, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. (See RFF-709). What is more, [REDACTED]
[REDACTED]
[REDACTED]

(See RFF-690; RFF-706, *infra* Part II.B.4.d). Intuit’s reliance on the Disclosure Efficacy Survey for purposes of establishing a baseline related to consumer impressions of whether TurboTax is free is odd, as Professor Hauser’s survey *did not*: (1) ask consumers about whether they thought they could file for free with TurboTax; (2) isolate consumers that were not eligible to file for free, or (3) ask any questions about TurboTax at all.²² (FF-746—FF-747; FF-754; RFF-611). Also, the calculation Professor Hauser used to reach one-third of survey respondents is not contained in his expert report, and the methodology is entirely unreliable and misleading. (RFF-743—RFF-745; RFF-611).

Intuit goes on to claim that Professor Novemsky overstated his survey results because he did not combine survey results from his Groups A and B. Br. 81. But combining these survey groups would be improper because, as Professor Novemsky testified:

[T]hey were sampled separately with different bases and they weren’t sampled in proportion to the population either. So the combination of a group A plus group B is an arbitrary sum of two numbers. If you want to do an analysis of group A considering their characteristics, you would do that, and then separately you could do an analysis of group B, considering their characteristics. The sum of 200 from one group and 400 from the other represents nothing corresponding to reality or the marketplace.

(See FF-520; RFF-588; RFF-615).

Intuit next points to Professor Hauser’s unreliable coding exercise, which it claims shows that fewer consumers were under the misimpression that they could file for free with TurboTax

²² Professor Hauser’s view (which was not reflected in his expert report) that the perception survey results do not “pass the smell test” are merely unsupported, unscientific musings. (RFF-612).

because of purported inconsistencies in their answers. Br. 81–82. But, far from being the “gold standard” of anything, this methodologically flawed and ill-advised analysis is unreliable and should be disregarded, as is evident by myriad faulty coding. (FF-582—FF-584; RFF-579; RFF-584; RFF-586—RFF-589; RFF-616). For example, Professor Hauser coded as “inconsistent” a respondent who indicated that they thought they could file for free and who mistakenly identified low income as the reason. (RFF-584). The respondent indicated: “I believe that it was free for a certain income bracket and a fee after that”; “[p]eople making less than a certain amount of money” could file for free; and they thought they “fall into the income bracket who can file for free.” (RFF-584). It is hard to understand how these responses could have been coded as inconsistent with a response of “I think I can file for free” in TAT240.

Finally, Intuit engages in what can only be considered “funny math” to reach the conclusion that only 5.6% of perception survey respondents could have been deceived. Br. 82. Intuit’s analysis is rife with flaws and inconsistencies and should be disregarded. For example, Intuit claims that survey respondents who identified sources of their misimpression *in addition to* TurboTax advertising or the website should be disregarded, Br. 82, though it provides no support for the apparent claim that Intuit advertising and marketing must be the *only* source of consumer misimpressions for those consumers to have been deceived. (RFF-619). Additionally, based on Professor Hauser’s unreliable coding exercise, Intuit excludes a number of survey responses from the numerator for certain answer options, but Intuit keeps the same number of survey responses in the denominator, artificially lowering the survey results. (RFF-588; RFF-621). Intuit also combines responses from Groups A and B, which, as discussed above, is improper. (RFF-588; RFF-621).

Despite Intuit’s strained efforts to undermine the perception survey and Professor Novemsky’s opinions, it has failed to demonstrate flaws in his methodology or reasoning. Professor Novemsky’s survey “draws[s] valid samples from the appropriate population, ask[s]

appropriate questions in ways that minimize bias, and analyze[s] results correctly.” *Thompson Med.*, 104 F.T.C. at 790.²³ It should be given full weight in this matter.

b. The Number of Consumer Complaints Are Not Dispositive Regarding Deception

An absence or small number of consumer complaints does not show a lack of deception. To prevail on the deception count in this matter, Complaint Counsel is not required to show, through consumer complaints or otherwise, that any one consumer was actually deceived by relying on Intuit’s advertising. *In re Viral Response Systems, Inc.*, 1991 FTC LEXIS 409, at *1 (Aug. 28, 1991); *FTC v. Wilcox*, 926 F. Supp. 1091, 1099 (S.D. Fla. 1995) (finding that the FTC “is only required to show that it is likely, not that it is certain, that a reasonable consumer would be misled” (cleaned up) (quoting *FTC v. US Sales Corp.*, 785 F. Supp. 737, 748 (N.D. Ill. 1992)); *see also In re Consumers Prods. of Am., Inc.*, 72 F.T.C. 533, 557 n.13 (1967); *Independent Directory Corp. v. FTC*, 188 F.2d 468, 471 (2nd Cir. 1951). All the same, Intuit claims that the number of consumer complaints identified by Complaint Counsel are proof that no significant minority of reasonable consumers were deceived. Br. 82. In so claiming, Intuit tries to turn the clear legal precedent on its head. *See also Daniel Chapter One*, 148 F.T.C. at 1014–17 (Chappell, C.A.L.J.) (“Both the Commission and the courts, however, have squarely rejected the notion that extrinsic evidence is always necessary in order to prove an implied claim.”).

In addition, Intuit engages in flawed analysis in its consideration of complaints. (*See* RFF-636; RFF-638). First, ignoring its own complaints and negative reviews, it focuses solely on complaints identified by Complaint Counsel through Consumer Sentinel—a platform that reflects complaints consumers make to law enforcement, the Better Business Bureau, and other consumer-focused entities.²⁴ Br. 83. But courts have already found that “[t]he meaning of a lack

²³ In any event, the Court need not require methodological perfection before it will rely on a copy test or other type of consumer survey, but looks to whether such evidence is reasonably reliable and probative. *See In re Bristol-Myers Co.*, 85 F.T.C. 688, 743–44 (1975).

²⁴ Intuit claims that the Sentinel complaints presented are inflated, as it had one of its experts review complaints identified as relevant by Complaint Counsel to further identify complaints that
(continued)

of complaints to the BBB is indeterminate.” *Voc. Guides*, 2006 U.S. Dist. LEXIS 82308, at *40; *see also Lasseter*, 2005 WL 1638735, at *4 (“[F]ailure by consumer victims to file a complaint with the FTC does not indicate that the Defendant has complied with the [FTC] Act.”). Intuit has *not* conducted any substantive analysis of complaints *it* received, even though the most likely place consumers would complain about Intuit is, unsurprisingly, to Intuit itself. (FF-724). Intuit also claims that Complaint Counsel had some obligation to “verify” the consumer complaints received through Sentinel. Br. 84. But courts have found consumer complaints submitted to the FTC to be reliable and trustworthy. *See FTC v. Figgie Int’l*, 994 F.2d 595, 608 (9th Cir. 1993) (discussing admissibility of consumer complaints); *see also, e.g., FTC v. Ewing*, No. 2:07-cv-479, 2014 WL 5489210, at *2–3 (D. Nev. Oct. 29, 2014); *FTC v. AMG Servs., Inc.*, No. 2:12-cv-536, 2014 WL 317781, at *15–16 (D. Nev. Jan. 28, 2014); *FTC v. Mag. Sols., LLC*, No. 07-cv-692, 2009 WL 690613, at *2–3 (W.D. Pa. Mar. 16, 2009); *FTC v. Direct Benefits Grp., LLC*, No. 6:11-cv-1186, 2012 WL 5508050, at *2 (M.D. Fla. Nov. 14, 2012); *FTC v. Zamani*, No. 09-cv-977, 2011 WL 2222065, at *1 (C.D. Cal. June 6, 2011), as amended (Sept. 28, 2011); *FTC v. Cyberspace.com, LLC*, No. 00-cv-1806, 2002 WL 32060289, at *3 n.5 (W.D. Wash. July 10, 2002).

Second, though Intuit and its expert claim that deceived consumers would complain, Br. 82–83, Intuit ignores entirely that the number of complaints is not a reliable metric of deception because consumers deceived by Intuit’s “free” advertising might not complain at all. (RFF-623—RFF-625; RFF-639 FF-725—FF-732). For example, consumers might not know they have been deceived by Intuit (RFF-624; RFF-639; FF-727—FF-728), or they might attribute their unmet

are purportedly irrelevant. Br. 83. That analysis is fatally flawed and should be disregarded. For example, Intuit’s analysis excluded complaints from consumers who thought they could file for free because of their low income. (RFF-636). But as the perception survey shows, many consumers have a misunderstanding about whether they can use TurboTax for free because they think “simple returns” is related to the amount of income they have. (RFF-636). And Intuit fails to account for the fact that “research has shown that consumers self-select to complain in ways that are not well understood, lower propensities to complain can be present along demographic lines, and that consumers’ willingness to complain to government entities can vary as well, suggesting that any set of complaints, and particularly a set of complaints collected by a government entity, may be unreflective of consumer sentiments to an unknown degree.” (FF-641).

expectations to their own tax situation, rather than Intuit's deceptive advertising. (FF-624; FF-639; FF-729). Consumers would also have to take the time and effort to figure out where to complain. (RFF-624; FF-731—FF-732). Intuit's records show that not all consumers who are deceived by TurboTax are dissatisfied (and therefore may not complain).

. (FF-733; *see also* RFF-624).

Intuit's own customer review data further demonstrates that consumers may rate their experience with TurboTax highly (5 out of 5), while at the same time including in their review sentiments consistent with those consumers having been deceived. (*E.g.*, FF-657; FF-658). Moreover, in addition to the complaints identified by Complaint Counsel, the record reflects a variety of evidence indicating that not only did Intuit receive relevant complaints about TurboTax pricing, it was aware of those complaints. (*See* FF-619—FF-662).

Intuit claims that because its comparative complaint rate is low, there is no significant minority of deceived consumers. Br. 85–86. For support, Intuit cites other public FTC cases that had higher Sentinel complaint rates, and Professor Golder's determination that Intuit's Better Business Bureau complaint rate is lower than that of its competitors and of companies in other industries. Br. 85–86. This myopic focus on complaints made to anyone other than Intuit clearly presents an incomplete and irrelevant picture of Intuit's actual complaint counts. (RFF-638—RFF-646; *see also* FF-722—FF-724). Moreover, Professor Golder's uninformative and flawed complaint comparison (based on "intuition," Br. 86) says nothing about whether consumers were deceived by Intuit, much less whether a significant minority was. (RFF-638—RFF-639; FF-734—FF-736). Ultimately, even though Intuit attempts to distract with its irrelevant complaint analysis, legal precedent is clear that even an absence of complaints does not establish a lack of deception. *Brake Guard*, 125 F.T.C. at 247 ("The number of consumer complaints has no bearing on whether the public is being harmed by the respondents' false or unsubstantiated claims."); *Wilcox*, 926 F. Supp. At 1099.

c. Intuit Customer Data Does Not Show that Taxpayers Were Not Deceived

i. Metrics

Intuit's arguments that other customer "metrics" show an absence of deception are similarly unpersuasive. Intuit first focuses on TurboTax's abandonment rates (the rate at which consumers abandon the tax filing process within a given tax year), and argues that because the abandonment rates are the same for its free and paid products, it is *unlikely* that consumers left TurboTax because they were deceived by its free claims. Br. 87–88. This is purely speculation. In fact, Intuit's own study [REDACTED] (FF-621). Intuit instead points to data that purportedly shows that of consumers who complete their taxes using TurboTax (*ie*, not those who abandon), most of those consumers start and finish in the same SKU, Br. 88. More fundamentally, however, whether consumers decide to abandon their tax filing after learning that they were deceived is not informative of whether deception occurred; deception occurs because Intuit's free ads create a false expectation that they can file for free when then cannot, regardless of what a consumer does once they learn of being deceived. (RFF-452).

Intuit also claims that its high retention rates indicate that there was no deception, because deceived consumers would be unlikely to return from one year to the next. Br. 88–89. Retention rates, however, generally are not a useful measure of an absence of deception. (FF-737). This assumes, however, that the consumer knows that they were deceived and attributes that deception to Intuit rather than, for example, attributing their inability to file for free using TurboTax their own misunderstanding of the offer. (FF-727—FF-730; RFF-624). Consumers also may associate sunk costs with switching tax preparation providers from one year to the next. For example, TurboTax customers expressed: "I would prefer to change companies, but stick with the devil I know" and "[s]ince they know me and have been doing my taxes for years, I just stick with them." (RFF-655). Consumer complaints also show consumers return to TurboTax despite being deceived. (*See, e.g.*, FF-650; FF-655—FF-656). Finally, as Judge Breyer put it: "A person induced into paying for services that the person initially expected to get for free, and who

continues to pay for those services annually, can trace the cumulative harm suffered back to the initial deception.” (FF-932).

In the end, however, the exercise is a semantic one because law is clear: The presence of some satisfied customers is not a defense to liability. *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989); *Intuit*, 2023 FTC LEXIS 18, at *36–37 (Jan. 31, 2023) (citing *In re Daniel Chapter One*, 2009 FTC LEXIS 86, at *7 (Apr. 20, 2009); *FTC v. Capital Choice Consumer Credit Inc.*, No. 02-cv-21050, 2004 WL 5149998, at *34 (S.D. Fla. Feb. 20, 2004), *aff’d*, 157 F. App’x 248 (11th Cir. 2005)); *Wilcox*, 926 F. Supp. At 1099.

ii. Customer-Level Data

Intuit next points to Mr. Bruce Deal’s counting of Intuit’s customer-level data to support its position. This analysis is both methodologically flawed and, even if the methodology is overlooked, results in a conclusion that is largely meaningless because Mr. Deal concedes that he can’t answer the question core to this case: whether a significant minority of consumers were deceived by Intuit’s advertising. *Compare* Deception Policy Statement, at 177 n.20 (“A material practice that misleads a *significant minority* of reasonable consumers is deceptive.” (emphasis added)) *with* FF-856. Mr. Deal is unable conclude that *any* of the consumers in the TY21 customer base were not deceived by Intuit’s advertisements. (See FF-855—FF-856; FF-861; FF-871). Instead, as detailed below, Mr. Deal asks this Court to disregard the best evidence—the ads themselves—and corroborating evidence from Dr. Novemsky. Mr. Deal instead, relies on an application of economic principles (and some guesswork) that is inconsistent with best practices in the field of economics. (RFF-633; see FF-851 to FF-889 (describing errors in Mr. Deal’s analysis)).

From the outset, Mr. Deal artificially narrows his dataset to (and as a result, only looks for deception concerning) *less than* [REDACTED] of the [REDACTED] customer interactions on the TurboTax website in TY21, starting his count with the 55.5 million people that Mr. Deal defines as the TY 2021 “customer base.” (FF-851—FF-854). Even [REDACTED] may be an underestimate of potentially deceived consumers, as it omits any consumers that saw Intuit’s free TurboTax ads

but did not ultimately go to the website; considering that these ads had billions of impressions, that could leave out a substantial number of potentially deceived consumers. (FF-854).

Having arrived at his TY21 customer base, Mr. Deal, according to Intuit, “examined the actual behavior of those consumers most susceptible to the deception alleged by Complaint Counsel” and found “the customer-level data showed no direct evidence that consumers believed they had been deceived.” Br. 89. As an initial matter, Mr. Deal did not *look* for direct evidence of deception—he neither surveyed any consumers about their experience nor did he systematically review the complaints received by Intuit’s customer service team—so it is unsurprising that he didn’t find it. (*See* FF-821; RFF-680). Where Mr. Deal did look, he constrained “those consumers most susceptible to the deception,” to *only* those “[1] new TurboTax Free Edition customers who [2] found the product through a TurboTax advertisement, [3] paid to file, *and* [4] did not have prior experience with the product evidencing either familiarity with Intuit’s paid offerings or a preference inconsistent with an expectation of filing for free.” (IFF-663; *see* Br. at 89–90). Of course, none of these categories is dispositive as to whether a consumer was or was not deceived.

First, consumers who have used TurboTax in the past can still be deceived in the current tax year. Mr. Deal (who does not have a Ph.D. or any background in consumer psychology, (FF-810—FF-811)) does not know, and did not conduct any consumer surveys to find out, whether consumers would remember their prior experience using TurboTax. (FF-671). Tax regulations, Intuit’s policies, and consumers’ tax situations are not static, yet Mr. Deal also did not explore whether consumers, beset with Intuit’s free advertising, could have expected Turbo Tax to be free for them in a given year, even if it hadn’t been in past years. (FF-671; *cf.* FF-932 (“A person induced into paying for services that the person initially expected to get for free, and who continues to pay for those services annually, can trace the cumulative harm suffered back to the initial deception.”)).

Second, Mr. Deal’s erroneous conclusion that a consumer need to have arrived at the TurboTax website via a clickable ad makes no sense in the context of a case where television

advertisements (from which consumers cannot arrive directly at the TurboTax website) play a central role. (RFF-766; FF-885).

Third, Mr. Deal’s exclusion of 17.6 million consumers who logged into a TurboTax account but abandoned at some point before completing their filing demonstrates a misunderstanding of consumer behavior and economics, and, again, makes no sense: Mr. Deal is excluding people who demonstrate the kind of behavior you might expect of someone who was deceived. (RFF-666; FF-858—FF-869).

Finally, Mr. Deal’s category of consumers who were not deceived because they demonstrated “familiarity with Intuit’s paid offerings or a preference inconsistent with an expectation of filing for free” is incorrect because a consumer’s subsequent decision to pay for TurboTax products does not mean that these customers were not deceived into initial engagement with TurboTax products. (FF-672—FF-673; FF-932).

Mr. Deal ignores all these factors, and his analysis of a “reasonable consumer” is therefore erroneous.

Strikingly, Intuit does not directly address Dr. Erez Yoeli’s comprehensive criticism of Mr. Deal’s analysis. *See* Br. at 92. Specifically, in a lengthy expert report, in his deposition, and at trial, Dr. Yoeli—an economist who holds positions at the Massachusetts Institute of Technology, Stanford University, and Harvard University (FF-817—FF-818)—laid out fundamental errors in Mr. Deal’s economic analysis; yet Intuit plows ahead, leaving these critiques unaddressed. (*Compare* FF-824—FF-889) (setting forth the errors in Mr. Deal’s analyses) *with* IFF-930—IFF-931. Intuit ignores, for example, Dr. Yoeli’s criticism of how Mr. Deal (incorrectly) employs switching costs. (*See* FF-844—FF-847). Intuit ignores that a fundamental assumption of Mr. Deal, and one from which his conclusions flow—that consumers who were deceived by TurboTax advertisements would necessarily defect—is wrong. (*See* FF-832—FF-843). Intuit also ignores that Dr. Yoeli identified circumstances in which Intuit could benefit from deception—circumstances that Mr. Deal overlooked. (*See* FF-827—FF-831; FF-

848—FF-850). As a result of these (and other) flaws, overgeneralizations, and assumptions, Mr. Deal vastly undercounts the total number of potentially deceived customers. (*See* FF-889).

d. Intuit’s Testing and Survey Data Are Consistent With a Finding of Deception

Intuit claims that its own testing demonstrates that there was no significant minority of consumers who were deceived by its “free” advertising. Br. 92.

First, Intuit relies on a 2020 NPS survey [REDACTED]. [REDACTED]. (RFF-717). On its face, the study does not provide any support for an absence of deception. (RFF-714). NPS scores are a limited metric intended to distill customer sentiment into a single value and, importantly, mask the number of detractors that comprise it. (RFF-714). According to Intuit, 48% of all respondents, including [REDACTED] of respondents who used a paid version of TurboTax, stated that they were aware of the option. Br. 93. Intuit claims because 44% of respondents filed for free, the survey shows that those who are expecting to get a free product are getting it, and those who are expecting to get a paid product are paying. Br. 93. But that conclusion does not follow: (1) Because the survey necessarily includes consumers who *did* file their taxes with TurboTax, there is no reason to believe it is a representative sample—for example, consumers who were misled may have defected to other tax filing options before filing, so they would not show up in these results. (RFF-517). (2) Intuit’s reliance on survey responses from respondents who recently used TurboTax, and therefore already know whether they can use it for free, is hardly a measure of whether those consumers could have been deceived. (RFF-718; *see also* FF-513; FF-518). For the survey to provide any helpful information about consumer impressions of their eligibility to use TurboTax for free before they use it (and confirm or refute their prior beliefs), Intuit would need to have surveyed the respondents *prior* to their TurboTax use. (RFF-718; *see also* FF-513; FF-518).

Second, Intuit claims that Professor Hauser’s Disclosure Efficacy survey shows that, because consumers consider a free product at the same rate even after making some purported

enhancements to its advertising and marketing, consumers were not deceived by the original advertisements (those without the purported enhancements). Br. 93–94. Professor Hauser’s survey, which is flawed (*see, e.g.*, RFF-728), shows nothing of the sort and is, at best, a comparative measure between two similarly flawed sets of disclosures. (RFF-722; RFF-737; FF-750—FF-762). Intuit’s position presumes that the changes Professor Hauser implemented between his “test” and “control” groups address the deceptive elements of Intuit’s “free” advertisements, which is simply not true—and which Professor Hauser did nothing to confirm. (RFF-728; RFF-730—RFF-731; RFF-738; RFF-740; FF-755—FF-762).²⁵ In fact, the Disclosure Efficacy Survey illustrates the power of Intuit’s free claims, and that trying to provide an accurate representation through disclaimers is difficult. (*See* RFF-738; RFF-740; RFF-742). And though Intuit claims new copy testing “conclusively demonstrates” that its new “free” TurboTax ads are not deceptive, Br. 94, it is unclear what, if anything, the new copy testing is capable of measuring, because: (1) [REDACTED], and as Professor Novemsky testified, [REDACTED]” (2) [REDACTED] (RFF-709).

Third, the last survey Intuit relies on to claim its ads were not deceptive is a survey conducted by Ms. Kirk Fair, Br. 95—even though that survey was not designed to test, and did not test, whether consumers thought they could file for free with TurboTax. (RFF-746—RFF-747; FF-681; FF-892; FF-895).²⁶ Intuit claims that if Intuit’s advertising was deceptive, it would expect to see a reduction in the selection of paid TurboTax offers by survey respondents when

²⁵ Intuit claims that Complaint Counsel’s argument that both test and control ads in Professor Hauser’s Disclosure Efficacy survey were similarly deceptive “defies credulity,” Br. 94, but what defies credulity is that Professor Hauser, to test Intuit’s deceptive advertising, used a *different* deceptive advertising as a control. (FF-748; FF-757—FF-758).

²⁶ The survey is also rife with design and other methodological flaws. (*See, e.g.*, RFF-749; RFF-755; FF-893—FF-897).

offered an alternative free product. Br. 95. But this conclusion does not follow, as the fact that consumers upgrade when faced with a hard stop at similar rates whether or not they are told about the additional free options does not mean that they did not arrive at the site expecting to file for free—and still desiring to file for free when they encounter the upgrade screen. (RFF-746; FF-902). Moreover, there are many reasons not accounted for by Ms. Kirk Fair that consumers may not have selected the additional free options, including perceived switching costs and status quo bias. (RFF-757; FF-899—FF-901; *see also* RFF-452). Intuit also claims that the Kirk Fair survey shows that consumers recognize that they can use non-TurboTax products but remain with TurboTax anyway which, according to Intuit is inconsistent with the notion that consumers do not go to TurboTax just to use a free TurboTax option. Br. 95. First, the cost of TurboTax does not have to be the *only* TurboTax feature consumers care about for Intuit’s “free” ads to be deceptive. *See infra* II.C. What is more, as noted above, there are many reasons consumers would decide to upgrade when informed that they would have to, including feeling like the need to upgrade is their fault based on their tax situation, and not wanting to start their tax return all over again. (RFF-639; RFF-757; RFF-452).

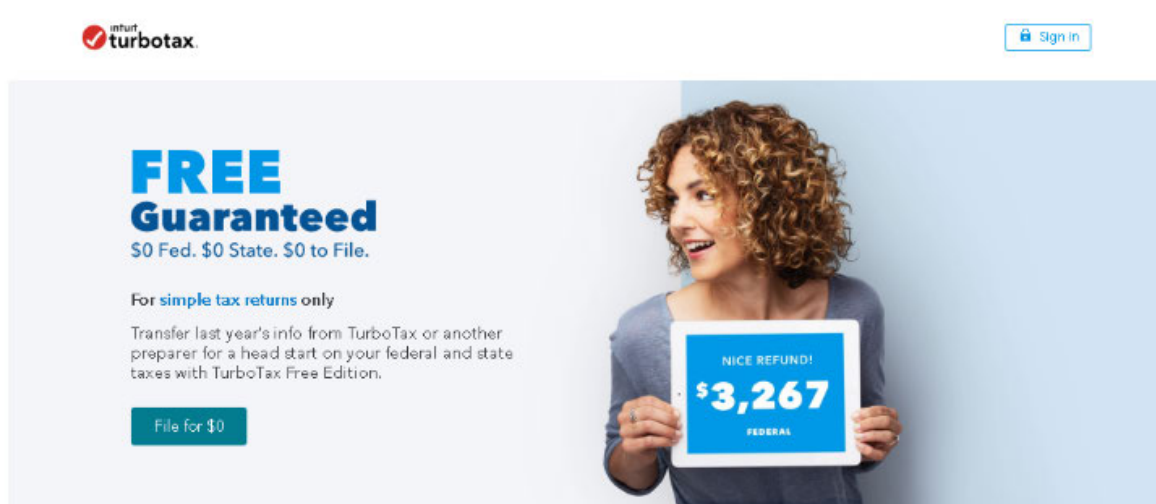
5. The TurboTax Website Perpetuated the Deception and Was Too Little Too Late To Prevent Consumer Harm (Replying to Br. § II.E)

Intuit is mistaken when it argues that the TurboTax website “is dispositive” and would have cured any deception because “consumers who arrived at the TurboTax website could easily learn the full details of the qualifications to file for free with TurboTax...” Br. at 96–98. In effect, Intuit rehashes its argument to overturn the deceptive door opener doctrine. This is ironic since much of its website states and reinforces its deceptive claims made elsewhere.

More to the point, even though the TurboTax website contains qualifying information, it is not clear that consumers see it, read it, or understand it. In fact, the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See* RFF-366—RFF-367; RFF-370; RFF-374; RFF-376; RFF-389—RFF-391; RFF-396; RFF-414—RFF-416; RFF-419; RFF-424; RFF-446; RFF-450);

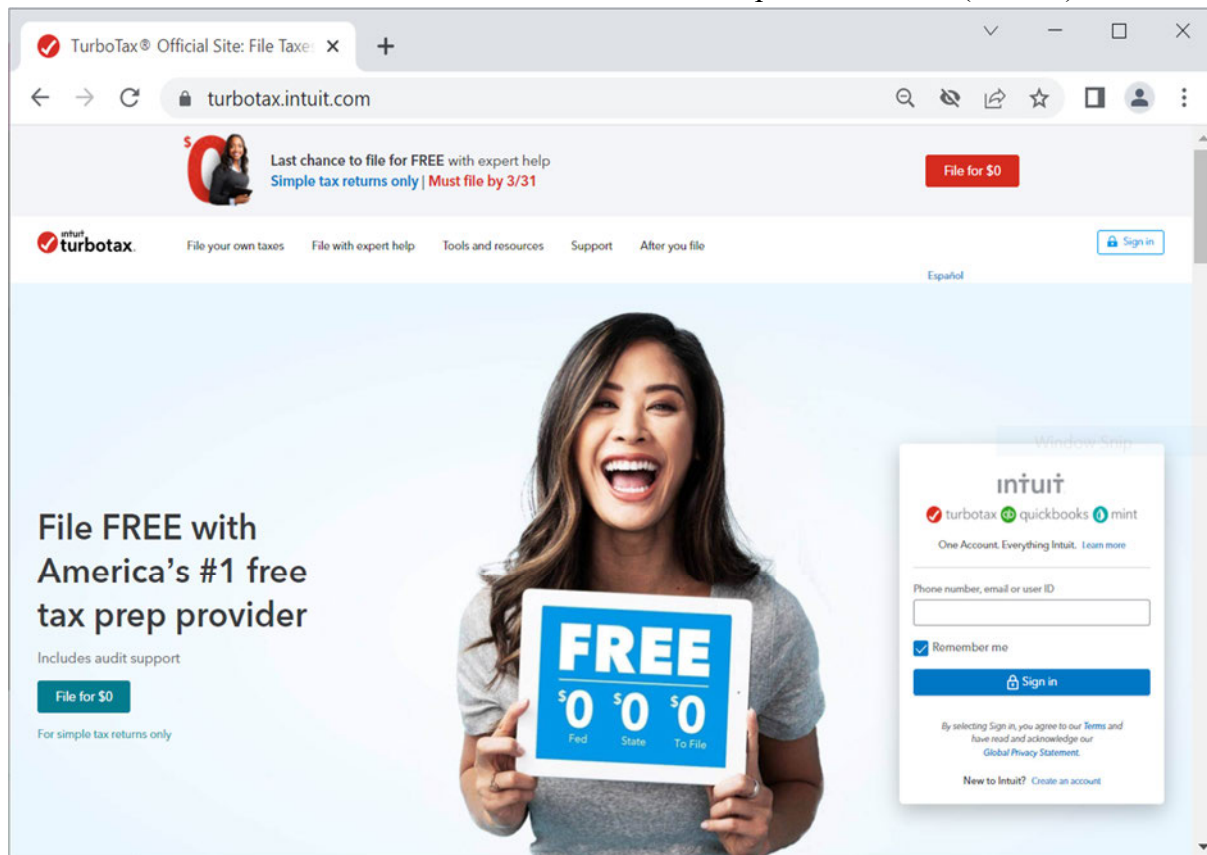
see also, e.g., FF-491—FF-503; FF-669—FF-670). For example, a number of consumer complaints, as well as consumer testimony, illustrate that many consumers did not learn they could not file for free until they reached the end of the tax filing process. (RFF-788; FF-671—FF-673; *see also, e.g.*, FF-635; FF-657; FF-651 (customer stating “It promotes free,free,free until its [sic] tme to checkout and then all of a sudden there is a fee that was more than the return itself.”)).

Before analyzing the effectiveness of any qualifications on the TurboTax website, it is critical to first understand that the website repeats and reenforces the express false “free” claims contained in the display ads and other TurboTax ads consumers are exposed to. (FF-456—FF-466; RFF-788). Those claims are powerful and enticing to consumers and likely distract them from any qualifications found on the TurboTax website. When consumers click on Intuit’s display advertisements and arrive at the TurboTax website, the website’s home page makes additional false and deceptive “free” claims. (FF-456—FF-466). For example, a screen Intuit used on its website, for TY 2020 is pictured below. (FF-461).



Here, Intuit’s website emphasizes “FREE Guaranteed,” “\$0 Fed. \$0 State. \$0 to File.” As well as “File for \$0,” (FF-461), when in truth, about two-thirds of taxpayers (or approximately 100 million taxpayers) are not eligible to file for free using TurboTax. (FF21—FF-23).

A screen Intuit used on its website for TY 2021, is pictured below. (FF-463).



Again, Intuit’s website emphasizes “FREE,” “\$0,” and “File for \$0,” (FF-463), even though most consumers cannot prepare and file their taxes for free using TurboTax. (FF21—FF-23; *see also* FF-456—FF-458, FF-459—FF-460, FF-463—FF-466 (providing additional examples of TurboTax website advertising claims)). Thus, Intuit bombards consumers with the message that they can file their taxes for “free.” (FF-47—FF-54 & FF-66—FF-466). Intuit baits consumers with false and deceptive ads on television, radio, social media, email, and online designed to drive traffic to the TurboTax website (FF-57—FF-65 & FF-66—FF-466), where it compounds the deception with more false claims. (FF-456—FF-458, FF-459—FF-461, FF-463—FF-466).

Intuit claims that disclaimers it presents (usually) behind a hyperlink are sufficient to cure consumer deception. Br. 96–97. However, any purported disclaimers on the TurboTax website are inadequate to correct the express false claims and deceptive net impression made by its

“free” advertising and the prominent “Free, free free free” claim on the website. (RFF-415; RFF-791). The disclaimers:

- 1) Are usually **hidden behind a hyperlink** over the words “See why it’s free” or the inscrutable phrase “simple tax returns”, even though the eligibility requirements of the “free” offer are integral to the “free” claim—consumers had to choose to click on the hyperlink to trigger a pop-up explaining the limitations, which is insufficient. (*See .com Disclosures: How to Make Effective Disclosures in Digital Advertising* (Mar. 2013), at 10 (“Disclosures that are an *integral part of a claim* or inseparable from it should not be communicated through a hyperlink. Instead, they should be placed on the same page and immediately next to the claim, and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information. This is *particularly true for cost information* or certain health and safety disclosures.” (emphasis added)) As Professor Novemsky opines, consumers are unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (RFF-134; FF-501—FF-503; *see also* GX316 (Complaint Counsel) at 14 (“Some consumers may not read information in pop-up windows or interstitials because they immediately close the pop-ups or move to the next page in pursuit of completing their intended tasks, or because they don’t associate information in a pop-up window or on an interstitial page to a claim or product they haven’t encountered yet.”)).
- 2) Are **dramatically less prominent** than the advertising claims on the page, e.g., “FREE.” *See* Deception Policy Statement, at 180 (“Other practices of

the company may direct consumers' attention away from the qualifying disclosures.”).

- 3) Again use the inscrutable phrase “**simple tax returns**,” which is anything but simple, and changes regularly at Intuit’s whim. (*See* RFF-134).

It is also important to note that Intuit has changed its website from tax year to tax year. It has, until recently, hidden the truth about eligibility for TurboTax Free Edition behind a hyperlink. (*See, e.g.*, FF-458). Consumers who are not eligible for TurboTax Free Edition may not learn they are ineligible until they have already invested significant time and effort into creating an account and inputting their sensitive personal and financial information into TurboTax. (*See* RFF-789; RFF-792; RFF-794; FF-14 & FF-671—FF-673).

Furthermore, learning the true price of TurboTax when consumers take the “steps to start preparing their tax returns using TurboTax” and arrive at the Products & Pricing page on the TurboTax website (the online point-of-sale), Br. at 97, does nothing to cure the deception that occurred in enticing consumers to visit the website in the first place. Point-of-sale material such as that found on the Products & Pricing page “will not necessarily correct a deceptive representation or omission.” Deception Policy Statement, 103 F.T.C. at 180. It is well established that “when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.” *Id.*

The Products and Pricing page is also ineffective at disclosing information to consumers. *First*, regardless of the effectiveness of disclosures on the website, the TurboTax “free” messaging still drives people to the website with the misperception that they can file for free. (RFF-414). *Second*, the Products & Pricing page obscures information about what “simple returns” actually means behind hyperlinks or in a small font at the bottom of the page, requiring consumers to click or scroll to find the information, which consumers are unlikely to do. (RFF-414—RFF-415). *Third*, to the extent the Products & Pricing Page repeats the “simple returns” language, that disclosure fails to convey to consumers that they may not qualify in a manner that is consistent with TurboTax’s qualification criteria. (RFF-414). And the evidence illustrates that

[REDACTED] (FF-721) and even if they do, the Products and Pricing page can steer consumers to the wrong product. (RFF-78). Additionally, the record shows that consumers reached the end of the tax filing process before learning they couldn't file for free. (See RFF-788). In a nutshell, Intuit asks the Court to ignore core advertising law principles, as well as the record, to find that the TurboTax website cures the deception and "is dispositive," as Intuit claims. Br. at 98.

C. Intuit's "Free" Claims Are Material (Replying to Br. § III)

The law is clear: a claim is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Cyberspace.com*, 453 F.3d at 1201 (quotation omitted); see also Deception Policy Statement, at 182; *Kraft*, 970 F.2d at 322; *In re Jerk, LLC*, 159 F.T.C. 885, 891 (2015). The record in this matter is clear. In the words of Intuit's own expert, the fact that price is important to many people is "not at all surprising for any product sold anywhere." (FF-596; RFF-779; see also FF-619; FF-621—FF-623; FF-665; FF-804—FF-806). According to one consumer deponent, TurboTax free advertising was "the key message that brought me to TurboTax in the first place." (FF-668). And as the Commission has already determined: "claims relating to ... cost, are presumptively material....[a]ccordingly, [A] representation that consumers can file their taxes for free is presumptively material. The importance of the 'free filing' representation is underscored by the fact that, in many of Intuit's ads, the word 'free' is essentially the only word spoken; it is the sole assertion in the ads." *In re Intuit Inc.*, 2023 FTC LEXIS 18, at *38 (citing *Thompson Med.*, 104 F.T.C. at 816–17; *Novartis*, 223 F.3d at 786).

Additionally, express and intentional claims are presumptively material. *Thompson Med.*, 104 F.T.C. at 788; *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095–96 (9th Cir. 1994); Deception Policy Statement, at 182; *In re Intuit Inc.*, 2023 FTC LEXIS 18, at *38; *Kraft*, 970 F.2d at 322; *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 856 (D. Mass. 1992). Intuit's "free" TurboTax claims are clearly express, see *supra* Part II.A.1, and they are also intentional. See *supra* Part II.A.2.b. (See, also, e.g., RFF-175; FF-612—FF-615; FF-618). Courts have also found

where a company knew that claims would induce purchases, the claim was material to consumers, *Kraft*, 970 F.2d at 323. Here, according to Intuit, [REDACTED] (FF-614; *see also* RFF-780; FF-615; FF-26; FF-28—FF-29).

Intuit asks the Court to overlook that both (1) claims about an item’s price, including that items are “free,”²⁷ and (2) express and intentional advertising claims, are *presumptively* material. Intuit also seems to want the Court to ignore that record is replete with direct evidence of materiality, primarily from Intuit’s own experts. (RFF-780; *see also* FF-596; FF-665; FF-804—FF-806).²⁸ Intuit starts by obtusely reframing of Complaint Counsel’s theory regarding *materiality* as arising “because consumers were drawn to the TurboTax website by the challenged ads and thus wasted time, effort, and in some cases money, amounting to harm that ‘can’t be remedied by subsequent disclosures.’” Br. 99. That framing is, of course, inaccurate.²⁹ Intuit correctly recites Complaint Counsel’s theory regarding Intuit’s deceptive door openers. *See supra* Part II.B.1. But as laid out in Complaint Counsel’s opening statement, and in its Pretrial Brief, Post-Trial Brief, and Motion for Summary Judgment, Complaint Counsel’s noncontroversial position on materiality is that “price, especially whether something is free or not, is material to consumers.” (RFF-781).

Having cooked up a Frankenstein version of Complaint Counsel’s materiality argument, Intuit *first* argues that its free claims are not material because consumers don’t make a

²⁷ An advertising claim that TurboTax is “free” is a claim about the *cost* of TurboTax. Advertising claims about the cost of a product or service pertain to a central characteristic of the product or service, and therefore are presumptively material. Deception Policy Statement, at 182 n.55; *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1068 (C.D. Cal. 2012), *aff’d in part, vacated in part on other grounds*, 815 F.3d 593 (9th Cir. 2016); *Johnson*, 96 F. Supp. 3d at 1121, 1142; *Thompson Med.*, 104 F.T.C. at 816–17.

²⁸ For example, Professor Hauser’s Purchase Driver Survey showed that 70.4% of survey respondents consider price an important factor in their choice of a tax preparation provider. (FF-805).

²⁹ Intuit also claims Complaint Counsel has “neglected” materiality because Complaint Counsel’s expert (an economist) was facile with the legal element, Br. 99, *see also* IFF-780. But Dr. Yoeli is not a lawyer, he was not called in Complaint Counsel’s case in chief, and his understanding of a legal term of art has no bearing at all on the evidence.

purchasing decision (presumably by entering payment information and clicking “pay”) regarding TurboTax until after they learn that they cannot file for free. Br. 99. In a twist that would bless virtually all advertising claims that occur before the point of sale, Intuit’s argument assumes that the only consumer behavior that can be materially influenced by deceptive ads is the moment of purchase, ignoring any time and effort invested by consumers before realizing that TurboTax is not, in fact, free for them. (*See* RFF-782). That is not the law. Point-of-sale material “will not necessarily correct a deceptive representation or omission.” Deception Policy Statement, at 180. Precedent clearly states that for information to be material, it only needs to be “likely to affect their choice of, or conduct regarding, a product.” *Cyberspace.com*, 453 F.3d at 1201 (quotation omitted); *see also* Deception Policy Statement, at 182; *Kraft*, 970 F.2d at 322; *Jerk*, 159 F.T.C. at 891. Consumer conduct leading up to an ultimate purchasing decision is still “conduct regarding a product” and any claims that could influence that conduct are material.

Second, Intuit claims that “Complaint Counsel did not establish that any allegedly misleading claim in the challenged ads was responsible for driving consumers to the TurboTax website, let alone driving consumers to pay for TurboTax.” Br. 100. Intuit’s arguments are not only contrary to the evidentiary record (*see, e.g.*, RFF-781), but they are also out of step with FTC law. The law does not require Complaint Counsel to prove that *any* consumers relied on Intuit’s deceptive advertising. “Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions.” *Figgie Int’l*, 994 F.2d at 605; *see also In re ECM Biofilms, Inc.*, 160 F.T.C. 276, 636 (2015) (“Liability under Section 5 does not require proof that particular purchasers relied upon or were actually deceived by” the deceptive representations. “); *Cyberspace.com*, 453 F.3d at 1201; *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979); *Five-Star Auto Club*, 97 F. Supp. 2d at 530 (holding that the FTC “need not prove that every consumer actually relied upon the misrepresentations to prevail.”); *In re Intuit Inc.*, 2023 WL 2609450, at *8 (F.T.C. Mar. 7, 2023) (Chappell, C.A.L.J.).

Third, Intuit misguidedly argues that because TurboTax ads are not the *only* source of information consumers rely on in deciding to use a tax preparation product or service, the ads are not material. Br. at 100. But that is *also* not the law. If Intuit had its way, companies could employ deceptive advertising as long as consumers were also influenced by, for example, “friends and family, internet research, [or] third-party reviews,” or if they have to visit a company’s website to make the purchase. *See* Br. at 100. And while Intuit’s purported expert evidence of what sources consumers consider when choosing tax preparation is flawed (*see* RFF-786), to the extent Intuit claims consumers rely on sources other than Intuit advertising, for example online search or word of mouth, those sources often contain or reflect TurboTax marketing. (RFF-786—RFF-787; RFF-619). Even Intuit’s website, which Intuit treats as some sort of cure all, itself contains and reinforces deceptive free messaging. (RFF-788—RFF-794). The record shows conclusively (and unsurprisingly) that Intuit’s free claims did influence consumer behavior, and that those material free claims did not evaporate from consumers’ minds at the website landing page. (RFF-779; RFF-783; *see also* FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806).

Fourth, Intuit argues that “merely causing consumers to visit the TurboTax website” cannot establish “materiality as to statements in the challenged ads” because of the length of time it takes to either find disclosure information on the website or for consumers to complete their tax filing. Intuit’s attempt to draw an arbitrary line at which point its initial deception no longer matters to consumers (according to Intuit, that would be sometime after 30 minutes, though it is not clear when), Br. at 100–01, is again out of step with the facts (RFF-790—RFF-794) and untethered to any legal support. What is more, as stated above, though Intuit seems to see its website as a panacea for its deception, the website itself contains and reinforces deceptive free messaging. (RFF-788—RFF-794).

Fifth, Intuit attempts to rebut the presumption that free claims are material by arguing that a version of TurboTax “is genuinely free” and that any alleged misrepresentations would not be about the cost of TurboTax but rather about the eligibility to use it for free. Br. at 101. But this

argument assumes that the message its advertising conveys to consumers is TurboTax “Free Edition” alone is free—which Intuit’s own marketing research shows is the case for only 5% of surveyed consumers, (RFF-795; FF-609), and which the Court can determine through common sense and experience is not the message that the ads convey. (*See also* FF-28—FF-29). If the Court finds that Intuit’s ads conveyed a message to reasonable consumers that TurboTax would be free for them, the claim is material, as the Commission has long recognized. *E.g., Book-of-the-Month Club*, 48 F.T.C. at 1312.

Even assuming, *arguendo*, that the misrepresentations here related to eligibility to use a product for a set price (here, free), rather than to price, the question of whether a consumer is qualified for the advertised product “seems no less a central characteristic of that product than its purpose, efficacy, performance, or quality, all of which are presumptively material. ... Indeed, a product has no ‘efficacy’ for a consumer who is ineligible to use it.” *In re Intuit Inc.*, 2023 FTC LEXIS 18, at *38–40 (F.T.C. January 31, 2023) (citing Deception Policy Statement, at 182; *Cap. Choice Consumer Credit*, 2004 WL 5149998, at *33).

A zebra can’t change its stripes, and Intuit can’t avoid liability for its free claims by arguing the real claim is who gets it for free.

D. A Cease and Desist Order is Warranted (Replying to Br. § IV)

The facts show a “cognizable danger of recurrent violation,” which merits a cease and desist order. *W. T. Grant*, 345 U.S. at 633. Intuit argues that there is no such danger. It claims a cease and desist order is not warranted because: (1) Intuit’s current TurboTax ads are not deceptive, (2) Intuit’s settlement with the states purportedly moots this action, (3) Intuit did not intend to deceive anyone, and (4) the proposed order would allegedly harm consumers. Br. § IV. Intuit’s argument is belied by the evidence. Intuit touts ads that display the word “simple” in large print and say it aloud; but the evidence indicates that that disclaimer is meaningless to consumers. Intuit also highlights that some of its ads now include a voiceover saying, “see if you qualify at turbotax.com,” but they are still deceptive door-openers—deception in ads legally cannot be cured on the TurboTax website. The State Consent Order is not sufficient to prevent

deception, and thus it does not moot this action. Intuit’s track record and its own documents show that Intuit was aware that it was misleading consumers, but it did not pull its worst ads until the eve of the Commission’s action against it. And the proposed order would not harm consumers—it is Intuit’s deception that harms consumers.

Much of Intuit’s argument on remedy evokes Justice Robert Jackson’s words of caution in *United States v. Oregon State Medical Society*: “It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.” 343 U.S. 326, 333 (1952), *quoted in W. T. Grant*, 345 U.S. at 632 n.5. Intuit continued to use deceptive “free” TurboTax claims for years, despite internal and external red flags. Intuit’s own research indicated that consumers were being misled by its advertising. And a steadily growing cavalcade of government investigations and consumer lawsuits and arbitrations mounted. Yet Intuit only incrementally improved its ads. Only after meeting with Chair Khan, shortly before the Commissioners voted to issue the Complaint, did Intuit have its road to Damascus revelation and hastily pulled its “Free, Free, Free, Free” television ads from the airwaves—an “abandonment seem[ingly] timed to anticipate suit,” *Oregon State Med. Soc.*, 343 U.S. at 333. Yet, despite pulling its television ads, Intuit continued making deceptive “free” claims online, including on social media and its website for the rest of tax year 2021 (*see e.g.*, FF-323—FF-324, FF-327, FF-441, FF-450—FF-454, FF-463, GX311 (Complaint Counsel) at CC-00006654–65; GX319 (Complaint Counsel) at CC-00006781–88), and resumed making similar claims during the most recent tax year (TY 2022) (IFF-337—IFF-352). Intuit now touts its “commitment to clarity” and “avowal that it ‘is not attempting and does not intend to violate the law.’” Br. at 102 & 108 (quoting *New Standard Publishing Co. v. FTC*, 194 F.2d 181, 183 (4th Cir. 1952)). Intuit doth protest its “reform” too much. Yet Intuit doesn’t protest its “repentance” at all—even though “the defendant’s recognition of the wrongful nature of [its] conduct” is probative “[i]n predicting the likelihood of future violations,” *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980); *see also FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 260 (E.D.N.Y. 1998) (looking to “defendants’

recognition of their culpability” in evaluating “cognizable danger of future violations in the present case”). Intuit tries to talk the talk, but the record shows it doesn’t walk the walk. Its “free” product is not free for roughly two-thirds of U.S. taxpayers. The proposed cease and desist order is necessary and appropriate to address Intuit’s deception. Without a cease and desist order, Intuit will be free to continue deceiving consumers about the cost of TurboTax.

1. Intuit’s Free TurboTax Campaign is Ongoing and Its Current Ads Remain Deceptive (Replying to Br. § IV.A)

Intuit still utilizes ads for TurboTax that make free claims. (IFF-337—IFF-352). Intuit argues that these ads are not deceptive because “[n]ot only do these ads have the same features that rendered past ads nondeceptive—identifying the specific SKU being advertised, noting that the offer is only for simple tax returns, and informing consumers that more information can be found on the TurboTax website—but those features have also been enhanced.” Br. at 104 (citation omitted); (*see also* IFF-335). Intuit is incorrect in asserting that those features were effective in rendering its past ads nondeceptive, and merely enhancing the same ineffective features offers no improvement. As always, “[t]he primary evidence of what representations an advertisement conveys to reasonable consumers is the advertisement itself.” *Telebrands*, 140 F.T.C. at 290; *see also Novartis*, 127 F.T.C. at 680. A review of Intuit’s current ads demonstrates that they continue to convey a deceptive free claim.

Identifying the Specific SKU Being Advertised. As discussed above, *supra* Part II.A.2.a, at pg. 18–19, this has never been an effective clarification for consumers. Internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609; *see also* FF-610). There is no indication that this disclaimer is any more effective now than it has been in the past.

Noting That the Offer Is Only for Simple Tax Returns. As discussed above, *supra* Part II.A.2.a, at pg. 19–20, this is not an effective disclaimer. What “simple” means is subject to Intuit’s reinterpretation nearly every tax season. (*See* FF-13, FF-15—FF-18 & FF-20). Intuit’s

General into Intuit’s marketing, advertising, promotion, and sale of certain online tax preparation products and whether Intuit’s conduct constituted deceptive or unfair business acts or practices in violation of the States’ consumer protection laws.” (FF-935). Intuit asserts that it is complying with the Consent Order, Br. at 106, which necessarily means that Intuit views its current ads to be compliant with the Consent Order. But Intuit’s current ads making free claims with regard to TurboTax have not improved in any way that makes them less deceptive than their forebearers. *See supra* Part II.D.1. That alone demonstrates that the Consent Order is not sufficient to curb Intuit’s deceptive advertising.

Additionally, specific loopholes in the Consent Order discussed in Complaint Counsel’s Post-Trial Brief include: (1) 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. (FF-937). This contradicts the black letter law principles, the principles of which are articulated in the .com Disclosures, at 10, among other FTC sources. (2) 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”—and not even that in a video of 8 seconds or less, as is often the case for social media video posts. (FF-938). Plus, this entire provision sunsets after ten years. (FF-938). This contradicts the black letter law principles articulated in the Deception Policy Statement, at 180, and the TV Ad Policy Statement, among other FTC sources. The Consent Order defines “Space-Constrained Advertisements” as any “that has space, time, format, size, or technological restrictions that limit Intuit from being able to make the disclosures required by this Assurance.” (FF-939). (3) The Consent Order allows hyperlinks to disclosures on Intuit’s website, without specifying that information integral to the claim cannot be hidden behind a hyperlink. (FF-940).

Beyond just arguing that the Consent Order obviates the need for an FTC cease and desist order, Intuit argues that the Consent Order moots this action as a matter of law. Br. at 105–06. Not so. Intuit’s argument is nothing more than the discredited mootness argument the Supreme Court rejected more than seventy years ago in *W.T. Grant Co.* There, the defendants argued that

they could not be sued because they were no longer engaged in the alleged conduct. 345 U.S. at 630. The Supreme Court disagreed, stating that such a case could only “be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated.” *Id.* at 633 (cleaned up). The Court cautioned that “[t]he burden is a heavy one,” and explained that lack of ongoing activity plus protestations that they would not engage in the conduct again “does not suffice.” *Id.* Significantly, “voluntary cessation of allegedly illegal conduct does not ... make the case moot.” *Id.* at 632 (citing cases). Mootness is an affirmative defense that Intuit raised in its Answer, and it bears the burden of proof on such a defense. *Timoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Dep’t of Energy*, 232 F.3d 1300, 1303 (9th Cir. 2000). Intuit has not met its burden. *See FTC v. Affordable Media*, 179 F.3d 1228, 1237–38 (9th Cir. 1999).

3. Intuit Has Shown It Is Incapable of Complying the Law in the Absence of a Cease and Desist Order (Replying to Br. § IV.C)

Intuit’s materials demonstrate that it has long known about the powerful effect its free advertising has on consumers. For example:

- A 2014 marketing strategy document found that a “Free/Free offer is compelling enough to drive considerable (1.2M) incremental customer growth.” (FF-615).
- Intuit’s FY ‘19 Go-to-Market White Paper admitted that: [REDACTED]
[REDACTED]
[REDACTED] (FF-612; *see also* FF-611—FF-614).
- In September 2019, Mary Ann Somers, then the SVP and Chief Growth Officer of Intuit’s consumer group, told a podcast: “But the key insight for us was, when you start talking about free, that’s what people hear. They hear free. You can say a lot of other things, but what they hear is free.” (FF-618).
- Intuit’s FY ’20 Go-to-Market Plan stated a goal to: [REDACTED]
[REDACTED]
[REDACTED]” (FF-615).

- A March 2020 presentation to Intuit from its television advertising agency, Wieden+Kennedy, stated: “[REDACTED]” (FF-616).

At the same time, for years Intuit ignored red flags that it was deceiving consumers with its free claims in TurboTax advertising. For example:

- [REDACTED] (FF-619).
- Consumer ad testing presented to Intuit in December 2018 showed that 73% of 250 survey respondents took away from the “Spelling Bee” ad the message: “That i [sic] can file my taxes for free.” (FF-606—FF-608).
- Marketing research conducted by Intuit in 2019 showed that 49% of consumers “are confident that Free Edition is truly free.” (FF-597).
- TY 2020 copy testing also showed that a significant percentage of consumers perceived that they could use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600—FF-601; FF-604—FF-605).
- Over recent years, Intuit has received substantial complaints from consumers complaining that they thought TurboTax would be free for them but turned out not to be. (FF-624—662).

Intuit also let legal actions involving its advertising accumulate until finally deciding to pull its worst ads on the eve of the Commission issuing the Complaint in this matter. This includes:

- On May 6, 2019, the Los Angeles City Attorney sued Intuit alleging, in part, that Intuit engaged in unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small

percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-918).

- On September 6, 2019, the Santa Clara County Counsel sued Intuit alleging, in part, that: “Intuit deliberately implemented a scheme to draw taxpayers to TurboTax’s revenue-producing URL with false representations that they could file their taxes for free using TurboTax and then to charge taxpayers significant sums to file through additional false and misleading statements.” (FF-919—FF-922).
- On September 13, 2019, a Consolidated Class Action Complaint was filed against Intuit alleging, in part, that: “Intuit implemented a pervasive, nationwide marketing and advertising campaign during the 2018 tax filing season promoting its offering of ‘free’ tax filing services, even though the vast majority of users would actually be charged to file their returns.” (FF-923—FF-925).
- Between October 1, 2019 and October 23, 2020, approximately 127,000 current and former Intuit customers filed demands for individual arbitration against Intuit alleging, in part, that they “were lured to Intuit’s website with promises of its Free Edition, only to learn later that they were ineligible for that free product and would have to pay to use TurboTax.” (FF-926—FF-928).
- On June 29, 2021, Complaint Counsel shared a draft complaint with Intuit that included a count alleging that Intuit’s free TurboTax claims were deceptive. (IFF-3).

After all this: “On March 24, 2022, Intuit informed FTC Chair Lina M. Khan that it was voluntarily retracting its ‘Free, Free, Free’ ads after a meeting with her in which concerns about those ads were expressed.” (IFF-7). So, after years of embracing a marketing strategy that Intuit knew left a “free” message with consumers, while simultaneously disregarding numerous red flags raised in consumer testing, consumer complaints, government lawsuits, consumer lawsuits, consumer arbitrations, and a draft FTC lawsuit, it took no less than a meeting with the Chair of

the Federal Trade Commission on the eve of filing for Intuit to finally decide to take action. That track record belies Intuit's claim of a "lack of deceptive intent, both past and future." Br. at 110.³⁰

Intuit waxes poetic about its "foundational values, long-term goals, and strategies for the TurboTax brand," its "ethos," its "commitment to clarity," and its "business interests" and "economic incentives." Br. at 107–10. But none of that can gloss over its actual history, factually or legally. A case that Intuit cites illustrates the point: "[Respondent] gave the line of business up only after the Commission had started to investigate its practices therein and only a few months before the Commission filed its complaint, and we have only the current corporate officers' expression of intention not to resume the business. ... [Thus,] [w]e think the Commission did not

³⁰ Intuit claims that "Complaint Counsel admitted before trial that there is no evidence Intuit intentionally tried to deceive consumers." Br. at 107. That is hardly the case. Intuit is applying its own narrative to the answers to a particularly badgering set of questions from Intuit's counsel. Here is what was really said: "Q. You keep saying 'the ads speak for themselves.' Can you just tell me what that means. A. I mean, I think Intuit was attempting to convey to consumers that TurboTax was free, and the ads clearly do that. Q. Okay. What evidence are you aware of -- can you identify the evidence that suggests to you that Intuit was attempting to convey to consumers that TurboTax was free? A. I believe there is evidence that Intuit produced to complaint counsel discussing this issue of consumers' understanding or their impression being that TurboTax was free. Q. Okay. That's nice. Can you identify the evidence you believe that Intuit produced to complaint counsel discussing this issue of its intent to communicate to customers that TurboTax was free? A. Okay. First of all, I don't think the complaint discusses intent. It discusses the advertisements at issue in the case being misleading and conveying to consumers that TurboTax was free when, in fact, it was not. Q. I am not asking you about the complaint. You just said Intuit was attempting to convey to consumers that TurboTax was free. That says to me something about its intent, so I am following up on something you just said. Can you identify any evidence that Intuit was attempting to convey to consumers that TurboTax was free? A. I believe there is evidence that supports that -- from Intuit that was produced as part of this matter that supports the position that consumers' impression from reviewing the advertisements was that it was free. Q. That -- that -- that's not my question. You said Intuit was attempting to convey that TurboTax is free. Can you identify the evidence regarding Intuit attempting to communicate that TurboTax is free? A. I am not certain whether there is evidence that they were attempting to -- there may be, but I am not certain if there is evidence of the intent. I believe there is evidence from Intuit that consumers took away the impression that TurboTax is free. Q. Come back to that in a second. Sitting here today, you are not aware of any evidence that Intuit was attempting to convey that TurboTax is free, correct? A. The best -- the evidence has been produced in this case. Intuit -- the evidence that Intuit has produced, obviously the complaint counsel and vice versa -- I don't have a photographic memory of the entire record or all evidence produced in this case. I cannot recall whether there is evidence that would support the proposition that Intuit intended for consumers to take away the impression that TurboTax was free. I am fairly confident that there is evidence that that was the impression that consumers had. There may be evidence that they intended to do that. I am not certain, and I do not remember a piece of evidence." (RX161 (Maxson (Complaint Counsel) Dep.) at 172–75).

exceed its statutory powers in issuing a cease and desist order against [Respondent].” *Coro*, 338 F.2d at 153.

The notion that voluntary discontinuance (and Intuit has only partially discontinued its deception) should not be trusted is consistent with weighty authority: “The fact that [Respondent] may have discontinued the offending practice before the Commission issued the complaint in this case ... does not bar a cease-and-desist order, where the public interest otherwise requires it.” *Fedders Corp.*, 529 F.2d at 1403; *see also, e.g., FTC v. USA Fin., LLC*, 415 F. App’x 970, 975 (11th Cir. 2011) (past illegal conduct “indicated a reasonable likelihood of future violations”); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1201–02 (10th Cir. 2009); *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985); *FTC v. Qualcomm Inc.*, No. 17-cv-220, 2018 WL 6597273, at *3–4 (N.D. Cal. Dec. 13, 2018); *FTC v. Citigroup Inc.*, No. 1:01-cv-606, 2001 WL 1763439, at *3 (N.D. Ga. Dec. 27, 2001) (“An inference arises from illegal past conduct that future violations may occur. The fact that illegal conduct has ceased does not foreclose injunctive relief.” (quoting *SEC v. Koracorp Indus., Inc.*, 575 F.2d 692, 698 (9th Cir. 1978))); *FTC v. Triangle Media Corp.*, No. 18-cv-1388, 2018 WL 6305675, at *1 (S.D. Cal. Dec. 3, 2018) (rejecting argument that proposed new defendant could not be violating or about to violate the law where the FTC had already obtained a preliminary injunction); *FTC v. Sage Seminars, Inc.*, No. 95-cv-2854, 1995 WL 798938, at *6 (N.D. Cal. Nov. 2, 1995) (finding that “defendants’ claimed cessation of conduct [which] occurred only *after* defendants learned that the FTC had commenced an investigation into [defendant’s] practices” could “hardly be considered ‘voluntary’”); *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1086–87 (C.D. Cal. 1994) (*rejecting* argument that the FTC is “only empowered to enjoin present unlawful practices and prevent their recurrence in the future”).³¹

³¹ Courts have also repeatedly ruled in other regulatory enforcement contexts that injunctions are appropriate based on past conduct. *See, e.g., CFTC v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1328 (11th Cir. 2018) (nature of past conduct can indicate likelihood of future conduct); *Murphy*, 626 F.2d at 655; *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (Defendant’s “continuing interest in investment opportunities strengthens the inference from his past conduct that he is likely to commit future violations”); *SEC v. Alpha Telecom, Inc.*, 187 F. Supp. 2d 1250, 1262 (D. Or. 2002) (“The key factor to consider is the past illegal conduct of the defendant.”), *aff’d sub nom. SEC v.* (continued)

Simply put: the Commission and the courts do not accept a defense of voluntary discontinuance “when the discontinuance is after the commencement of investigation, i.e., when the Commission’s ‘hand is on one’s shoulder.’” *Lovable Co.*, 67 F.T.C. at 1332–33. The self-serving testimony of Intuit’s executives does not carry much legal weight when compared to its actual track record. *See Or. State Med. Soc.*, 343 U.S. at 333 (“beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption”). Intuit’s protestations to the contrary, a cease and desist order is warranted.

4. The Proposed Cease and Desist Order Is Appropriate and Would Bring Clarity to Consumers (Replying to Br. § IV.D)

Complaint Counsel’s proposed cease and desist order is essentially a follow-the-law injunction. Intuit appears to directly argue against only Section I of the proposed order, which provides:

Prohibition Concerning “Free” Offers

It is ordered that Respondent, Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, or offering for sale of any goods or services, must not represent that a good or service is “Free” unless:

A. Respondent offers the good or service for Free to all consumers; or

B. 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.

C. Further, if the goods or services are not Free for a majority of U.S. taxpayers, such a fact is disclosed Clearly and Conspicuously at the outset of any disclosures required by I[]B.³²

Rubera, 350 F.3d 1084 (9th Cir. 2003); *SEC v. Poirier*, 140 F. Supp. 2d 1033, 1046 (D. Ariz. 2001).

³² The Proposed Order, at § I.C, cross-references “II.B”—with apologies to the Court for the typo, it should cross-reference “I.B.”

Proposed Order § I. Intuit argues most strenuously against paragraphs B and C of the proposed language. Br. at 110–13. But this provision is little more than a basic instruction not to deceive people. Compare § I.B with the Guide Concerning Use of the Word “Free” and Similar Representations 16 C.F.R. 251.1(c): “[C]onditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be 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.” This proposed language echoes consumer protection fundamentals that have been in place for nearly seventy years.³³

Intuit frets that if it continues making free claims, its ads will have to be so heavily laden with disclaimers that consumers will end up confused. Br. at 111–12. If so, perhaps that is a warning sign about the nature of the claims Intuit is making in the first place. If Intuit *cannot* hold itself to a basic standard of transparency, it may not make claims that would trigger the need for such clarifying disclosures. *See .com Disclosures*, at 6 (“If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, and if it is not possible to make the disclosure clear and conspicuous, then either the claim should be modified so the disclosure is not necessary or the ad should not be disseminated.”). But if Intuit did continue to make the claim, it has demonstrated a wealth of internal and external marketing and legal experts that can help it develop the right message without misleading consumers. *E.g.* IFF-163—IFF-166.

Intuit also argues that any ad compliant with the proposed order would “affirmatively harm consumers.” Br. at 111. But what is the purported harm? Disclosures “would likely decrease consumers’ engagement with the ads” and “exacerbate the skepticism that reasonable consumers already bring to offers for free products or services, again resulting in fewer consumers filing for free.” Br. at 111. A decrease in consumer engagement with Intuit’s ads is not a harm to consumers; it is a harm to Intuit that follows from ceasing its deception. Of course

³³ The Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251.1, has been in place since 1971; it superseded an older trade practice rule on use of the word “free,” released by the Commission on December 3, 1953. *See* 36 Fed. Reg. 21,517.

consumers are more likely to engage with offers that sound attractive to them—and “free” is certainly an attractive offer. *See e.g., Book-of-the-Month Club*, 48 F.T.C. at 1312 (“The word ‘free’ is a lure. It is the bait. It is a powerful magnet that draws the best of us against our will ‘to get something for nothing.’”) (*see also* FF-488 & FF-489, FF-616 [REDACTED]). But increasing consumer engagement through deception is illegal, 15 U.S.C. § 45(a), and Intuit’s free claim is deceptive because TurboTax is not free for most people (*see* FF-21—FF-23). The argument that full disclosure would increase consumer skepticism is also unavailing. The law requires truthful and accurate advertising. Intuit should not be permitted to do otherwise. Further, as Intuit knows, truly free online tax filing services—both on the commercial marketplace (*see* SF-8), and through a public-private partnership (*see* FF-31—FF-35)—are available. Getting consumers to an offering that is free for them is a laudable goal; but not at the price of deceiving other consumers. Intuit cannot justify deceiving as many as two-thirds of taxpayers by providing a free service to the other third. Consumers are not harmed by truthful advertising; they are harmed by Intuit’s deception. (According to Judge Breyer: “The Court is left to do a back-of-the envelope calculation [of the harm caused by Intuit’s deception]: for a projected class of 19 million people, who paid an average of \$100 per-year for at least one year, a conservative estimate of Intuit’s potential liability is \$1.9 billion.” (FF-930).) Beyond individual consumers, Intuit’s deception also harms the marketplace. (*See* FF-848—FF-850).

Finally, Intuit argues that “Complaint Counsel’s proposed order would run afoul of the constitution.” Br. 112–13. In this argument, Intuit only address one provision of the proposed order: “Further, if the goods or services are not Free for a majority of U.S. taxpayers, such a fact is disclosed Clearly and Conspicuously at the outset of any disclosures required by [the order].” Intuit argues that such a required disclosure fails the requirement articulated by the Supreme Court in *Nat’l Inst. of Fam. & Life Advoc. (NIFLA) v. Becerra* that required disclosures in commercial speech be “noncontroversial” and not “unjustified or unduly burdensome.” 138 S.

Ct. 2361, 2372 (2018).³⁴ First, it's worth remembering that this provision would only apply when Intuit makes the affirmative choice to "represent that a good or service is 'Free.'" Proposed Order § I. Second, Intuit's argument on the "noncontroversial" element fails because: (1) Intuit's argument about the correct denominator in measuring who is eligible for TurboTax Free Edition is a red herring in general, *see supra* Part II.B.1, at pg. 34, and here specifically—as the order imposes a lower threshold for disclosure (a majority) than Intuit's actual applicability in recent years (two-thirds); and (2) the parties' quibbling over the correct denominator is hardly the controversial topic at issue in *NIFLA*—"abortion, anything but an 'uncontroversial' topic," *NIFLA*, 128 S. Ct. at 2372. Third, Intuit's only argument on the "unjustified or unduly burdensome" prong is that: "[I]mposing such a requirement on TurboTax and not its competitors would, on this record, be unjustified. ... The disclosures sought by Complaint Counsel impose [an undue] burden and should be rejected for that reason too." Br. 112–13. This argument is entirely conclusory. Intuit does not cite any facts at all in support of this contention, and has thus failed to demonstrate any specific burden that would satisfy the *Zauderer/NIFLA* test. Additionally, that Intuit's competitors may also employ deceptive advertising is not a defense. Intuit's competitors should carefully examine their own practices in light of any order this Court may issue against Intuit. *Cf.* 15 U.S.C. § 45(m)(1)(B). Simply requiring Intuit to be more factual about who qualifies for its free offers is a "minimal requirement" that "does not interfere with

³⁴ Intuit misquotes *NIFLA* in putting "noncontroversial and not unjustified or unduly burdensome" together in a single quotation, Br. at 112, but both requirements do appear on the page of *NIFLA* that Intuit cites. In *NIFLA*, the Supreme Court newly made mandatory observations from *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* that required disclosures in commercial speech should be "purely factual and uncontroversial information" and not "unjustified or unduly burdensome." 471 U.S. 626, 651 (1985); *see NIFLA*, 138 S. Ct. at 2372, 2377; *see also CTIA - The Wireless Ass'n v. City of Berkeley, Cal.*, 928 F.3d 832, 844–45, 848–49 (9th Cir. 2019) (explaining *NIFLA*'s extension of *Zauderer*). Intuit only argues the "noncontroversial" and "unjustified or unduly burdensome" requirements are at play here. Br. at 112–13. Thus, Intuit has waived any argument that the proposed order's disclosure requirement is not "purely factual." *See CTIA*, 928 F.3d at 848 (party did not argue that one prong of *Zauderer/NIFLA* was at issue with regard to a certain dispute of fact ("whether radio-frequency radiation can be dangerous to cell phone users"), and thus made a "tacit admission" that the required disclosure satisfied that prong with regard to that fact).

advertising or threaten to drown out messaging”—it only renders Intuit’s messaging less deceptive. *CTIA*, 928 F.3d at 849. In sum:

This case is far from the boundary line staked out by *NIFLA*. Unlike in that case, the disclosure requirements here are directly targeted at promoting the State’s interest in dissipating the possibility of consumer confusion or deception. And they do so by providing information directly connected to the subject of the advertisement, rather than by compelling speech concerning unrelated or competing services.

Recht v. Morrissey, 32 F.4th 398, 417 (4th Cir.), *cert. denied*, 143 S. Ct. 527 (2022).

* * *

Intuit did not take heed of years of red flags indicating that it was deceiving consumers. It stuck to its “free” marketing strategy, brushing aside consumer complaints, government investigations, and public and private litigation—until, that is, it met with Chair Khan and suddenly decided to get serious in a last-ditch effort to avoid an FTC enforcement action. After the Commission issued the Complaint in this matter, Intuit finalized a deal with the States that has enough loopholes to allow Intuit to continue running ads with free claims today that are little improved over their predecessors. Saying “simple returns” louder does not substantively improve the inscrutable disclosure. Examining “the totality of the circumstances surrounding” Intuit and its violations, including Intuit’s scienter, CC Post-Trial Brief Parts II.D.2–4, its long history of deceptive advertising, CC Post-Trial Brief Part Part II.F, its lack of contrition, its inclination to expand its use of free claims (*see* FF-9, FF-30), and its assurances against future violations being rendered questionable in comparison to its actual track record, there is a “likelihood of future violations” that should be enjoined, *see Murphy*, 626 F.2d at 655. The Court should issue the proposed order.³⁵

³⁵ Of course, the Court has discretion to modify the specifics of the proposed order, but on this record, a cease and desist order in general is clearly warranted and the proposed order is appropriate.

E. Intuit’s Timeliness Defenses are Inapplicable (Replying to Br. § V)

As the Commission has long held: “No statute of limitations attaches to administrative proceedings brought under Section 5 of the Federal Trade Commission Act . . . , and neither equitable estoppel nor laches is a defense to an action brought by the government in the public interest.” *Rentacolor*, 103 F.T.C. at 418–19; *see also Simeon Mgmt.*, 87 F.T.C. at 1222. Unsatisfied with this reality, Intuit argues for two more changes in the law. Intuit asks this Court to nullify binding precedent and, for the first time ever, subject an administrative proceeding under Section 5 of the FTC Act to: (1) a three-year statute of limitations; and (2) the doctrine of laches. Br. § V. The Court should decline Intuit’s further requests to change the law.

1. There is No Applicable Statute of Limitations (Replying to Br. § V.A)

Intuit acknowledges that “[S]ection 5 does not include an express statute of limitations.” Br. at 113. Intuit also acknowledges cases that stand “for the proposition that [S]ection 5 is not subject to *any* statute of limitations.” Br. at 114 (emphasis in original). Intuit offers three rebuttals to this authority: (1) prior cases did not consider *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and other cases in which the Supreme Court has borrowed a statute of limitations from another source and applied it to a law without a limitations period; (2) the parties’ tolling agreement is a tacit admission that a statute of limitations applies; and (3) failure to apply a limitations period would violate fairness and due process. All three arguments fail in Intuit’s quest to set aside binding precedent. *See Rentacolor*, 103 F.T.C. at 418–19; *Simeon Mgmt.*, 87 F.T.C. at 1222.

First, regarding *DelCostello*, Intuit persistently overlooks the differences between civil litigation among private parties and government law enforcement actions. When that distinction is recognized, it is clear that *DelCostello* is not applicable. For example, in *FTC v. 4 Star Resolution, LLC*, the court refused to apply *DelCostello*, stating: “The actions at issue in that case were brought by individual employees against their employers and unions, not by the United States Government.” No. 15-cv-112S, 2015 WL 7431404, at *2 (W.D.N.Y. Nov. 23, 2015). The Supreme Court held in *E. I. Du Pont De Nemours & Co. v. Davis* that “an action on

behalf of the United States in its governmental capacity ... is subject to no time limitation, in the absence of congressional enactment clearly imposing it.” 264 U.S. at 462; *see also United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997) (“the properly constructed rule is that—absent a clear expression of Congress to the contrary—a statute of limitation does not apply to claims brought by the federal government in its sovereign capacity”); *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1489 (9th Cir. 1993) (“In the absence of a federal statute expressly imposing or adopting one, the United States is not bound by any limitations period.”); *United States v. City of Palm Beach Gardens*, 635 F.2d 337, 339 (5th Cir. 1981) (“courts have long held that the United States is not bound by any limitations period unless Congress explicitly directs otherwise”). *DelCostello* did not address *E. I. Du Pont*, let alone overrule it. Intuit’s reliance on *DelCostello* is misplaced. Borrowing a statute of limitations from another source and applying it to this action is not supported by the applicable precedent.³⁶

Second, Complaint Counsel’s request for a tolling agreement is not evidence that a statute of limitations should apply to this action. While “[n]o statute of limitations attaches to administrative proceedings brought under Section 5,” *Rentacolor*, 103 F.T.C. at 418–19; *see also Simeon Mgmt.*, 87 F.T.C. at 1222, a statute of limitations applies to any follow-on action under Section 19 of the FTC Act, 15 U.S.C. §57b, for relief “to redress injury to consumers” based on Intuit’s dishonest and/or fraudulent acts or practices. As Intuit slow-rolled compromise negotiations in late 2021 and early 2022 (*see* GX312 (Complaint Counsel) ¶¶ 7(b), 11, 29(s)), Complaint Counsel insisted that Intuit execute a tolling agreement in order to preserve the future opportunity to secure relief under Section 19 for consumers harmed by Intuit’s conduct in the TY 2018 filing season (which began in January 2019).

³⁶ Intuit claims that “at least one court has already faulted the FTC” for the “oversight” of citing to authority that does not address *DelCostello*. Br. at 114 (citing *FTC v. Centro Natural Corp.*, No. 14-cv-23879, 2014 WL 7525697, at *7–8 (S.D. Fla. Dec. 10, 2014) (Intuit cites the case as “*Centro National [sic] Corp.*”). But even that court concluded: “Still, the weight of authority does appear to lie with the FTC” on this issue. *Centro Natural*, 2014 WL 7525697, at *7 (citing *FTC v. Instant Response Sys., LLC*, No. 13-cv-976, 2014 WL 558688, at *3 (E.D.N.Y. Feb. 11, 2014) (collecting cases)).

Third, the lack of a statute of limitations applicable to Section 5 also does not violate fairness or due process. This argument fails because Intuit’s support for it comes from quotations craftily edited to make it look like the law is on Intuit’s side when it isn’t, as laid out below:

Intuit’s Brief	Full Context
<p>The Supreme Court has long “used particularly forceful language in emphasizing the importance of time limits” on government enforcement actions. <i>Gabelli v. SEC</i>, 568 U.S. 442, 452 (2013). Br. at 114.</p>	<p>“Chief Justice Marshall used particularly forceful language in emphasizing the importance of time limits on penalty actions.” <i>Gabelli v. SEC</i>, 568 U.S. 442, 452 (2013) (emphasis added).</p>
<p>Over two centuries ago, for example, Chief Justice Marshall explained that it would be “utterly repugnant to the genius of our laws” if government enforcement actions could “be brought at any distance of time,” noting that “[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable” for a far lesser offense. <i>Adams v. Woods</i>, 6 U.S. (2 Cranch) 336, 342 (1805). Br. at 114–15.</p>	<p>“In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.” <i>Adams v. Woods</i>, 6 U.S. 336, 342 (1805) (emphasis added).</p>
<p>Consistent with those views, the Supreme Court later declared that time limits are “an almost indispensable element of fairness.” <i>Rothensies v. Electric Storage Battery Co.</i>, 329 U.S. 296, 301 (1946). Br. at 115.</p>	<p>“It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.” <i>Rothensies v. Elec. Storage Battery Co.</i>, 329 U.S. 296, 301 (1946) (emphasis added).</p>

By cutting off *Gabelli* just before the words “on penalty actions,” and *Adams* just before the words “to a pecuniary forfeiture,” and *Rothensies* just before the words “of an income tax policy,” Intuit contorts these inapposite cases to fit its narrative. This is not an action for penalties. It is also not an income tax case. This is an administrative action for a cease and desist order “brought by the federal government in its sovereign capacity.” *Banks*, 115 F.3d at 919.

Contrary to Intuit’s dubious citations, the weight of the authority from the Supreme Court, the Courts of Appeals, and the Commission has no concern with a lack of statutes of limitations in cases like this. *E. I. Du Pont*, 264 U.S. at 462; *Banks*, 115 F.3d at 919; *Dos Cabezas*, 995 F.2d at 1489; *City of Palm Beach Gardens*, 635 F.2d at 339; *Rentacolor*, 103 F.T.C. at 418–19; *Simeon Mgmt.*, 87 F.T.C. at 1222.³⁷

2. Laches Does Not Apply (Replying to Br. § V.B)

Intuit next asserts that “[l]aches applies against the government—including the FTC—when it unreasonably delays bringing an enforcement action to the defendant’s detriment.” Br. at 116. This argument fails for at least three reasons.

First, in general, Intuit’s assertion flies in the face of significant authority to the contrary. *Summerlin*, 310 U.S. at 416 (“It is well settled that the United States is not ... subject to the defense of laches in enforcing its rights.”) (citing cases); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) (citing cases); *In re Basic Research, LLC*, 2004 FTC LEXIS 211, at *14 (Nov. 4, 2004) (striking laches affirmative defense); *In re Metagenics, Inc.*, 1995 WL 17003144, at *1–2 (F.T.C. Jan. 5, 1995) (same); *Rentacolor*, 103 F.T.C. at 418–19; *In re Horizon Corp.*, 97 F.T.C. 464, 860 (1981); *In re SKF Indus., Inc.*, 94 F.T.C. 6, 83 n.8 (1979); *Simeon Mgmt.*, 87 F.T.C. at 1222; *In re Hollywood Carpets, Inc.*, 86 F.T.C. 784, 805 (1975) (initial decision adopted by the Commission); *In re Vulcanized Rubber & Plastics Co.*, 53 F.T.C. 920, 921–22 (1957) (initial decision adopted by the Commission).

Second, even if the doctrine of laches were applicable here, Intuit has failed to prove its case on even a basic level. “The defense of laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). “Laches is an affirmative defense. Accordingly,

³⁷ Intuit’s fourth quotation in that paragraph, from *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, is innocuous enough, but is also out of context. There the Court was discussing the rule of statutory construction that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” 485 U.S. 568, 575 (1988).

the burden of proving it rests with its proponent.” *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 38 (1st Cir. 2001) (citation omitted). In support of its laches argument, Intuit cites only four facts:

- IFF ¶ 1: “The Federal Trade Commission (‘FTC’) initiated an investigation into Intuit’s allegedly deceptive advertising in May 2019.”
- IFF ¶ 6: “After starting its investigation, the FTC allowed nearly three full tax seasons to pass before suing Intuit in 2022.”
- IFF ¶ 14: “During [the TRO] hearing, U.S. District Judge Charles R. Breyer observed that the FTC’s purported emergency motion was made after extensive delay—as the conduct was ‘known to the FTC for a considerable period of time’—and that its timing was ‘entirely disruptive’ to Intuit.”
- IFF ¶ 214: “Complaint Counsel contend that 131 TurboTax brand video ads that ran between Tax Years 2014 and 2021 (and one exhibit containing brand video scripts) were deceptive to reasonable consumers.”

See Br. at 115–16. These facts, and Intuit’s discussion of laches in its brief, make no showing of a “lack of diligence,” let alone “prejudice” to Intuit. *Kansas*, 514 U.S. at 687. The timeline of Complaint Counsel’s thorough investigation and lengthy attempts at settlement are documented in the record. (*See generally* GX312 (Complaint Counsel)). Other than simply stating lengths of time that have elapsed, Intuit has not provided any evidence of unreasonable delay. And Intuit has not provided any evidence from its witnesses or internal documents showing what prejudice it purportedly attributes to any such delay. (Judge Breyer was reflecting on the timing of an emergency motion for a temporary restraining order after the end of the tax season—not on the timeliness of case in general.) Intuit’s argument boils down to one conclusory statement: “It is inequitable to penalize Intuit for outdated ads when the FTC waited years and years, across three different administrations, before filing this case.” Br. at 116. But Intuit fails to back that statement up with any actual evidence (and an FTC cease and desist order is not a penalty—a point Intuit itself makes).

Third, in cases that suggest that laches might possibly be applicable against the government, courts often impose additional elements that Intuit has not even attempted to address. Intuit cites *FTC v. DirecTV, Inc.*, No. 15-cv-1129, 2015 WL 9268119, at *3 (N.D. Cal. Dec. 21, 2015), and *FTC v. Hang-Ups Art Enterprises, Inc.*, No. 95-cv-27, 1995 WL 914179, at *4 (C.D. Cal. Sept. 27, 1995)—both cases in which courts declined FTC requests to strike laches defenses from defendants’ answers. Both cases discuss footnote 10 of *United States v. Ruby Co.*, which opined, in dicta:

The traditional rule is that the doctrine of laches is not available against the government in a suit by it to enforce a public right or protect a public interest. It may be that this rule is subject to evolution as was the traditional rule that equitable estoppel would not lie against the government. However, in the analogous estoppel situation, the invocation of the doctrine against the government requires a showing of affirmative misconduct. Even if there were some allowance for laches against the government, there is no reason why that doctrine should not be subject to at least the same strictures as estoppel. In any event, on the facts of this case, we deem the policy considerations so strong as to compel denial of the defense of laches.

588 F.2d 697, 705 n.10 (9th Cir. 1978) (citation omitted); *see also DirecTV*, 2015 WL 9268119, at *3 (“*Hang-Ups* cited *Ruby* for the principle that laches may be a defense against the government if affirmative misconduct by the government is shown.” (cleaned up)). Complaint Counsel undertook a thorough investigation and afforded Intuit a lengthy window to try to settle the matter. (*See generally* GX312 (Complaint Counsel)). Intuit has not even raised the notion that the process was infected by “affirmative misconduct.” Again, Intuit’s claim of laches is so unsupported by the facts as to be effectively abandoned.

3. Neither Statute of Limitations Nor Laches Would Bar This Action Because Intuit’s Deception Was Ongoing When the Complaint Was Issued

Finally, it’s worth remembering that even if Intuit’s timeliness defenses were valid—and they’re not for the myriad reasons discussed above—they would bar only a finding of liability based on ads from TY 2017 and before. (Intuit lists 26 exhibits constituting such ads in Appendix A to its Post-Trial Brief, though several of those exhibits are duplicates of each other from

different sources.) In this case premised on a one-count Complaint, this Court can find Intuit liable on Count I based on Intuit’s deceptive ads from TY 2018 onward. *Supra* Part II.A. Thus, Intuit’s timeliness defenses boil down to little more than an attempt to avoid the Court considering some of Intuit’s most egregious ads. (*E.g.*, FF-66—FF-69 (2015 Super Bowl Ad); FF-70—FF-73 (2016 Super Bowl Ad); FF-74—FF-93 (2017 ads featuring the phrase “at least your taxes are free”). Intuit admits that it has made “[i]mprovements [i]n TurboTax [a]ds [o]ver [t]ime.” Intuit PFF § VI.F. Conveniently, Intuit’s examples of such improvements begin at the dawn of its incorrectly asserted limitations period—TY 2018, *see* Intuit PFF ¶ 356, and extend through the present, *see* Intuit PFF ¶¶ 357–62. But those improvements do not solve Intuit’s deception problem. *Supra* Part II.A. The Court should consider all of Intuit’s deceptive ads, from the Super Bowl in 2015 to those still in the marketplace as of the filing of the Complaint.

F. Part 3 Proceedings are Constitutional (Replying to Br. § VI)

In its final attempt to seek changes in long-standing law, Intuit asks this Court to declare itself and the Commission unconstitutional. Though Intuit may not like the structure that Congress established and the Supreme Court blessed eighty-eight years ago, it is still standing today. Binding precedent renders Intuit’s constitutional defenses meritless.³⁸

1. The Commission’s Dual Roles as Investigator/Prosecutor and Adjudicator Are Constitutional (Replying to Br. § VI.A)

Congress created the Commission to serve as an expert body to administer the FTC Act and “determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed.” *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612–13 (1946); *see also FTC v. Texaco, Inc.*, 393 U.S. 223, 226 (1968); *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977); *Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962); *Carter Prods., Inc. v.*

³⁸ Intuit admits, as it must, that this effort is a largely academic exercise to preserve these arguments for appellate review. *See* Br. at 117 (“To the extent this Court cannot grant relief on any of these constitutional arguments, Intuit presents each to preserve them for further review.”); *id.* at 118 (“To the extent *Withdraw* would require rejection of the argument here, Intuit preserves for further review that it was wrongly decided.”); *id.* at 119 (“Although the Supreme Court upheld the FTC’s removal structure in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) ... Intuit preserves that argument for further review.”).

FTC, 268 F.2d 461, 498 (9th Cir. 1959). To effectuate that goal, Congress gave the Commission powers to investigate, prosecute, and adjudicate violations of the FTC Act. *See, e.g.*, 15 U.S.C. §§ 45(a)(2) & (b), 46(a), 49, 57b-1. “The combination of investigative and judicial functions within an agency has been upheld against due process challenges, both in the context of the FTC and other agencies.” *Gibson v. FTC*, 682 F.2d 554, 560 (5th Cir. 1982) (citing *FTC v. Cinderella Career & Finishing Sch., Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968); *Pangburn v. CAB*, 311 F.2d 349, 356 (1st Cir. 1962); *FTC v. Cement Inst.*, 333 U.S. 683, 700–03 (1948); *Withrow*, 421 U.S. at 51–56 (each of which cite additional cases)). The Commission’s dual roles are constitutional under long-standing precedent. Nonetheless, Intuit argues against this weighty precedent.

First, Intuit suggests that the Commission is like the Philadelphia district attorney who authorized his staff to seek a death sentence and later, as the Chief Justice of the Pennsylvania Supreme Court, voted to uphold the same sentence. Br. at 117 (citing *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016)). The Supreme Court reversed, finding that the Justice should have been recused, a “conclusion [that] follows from the Court’s analysis in *In re Murchison*.” *Williams*, 579 U.S. at 9 (citing *In re Murchison*, 349 U.S. 133, 134–37 (1955)). But the Supreme Court had already distinguished *Murchison* from the agency adjudication context:

Plainly enough, *Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications. The Court did not purport to question the Cement Institute case, [*FTC v. Cement Inst.*, 333 U.S. 683 (1948)], or the Administrative Procedure Act [*see* 5 U.S.C. § 554] and did not lay down any general principle that a judge before whom an alleged contempt is committed may not bring and preside over the ensuing contempt proceedings. The accepted rule is to the contrary.

Withrow, 421 U.S. at 53. Thus *Williams*, which was based on *Murchison*, is inapposite here.

Second, Intuit argues that the Commission’s recent history of finding respondents liable on the complaints it issues is “a strong sign of an unhealthy and biased institutional process.” Br. at 117 (quoting former Comm’r Wright). But Intuit needs more than recent statistics to show a due process violation.

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented. Very similar[] claims have been squarely rejected in prior decisions of [the Supreme] Court.

Withrow, 421 U.S. at 47. “In other words, an overlap of investigative and adjudicative functions alone, without further factual demonstration of bias or prejudice inherent in the particular application of the statutory scheme, does not violate due process.” *Anderson v. Dolce*, 653 F. Supp. 1556, 1566 (S.D.N.Y. 1987) (citing *Withrow*, 421 U.S. at 47). “As the *Withrow* Court suggested, the situations that threaten the impartiality of an adjudicator can be divided into three categories: 1) pecuniary interest; 2) personal bias; and 3) predisposition to facts or law.” *Id.* at 1568. Intuit has not alleged a pecuniary interest or personal bias. And statistics pertaining to a relatively small number of recent cases do not meet the “difficult burden of persuasion” to “overcome a presumption of honesty and integrity” and establish a predisposition to facts or law. *Withrow*, 421 U.S. at 47. In response, Intuit argues that *Withrow* was wrongly decided, Br. at 118—an argument that Intuit will have to wait to present to the Supreme Court itself. As an alternative, Intuit suggests that “special facts and circumstances present in the case” merit an exception to the presumption discussed in *Withrow*. Br. at 118 (quoting *Withrow*, 421 U.S. at 58). But Intuit does not go further down that path beyond conclusory statements that the agency has prejudged the matter. The Court should not indulge Intuit’s prejudgment conspiracy theories. *See also infra* Part II.F.4.

Third, Intuit argues that the alleged due process problems stemming from the Commission’s dual roles are “amplified by the fact that this case implicates Intuit’s right to liberty.” Br. at 118–19. The only support Intuit provides for this argument is citation to two concurring opinions by Justice Thomas, which do not carry the force of law and, in any event, are inapposite here. In the cited portion of *44 Liquormart, Inc. v. Rhode Island*, Justice Thomas

argues against the well-settled proposition that commercial speech enjoys less protection than noncommercial speech, principally citing two cases in which advertising was held to be protected by the freedom of the press (though Intuit is not a press organization). 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part); *contra Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–64 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770–73 (1976). But of course, in Intuit’s case, its advertising is deceptive. “The government may ban forms of communication more likely to deceive the public than to inform it.” *Cent. Hudson*, 447 U.S. at 563. In the cited portion of *Axon Enterprise, Inc. v. FTC*, Justice Thomas provides a review of the historical differences between the adjudication of “public” and “private” rights. 143 S. Ct. 890, 907, 910 (2023) (Thomas, J., concurring). Intuit asserts that “advertising” is “integral” to “liberty,” “which is a ‘private right[.]’” Br. at 118 (quoting *Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part); *Axon*, 143 S. Ct. at 907 (Thomas, J., concurring)). But again, Intuit has no right to deceive people. *Cent. Hudson*, 447 U.S. at 563. Policing Intuit’s deception does not infringe on its corporate “right to liberty,” if such a right even exists.

Consistent with substantial authority, the Commission’s dual roles do not offend due process. If Intuit does not prevail before the Court and/or the Commission, it will be because Intuit has indeed repeatedly and continuously made deceptive “free” claims through its nationwide, multi-year, multi-channel “free” TurboTax advertising campaigns; not because the dual roles of the Commission somehow biased the process.

2. The Commission’s Structure Is Constitutional and Does Not Violate the Separation of Powers (Replying to Br. § VI.B)

Next, Intuit asks this Court to declare that the Commission’s structure violates the separation of powers doctrine, overturning no less than *Humphrey’s Executor*, a foundational administrative law case in which the Supreme Court upheld the FTC’s structure eighty-eight years ago. *See* Br. at 119–21. Citing another concurring opinion by Justice Thomas, Intuit alleges that the Supreme Court has undermined *Humphrey’s Executor*. Br. at 119. Whatever the validity

of that point may be, *Humphrey's Executor* is still good law today. Intuit acknowledges that, at best, it can “preserve[] that argument for further review.” *Id.*

As its argument about the Commission’s structure runs headlong into *Humphrey’s Executor*, Intuit also offers a subsidiary argument: that this Court’s structure violates the separation of powers doctrine, as the Administrative Law Judge is insulated from being removed from office by the President of the United States. Br. at 119–20. In support, Intuit relies on *Jarkesy v. SEC*, in which the Fifth Circuit held that the statutory removal restrictions for SEC ALJs are unconstitutional. 34 F.4th 446 (5th Cir. 2022), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023). No court has extended that ruling to the FTC, and it is not binding on this Court; moreover, it was wrongly decided. ALJs “perform adjudicative rather than enforcement or policymaking functions.” *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 507 n.10 (2010).³⁹ The scope of the President’s constitutional power to remove and control adjudicators differs from the scope of the President’s power to remove and control other executive officers. In *Humphrey’s Executor*, the Court found it “plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers” charged with “quasi-judicial” duties. *Id.* at 629. In *Wiener v. United States*, the Court held that Congress could limit the President’s power to remove members of the War Claims Commission, an “adjudicatory body,” because of “the intrinsic judicial character of the task with which the Commission was charged.” 357 U.S. 349, 355–56 (1958). And in *Morrison v. Olson*, the Court observed that tenure protection may be “necessary to the proper functioning” of “an official performing ‘quasi-judicial’ functions.” 487 U.S. 654, 691 n.30 (1988).

Finally, Intuit quibbles with the “[s]ettled precedent” that “confirms that the unlawfulness of the removal provision does not strip [an officer] of the power to undertake the other responsibilities of [their] office.” *Collins v. Yellen*, 141 S. Ct. 1761, 1787–88 & n.23 (2021)

³⁹ The Commission has announced amendments to its Part 3 Rules, but those amendments would not affect this matter. *See* Revisions to Rules of Practice (“The rules that were in effect before [the amendments are published in the Federal Register] will govern all currently pending Commission adjudicative proceedings.”), *available at* [ftc.gov/system/files/ftc_gov/pdf/p072104-amendments-to-part-3-rules-frn.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p072104-amendments-to-part-3-rules-frn.pdf).

(citing *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207–11 (2020)). Under that precedent, whatever the constitutionality of the removal protections for Commissioners and ALJs may be, it has no bearing on the validity of any cease-and-desist order issued in these proceedings because all of the participating officials have been “properly appointed.” *Id.* Intuit argues that “[p]roper appointment does not salvage the actions of an officer with unconstitutional removal protection if that protection contributes to any harm inflicted.” Br. at 120–21. But Intuit’s claim on that front is entirely speculative—“the [P]resident *could* ensure that the [C]ommissioners decided this case based on the evidence”; “it *seems unlikely* that [C]ommissioners would rule for themselves in every instances ... if the threat of removal required them to set aside their prior determination.” *Id.* (emphasis added). The Supreme Court gave far more concrete—and significant—examples in *Collins*:

Suppose, for example, that the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have “cause” for removal. Or suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way. In those situations, the statutory provision would clearly cause harm.

Collins, 141 S. Ct. at 1789. Courts interpreting *Collins*, including the district court on remand in *Collins*, “require a party challenging the agency action due to an unconstitutional removal scheme to establish ‘a nexus between the desire to remove and the challenged actions taken by the insulated actor.’” *Collins v. Lew*, No. 4:16-cv-3113, 2022 WL 17170955, at *4 (S.D. Tex. Nov. 21, 2022) (“*Collins I*”) (quoting *Cnty. Fin. Servs. Ass’n of Am., Ltd. v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022) (citing multiple other cases), *cert. denied* 143 S. Ct. 981 (2023)). In *Collins II*, on remand, the plaintiffs pointed to several sources (not speculation) that the removal process caused compensable harm, but the district court still found their allegations implausible. *Collins II*, 2022 WL 17170955, at *4–5. Intuit has not come forward with any evidence whatsoever to suggest that President Biden has any lack of confidence in his own three nominees

to the Commission.⁴⁰ Intuit’s idle speculation does not meet its burden in pressing this affirmative defense. Its arguments that the Commission’s structure violates the separation of powers doctrine carry no weight.

3. The Commission’s Choice To Proceed Administratively Is Not A Legislative Power and Does Not Violate the Non-Delegation Doctrine (Replying to Br. § VI.C)

Under the nondelegation doctrine, Congress may not delegate “powers which are strictly and exclusively legislative.” *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality). Intuit, based again on the Fifth Circuit’s recent opinion in *Jarkesy*, argues that “the power to choose whether to assign disputes to agency adjudication or to an Article III tribunal” is a strictly and exclusively legislative power. Br. at 121–22. To the contrary, in making choices about whether and how to enforce the laws it enforces, the Commission does not exercise legislative power; instead, it exercises enforcement discretion—a classic executive power. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021) (“[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch.”); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *cf. Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (noting that a federal prosecutor’s decision not to indict a particular defendant “has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed’” (citation omitted)). A Commission decision whether to pursue an enforcement action in federal court or in Part 3 constitutes a “forum choice” that is a classic exercise of prosecutorial discretion, which is not a legislative function. *See Hill v. SEC*, 114 F. Supp. 3d 1297, 1313 (N.D. Ga. 2015), *vacated on other grounds*, 825 F.3d 1236 (11th Cir. 2016). Far from forum shopping, the FTC is correctly adhering to the existing statutory scheme to ensure Intuit’s compliance with the FTC Act while preserving the possibility of consumer redress

⁴⁰ President Biden nominated, and the Senate confirmed, Chair Khan and Commissioner Bedoya to their first terms; he nominated Commissioner Slaughter to a second term earlier this year.

available under Section 19. This is precisely what the Supreme Court recently described as a “coherent enforcement scheme.” *AMG*, 141 S. Ct. at 1349.

Intuit counters that the nondelegation doctrine is nonetheless violated because Congress failed to provide “guidance” on the choice between judicial and administrative enforcement. Br. at 121 (quoting *Jarkesy*, 34 F.4th at 461–62). But the Supreme Court has applied the principle Intuit cites only in cases where Congress has authorized executive agencies to adopt *general rules* governing private conduct. *See, e.g., Gundy*, 139 S. Ct. at 2129–30 (rules governing registration of sex offenders); *Whitman v. Am. Trucking Ass’n*s, 531 U.S. 457, 472–76 (2001) (environmental rules); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 420–33 (1935) (rules governing commerce in petroleum). A decision concerning whether and in what forum to pursue an individual enforcement action, by contrast, involves the execution rather than the making of federal law. The absence of statutory language providing intelligible principles to guide executive officials in exercising enforcement discretion in particular cases therefore does not effect a delegation of any responsibility that Congress itself should have performed.

Intuit further argues: “Congress ‘effectively gave the [agency] the power to decide which defendants should receive *certain legal processes* (those accompanying Article III proceedings) and which should not.’ ‘Such a decision,’ the [*Jarkesy*] court explained, ‘is a power that Congress uniquely possesses.’” Br. at 121 (quoting *Jarkesy*, 34 F.4th at 462). But case-specific Executive Branch enforcement choices often affect the procedural rights that particular defendants may assert. For example, the Executive Branch may choose between bringing criminal prosecutions and bringing civil suits. It may also choose between bringing felony charges (which would entitle the defendant to trial by jury) and bringing petty-misdemeanor charges (which would not). *See Baldwin v. New York*, 399 U.S. 66, 69–70 (1970) (plurality opinion). And executive agencies often choose between regulating parties through rulemaking and regulating them through adjudication. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290–95 (1974). The Supreme Court has never suggested that, simply because those enforcement choices affect the procedural rights that the defendants may assert, an agency exercises

legislative power when making those choices. *Cf. United States v. Batchelder*, 442 U.S. 114, 121, 124 (1979) (Congress did not violate the nondelegation doctrine by enacting two criminal statutes with “different penalties for essentially the same conduct” and leaving federal prosecutors with “discretion to choose between” them). Intuit’s vapid argument that the Commission’s decision to authorize an administrative complaint and seek concurrent relief in federal district court somehow shows that “Complaint Counsel are wielding core legislative authority to get a second bite at the apple in an administrative proceeding” illustrates Intuit’s fundamental misunderstanding of the “coherent enforcement scheme” in Part 3. *AMG*, 141 S. Ct. at 1349.

Intuit’s nondelegation arguments carry no weight under the applicable law as it exists today.

4. The Commission Has Not Prejudged This Matter (Replying to Br. § VI.D)

Intuit’s last argument for a change in the law hits closer to home, as Intuit seeks to overturn rulings that are already the law of the case, issued by this Court.

First, Intuit complains about a retweet from Chair Khan’s FTC Twitter account of an FTC tweet linking to the press release announcing the issuance of the complaint in this case. Br. at 122–23. As this Court has already ruled:

Chair Khan’s retweeting of an FTC press release does not reasonably call into question the Chair’s impartiality, as claimed by Respondent, and does not indicate any prejudgment of the merits of this case. The Chair merely retweeted, without any commentary, an FTC post linking to a published FTC press release that reported the filing of the suit against Intuit and summarized the allegations and relief requested. As held in *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968), such press releases are not indicative of prejudgment or a violation of due process. *Id.* at 1314–15 (holding that the Commission’s issuance of press releases that called attention to the pending proceedings and allegations did not constitute prejudgment or violate respondent’s right to due process of law).

In re Intuit Inc., 2022 WL 16960890, at *5 (F.T.C. Nov. 7, 2022) (Chappell, C.A.L.J.).

Second, Intuit complains about a speech by Chair Khan in which she mentioned this case. Br. at 123. As this Court has already ruled: “Factual statements that the FTC has brought a lawsuit alleging deception are akin to a factual press release describing pending adjudicatory proceedings and allegations, which, as noted above, does not evince prejudice.” *Intuit*, 2022 WL 16960890, at *5 (citing *Cinderella Career & Finishing Schs.*, 404 F.2d at 1314–15).⁴¹

The Court has already distinguished *Cinderella Career & Finishing Schools* and concluded that, on the same factual allegations of prejudice, “Intuit’s contention is without merit.” *Intuit*, 2022 WL 16960890, at *4–5. Intuit does not mention this inconvenient truth in its Post-Trial Brief. To the extent Intuit has made the argument any differently now than it did late last year, it has not at all explained how that meets the threshold for the Court to reconsider its previous order.⁴² Intuit also does not mention that the D.C. Circuit has “since elaborated on the *Cinderella* test, stating that we will set aside a commission member’s decision not to recuse himself from his duties only where [he or she] has demonstrably made up [his or her] mind about important and specific factual questions and is impervious to contrary evidence.” *Fast Food Workers Comm. v. NLRB*, 31 F.4th 807, 815 (D.C. Cir. 2022) (cleaned up) (citing cases). Intuit’s purported evidence—a retweet and a mention in a speech—are nowhere close to Chair Khan “demonstrably” making up her mind and being “impervious to contrary evidence.” *Id.* What is more, Intuit failed to avail itself of the path to relief for parties concerned with prejudice,

⁴¹ The Commission also already determined that “the prejudice argument asserted is without merit.” *Intuit*, 2023 FTC LEXIS 18, at *48-49 (Jan. 31, 2023).

⁴² *Cf.* D. Ariz. L.R. Civ. 7.2(g)(1) (“The Court will ordinarily deny a motion for reconsideration of an Order absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence. Any such motion shall point out with specificity the matters that the movant believes were overlooked or misapprehended by the Court, any new matters being brought to the Court’s attention for the first time and the reasons they were not presented earlier, and any specific modifications being sought in the Court’s Order. No motion for reconsideration of an Order may repeat any oral or written argument made by the movant in support of or in opposition to the motion that resulted in the Order. Failure to comply with this subsection may be grounds for denial of the motion.”).

choosing inaction that stands in direct contrast with its current outrage.⁴³ Intuit's affirmative defense of prejudgment rings as hollow now as it did the last time the Court considered it.

III. Conclusion

The preponderance of the evidence shows that Intuit made false representations regarding a material fact that are likely to mislead consumers acting reasonably under the circumstances.

That material fact is whether TurboTax is free. It is not free for most taxpayers. The Court should find Intuit liable on Count I of the Complaint and issue the proposed cease and desist order.

Respectfully submitted,

Dated: June 20, 2023

/s/ Roberto Anguizola

Roberto Anguizola, IL Bar No. 6270874

Rebecca Plett, VA Bar No. 90988

James Evans, VA Bar No. 83866

Sara Tonnesen, MD Bar No. 1312190241

Federal Trade Commission

600 Pennsylvania Ave., NW, CC-6316

Washington, DC 20580

(202) 326-3284 / ranguizola@ftc.gov

(202) 326-3664 / rplett@ftc.gov

(202) 326-2026 / james.evans@ftc.gov

(202) 326-2879 / stonnesen@ftc.gov

Counsel Supporting the Complaint

Federal Trade Commission

⁴³ Despite its repeated complaints about Chair Khan's retweet and speech, Intuit has never sought her disqualification under Commission Rule 4.17. Such a motion must "be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification." 16 C.F.R. § 4.17(b)(2). At this late hour, Intuit's allegation that Chair Khan is not impartial should be deemed effectively waived.

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

In the matter of:

Intuit Inc.,
a corporation,

Respondent.

Docket No. 9408

**COMPLAINT COUNSEL'S
REPLY CONCLUSIONS OF LAW**

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COMPLAINT COUNSEL'S REPLY CONCLUSIONS OF LAW

Complaint Counsel submits the following Replies to Respondent Intuit Inc.'s Proposed Conclusions of Law:

I. Elements Of A Deception Claim Under The FTC Act

1. Section 5(a) of the FTC Act provides that “deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. §45(a)(1).

Response to Conclusion No. 1:

Complaint Counsel has no specific response.

2. An advertisement is deceptive under section 5(a) only if “(1) there is a representation, omission, or practice; (2) that is likely to mislead consumers acting reasonably under the circumstances; and (3) the representation, omission, or practice is material.” *FTC v. DirecTV, Inc.*, 2018 WL 3911196, at *5 (N.D. Cal. Aug. 16, 2018) (quotation marks omitted).

Response to Conclusion No. 2:

Sourced from FTC administrative precedent: “An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer’s purchasing decision.” *In re POM Wonderful, LLC*, 155 F.T.C. 1, 10 (2013), *aff’d sub nom. POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015); *see also In re California Naturel, Inc.*, 162 F.T.C. 1066, 1078 (2016); *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”). In determining whether an advertisement is deceptive, the Commission considers (1) what claims are conveyed in the ad; (2) whether those claims are false or misleading; and (3) whether the claims are material. *In re Health Research Labs., LLC*, No. 9397, 2021 WL 5711355, at *5 (F.T.C. Nov. 19, 2021); *In re Traffic Jam Events*, No. 9395, 2021 WL 5124183, at *12 (F.T.C. Oct. 25, 2021), *pet. for review filed*, No. 21-60947 (5th Cir. Dec. 21, 2021); *California Naturel*, 162 F.T.C. at 1078.

3. In Part 3 proceedings, Complaint Counsel “shall have the burden of proof” as to each element and “shall be required to sustain the burden of proof with respect” to “any factual proposition” they assert. 16 C.F.R. §3.43(a).

Response to Conclusion No. 3:

Complaint Counsel has no specific response, though full context for the citations above is helpful:

Counsel representing the Commission ... shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

16 C.F.R. § 3.43(a).

4. To establish that any advertisement challenged as deceptive was in fact deceptive, therefore, Complaint Counsel have the burden to prove each element by a “preponderance of the evidence.” *Telebrands Corp.*, 140 F.T.C. 278, 426 (2005).

Response to Conclusion No. 4:

“It is well established that the preponderance of the evidence standard governs Federal Trade Commission ... enforcement actions.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (citing cases).

5. Actionable representations can be made through either express or implied claims. *Fanning v. FTC*, 821 F.3d 164, 170 (1st Cir. 2016). A claim is “express” when the ad “directly state[s] the representation at issue.” *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984). Implied claims are ones that, although not directly stated, are nevertheless conveyed by the “overall net impression” of an advertisement. *Fanning*, 821 F.3d at 171.

Response to Conclusion No. 5:

Claims may be express or implied: express claims are those that directly state the representation at issue, while implied claims are any that are not express. *In re Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff’d sub nom. Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992). Both express and implied claims may be deceptive. *Fedders Corp. v. FTC*, 529 F.2d 1398, 1402-03 (2d Cir. 1976). “Deception may be accomplished by innuendo rather than by outright false statements.” *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995) (quoting *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963)); *FTC v. Cap. Choice Consumer Credit, Inc.*, No. 02-

21050 CIV, 2003 WL 25429612, at *4 (S.D. Fla. Jun. 2, 2003) (same), *aff'd*, 157 F. App'x 248 (11th Cir. 2005).

The meaning of marketing communications can be determined “through an examination of the representation itself.” Deception Policy Statement, at 176; *see also FTC v. Fleetcor Techs., Inc.*, No. 1:19-cv-5727, 2022 WL 3273286, at *6, *9 (N.D. Ga. Aug. 9, 2022); *Fanning v. FTC*, 821 F.3d 164, 170 (1st Cir. 2016); *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 798 (1994); *Kraft*, 970 F.2d at 319 (“when confronted with claims that are implied, yet conspicuous, extrinsic evidence is unnecessary because common sense and administrative experience provide the Commission with adequate tools to makes its findings”). Absent an explicit representation, the question of whether the advertisement at issue makes a particular representation is determined by considering the “net impression” of such an advertisement for the reasonable consumer-viewer. *Traffic Jam Events*, 2021 WL 5124183, at *12; *In re Jerk LLC*, 159 F.T.C. 885, 891 (2015); *Pom Wonderful*, 155 F.T.C. at 12; *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (quoting *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006)); *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) (looking to “common-sense net impression” of an advertisement); *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 298 (D. Mass. 2008).

Where claims are reasonably clear from the face of the advertisement, “the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed.” *Kraft*, 970 F.2d at 319; *see also Stouffer Foods*, 118 F.T.C. at 798 (“If, after examining the interaction of all the different elements in the ad, the Commission can conclude with confidence that an ad can reasonably be read to contain a particular claim, a facial analysis is sufficient basis to conclude that the ad conveys the claim.”). Thus, where the ad claim is (1) express or (2) implied but conspicuous and reasonably clear, extrinsic evidence is unnecessary. *Kraft*, 970 F.2d at 319; *POM Wonderful*, 155 F.T.C. at 13-14; *Fleetcor*, 2022 WL 3273286, at *9; *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008). However, if relevant extrinsic evidence regarding the meaning of the ad has been introduced, the Commission will consider it. *POM Wonderful*, 155 F.T.C. at 14; *In re Bristol-Myers Co.*, 102

F.T.C. 21, 319 (1983). But it is not “necessary for the Commission to conduct a survey of the viewing public before it [can] determine that the commercials had a tendency to mislead,” *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965), *see also Fleetcor*, 2022 WL 3273286, at *9.

“If a claim conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if nonmisleading interpretations are possible. Liability may be imposed if at least a significant minority of reasonable consumers would be likely to take away the misleading claim.” *Fanning*, 821 F.3d at 170-71 (quoting *In re Telebrands Corp.*, 140 F.T.C. 278, 291 (2005), *aff’d, sub nom Telebrands Corp. v. FTC*, 457 F.3d 354 (4th Cir.2006)) (quotation marks and brackets omitted); *see also Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (“Advertising capable of being interpreted in a misleading way should be construed against the advertiser.”); Deception Policy Statement, at 178 (“To be considered reasonable, the interpretation or reaction does not have to be the only one. When a seller’s representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.”).

“[T]he Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond. Thus, in advertising the Commission will examine the entire mosaic, rather than each title separately.” Deception Policy Statement, at 179 (cleaned up).

6. “Under Commission Rule of Practice 3.51(c)(1), ‘an initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence.’” *Telebrands*, 140 F.T.C. at 425. “According to Black’s Law Dictionary, ‘probative evidence’ means having the effect of proof; tending to prove, or actually proving an issue.” *Id.*

Response to Conclusion No. 6:

Complaint Counsel has no specific response.

II. Complaint Counsel Failed To Meet Their Burden To Prove That The Challenged Ads Conveyed Any Of The Claims They Allege

7. Complaint Counsel failed to satisfy their burden to prove that any of the challenged ads expressly or implicitly conveyed any of the claims Complaint Counsel allege.

Response to Conclusion No. 7:

Same response as RCL-8.

8. Complaint Counsel's failure to prove that the ads conveyed the express or implied claims asserted alone justifies judgment in Intuit's favor.

Response to Conclusion No. 8:

This is not a conclusion of law; it purports to be an adjudication of the entire matter. Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that the challenged ads expressly or impliedly conveyed the deceptive *free* claims that Complaint Counsel alleges; Intuit is liable for violations of Section 5 of the FTC Act as alleged in Count I of this one-count Complaint, and the Court should enter the proposed order.

A. Complaint Counsel Did Not Establish That Any Of The Challenged Ads Made Any Of The Express Claims Complaint Counsel Allege

9. Whether an alleged express claim is conveyed by an advertisement requires the ad to "be judged ... as whole, without emphasizing isolated words or phrases apart from their context." *Removatron International Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989); *see also Marksberry v. FCA US LLC*, 606 F.Supp.3d 1075, 1082 (D. Kan. 2022); *Eckler v. Wal-Mart Stores, Inc.*, 2012 WL 5382218, at *3 & n.4, *6 & n.9 (S.D. Cal. Nov. 1, 2012).

Response to Conclusion No. 9:

Full context for the *Removatron* citation above is helpful:

The Commission's findings with respect to what representations are made in advertisements are factual. In making such findings, [t]he tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context. The impression created by the advertising, not its literal truth or falsity, is the desideratum.

Each advertisement must stand on its own merits; even if other advertisements contain accurate, non-deceptive claims, a violation may occur with respect to the deceptive ads. Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to

change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.

Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1496–97 (1st Cir. 1989) (cleaned up).

Neither *Marksberry* nor *Eckler* involve analysis of deception under Section 5 of the FTC Act, and thus have little bearing on this matter.

10. Throughout this case, Complaint Counsel have articulated a variety of express claims that they contend the challenged ads made. PFF ¶¶206. The ads did not expressly state any of the claims alleged.

Response to Conclusion No. 10:

This is not a conclusion of law; it purports to be an adjudication of the entire question of express claims (or, in additional proposed conclusions below, the same question with regard to a subset of Intuit's ads). Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that many of the challenged ads expressly conveyed the deceptive *free* claims that Complaint Counsel alleges.

11. Complaint Counsel failed to prove that any of the challenged brand video ads expressly conveyed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. PFF ¶¶214-244.

Response to Conclusion No. 11:

Same response as RCL-10.

12. Complaint Counsel failed to prove that any of the challenged display ads expressly conveyed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. PFF ¶¶247-262.

Response to Conclusion No. 12:

Same response as RCL-10.

13. Complaint Counsel failed to prove that any of the challenged paid-search ads expressly conveyed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. PFF ¶¶265-275.

Response to Conclusion No. 13:

Same response as RCL-10.

14. Complaint Counsel failed to prove that any of the challenged email ads expressly conveyed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. PFF ¶¶280-290.

Response to Conclusion No. 14:

Same response as RCL-10.

15. Complaint Counsel failed to prove that any of the challenged radio ads expressly conveyed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. PFF ¶¶293-299.

Response to Conclusion No. 15:

Same response as RCL-10.

16. Complaint Counsel contend that certain challenged video ads expressly conveyed that “TurboTax is free” because they repeated the word “free.” PFF ¶219. But the word “free,” by itself, is not a representation about TurboTax or any TurboTax product. As the designee for the Commission’s Bureau of Consumer Protection explained, the meaning of the word “depends [on] whether there is any other context for the person that is hearing” it. PFF ¶221. And the use of a single word in an ad cannot be considered in isolation. Rather, ads must “be judged ... as whole, without emphasizing isolated words or phrases apart from their context.” *Removatron*, 884 F.2d at 1496. All the ads that repeated the word “free” also stated, at the same time that they mentioned TurboTax or tax filing at all, that the ad was for a specific TurboTax offer and that there were qualifications. PFF ¶223. In fact, the evidence shows that consumers did not associate the “Free, Free, Free” ads with TurboTax until Free Edition was mentioned. PFF ¶224. Accordingly, ads that repeated the word “free”—which made up less than one-third of all challenged ads, including almost none of the non-video ads, PFF ¶220—did not explicitly state “TurboTax is free” or any of the other alleged express claims that Complaint Counsel have asserted.

Response to Conclusion No. 16:

With the exception of a conclusory citation to *Removatron*, this is not a conclusion of law but a statement of purported fact about the contents, meaning and interpretation of Intuit’s ads. As such, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited

to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that evidence demonstrates Intuit made express free claims in its advertising for free TurboTax. (*See, e.g.*, RFF ¶¶219-224)

To the extent Counsel cites to *Removatron*, Complaint Counsel refers to its response to Conclusion 9.

17. Contrary to Complaint Counsel’s assertions about express claims, in fact, the challenged ads expressly stated that the free TurboTax product or offer being advertised was available only to qualifying consumers, and often that additional information was on the TurboTax website. PFF ¶¶215-218, 229-244, 248-262, 266-275, 281-290, 294-299.

Response to Conclusion No. 17:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the entire question of express claims and the adequacy of Intuit’s disclosure. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports finding the ads contain express claims that are not qualified by compliant disclosures. (*See, e.g.*, RFF ¶¶215-218, 229-244, 248-262, 266-275, 281-290, 294-299).

18. Complaint Counsel have therefore failed to prove that any of the challenged ads contained any false or misleading express claim. PFF ¶¶215-218, 229-244, 248-262, 266-275, 281-290, 294-299, 302-308.

Response to Conclusion No. 18:

Same response as RCL-10 and RCL-17.

B. Complaint Counsel Did Not Establish That Any Of The Challenged Ads Implied Any Of The Claims Complaint Counsel Allege

19. “An advertisement will only be found to contain implied claims where the language or depictions are clear enough to permit [a court] to conclude with confidence, after examining the interaction of all of the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances.” *Telebrands*, 140 F.T.C. at 429 (quotation marks omitted). And “if, based on [an] initial review of the evidence from the advertisement itself, [the court] cannot conclude with confidence that an advertisement can reasonably be read to contain a particular implied message, [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.* (first alteration in original).

Response to Conclusion No. 19:

Same response as RCL-5.

20. Complaint Counsel’s implied-claim theory is inconsistent with the evidence in this case regarding both (1) “consumers acting reasonably under the circumstances” and (2) “the interaction of all the constituent elements” in the challenged ads. *Telebrands*, 140 F.T.C. at 429.

Response to Conclusion No. 20:

This is not a conclusion of law; it purports to be an adjudication of the entire question of implied claims (or, in additional proposed conclusions below, the same question with regard to a subset of Intuit’s ads). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that the challenged ads expressly or impliedly conveyed the deceptive *free* claims that Complaint Counsel alleges.

21. Unrebutted evidence indicates that “consumers acting reasonably under the circumstances,” *Telebrands*, 140 F.T.C. at 429, would not have taken away any of Complaint Counsel’s alleged claims because reasonable consumers understand that virtually any free offer from a for-profit company will be qualified—and in particular that free offers for tax-preparation products will be—even if qualifications are not articulated in advertisements. PFF ¶¶470-527.

Response to Conclusion No. 21:

While citing *Telebrands* for the test “consumers acting reasonably under the circumstance (see also RCL-5), this is not a conclusion of law; it purports to be a factual assertion and adjudication of the factual question of how a consumer would view and interpret Intuit’s ads. As an initial matter, the purported conclusion of law does not cite to any instructive legal authority

and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports finding that Intuits ads are deceptive to a reasonable consumer. (*See, e.g.*, RFF ¶¶470-527).

22. “[A]fter examining the interaction of all of the constituent elements” in the challenged ads, *Telebrands*, 140 F.T.C. at 429, it is clear that the ads did not imply any of the claims alleged by Complaint Counsel. In discerning “implied claims” from an ad’s “net impression,” courts must consider “the entire document,” including “the juxtaposition of various phrases in the document.” FTC Policy Statement on Deception, 103 F.T.C. 174, 176 & n.7 (1984). “The determination” of what an ad conveys, that is, “must be made based on the net impression created by the interaction of different elements in a given ad, not [based on] the elements by themselves.” *Telebrands*, 140 F.T.C. at 429 (alteration in original) (quotation marks omitted); *see also id.* at 286 (evaluating an ad’s claims “[b]ased on the interaction between and among various elements in the ads,” including “the product name, visual images, text, and surrounding circumstances”).

Response to Conclusion No. 22:

Complaint Counsel does not dispute: “‘The determination’” of what an ad conveys, that is, ‘must be made based on the net impression created by the interaction of different elements in a given ad, not [based on] the elements by themselves.’ *Telebrands*, 140 F.T.C. at 429 (alteration in original) (quotation marks omitted); *see also id.* at 286 (evaluating an ad’s claims ‘[b]ased on the interaction between and among various elements in the ads,’ including “the product name, visual images, text, and surrounding circumstances”). However, “If a claim conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if nonmisleading interpretations are possible. Liability may be imposed if at least a significant minority of reasonable consumers would be likely to take away the misleading claim.” *Fanning*, 821 F.3d at 170-71 (quoting *In re Telebrands Corp.*, 140 F.T.C. 278, 291 (2005), *aff’d, sub nom Telebrands Corp. v. FTC*, 457 F.3d 354 (4th Cir.2006)) (quotation marks and brackets omitted); *see also Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (“Advertising capable of being interpreted in a misleading way should be construed

against the advertiser.”); Deception Policy Statement, at 178 (“To be considered reasonable, the interpretation or reaction does not have to be the only one. When a seller’s representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.”).

Complaint Counsel disputes: “it is clear that the [TurboTax] ads did not imply any of the claims alleged by Complaint Counsel.” This is an improper factual assertion that seeks adjudication of the factual question of how a consumer would view and interpret Intuit’s ads. As an initial matter, the purported conclusion of law does not cite to the evidentiary records or to any instructive legal authority and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”).

23. Complaint Counsel’s implied-claim theory fails because it depends on ignoring various components of the challenged ads, *see* FTC Policy Statement on Deception, 103 F.T.C. at 176 & n.7; *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001), including “the product name, visual images, text, and surrounding circumstances,” *Telebrands*, 140 F.T.C. at 286. Considering the “entire” ads and “the interaction of different elements,” *id.*, the net impression created by the challenged ads did not include any of the claims alleged by Complaint Counsel. PFF ¶¶215-218, 244, 248-251, 262, 266-268, 275, 281, 290, 294, 299. When taken together, the various elements of the challenged ads left an impression that TurboTax was advertising a free product with specific qualifications, and the details about those qualifications were available on the TurboTax website.

Response to Conclusion No. 23:

Where claims are reasonably clear from the face of the advertisement, “the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed.” *Kraft*, 970 F.2d at 319; *see also Stouffer Foods*, 118 F.T.C. at 798 (“If, after examining the interaction of all the different elements in the ad, the Commission can conclude with confidence that an ad can reasonably be read to contain a particular claim, a facial analysis is sufficient basis to conclude that the ad conveys the claim.”). Thus, where the ad claim is (1) express or (2) implied but conspicuous and reasonably clear, extrinsic evidence is unnecessary.

Kraft, 970 F.2d at 319; *POM Wonderful*, 155 F.T.C. at 13-14; *Fleetcor*, 2022 WL 3273286, at *9; *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008).

To the extent this paragraph asks for a factual determination, it is improper. Specifically, complaint counsel disputes: “[T]he net impression created by the challenged ads did not include any of the claims alleged by Complaint Counsel. PFF ¶¶215-218, 244, 248-251, 262, 266-268, 275, 281, 290, 294, 299. When taken together, the various elements of the challenged ads left an impression that TurboTax was advertising a free product with specific qualifications, and the details about those qualifications were available on the TurboTax website.” This is not a conclusion of law; it purports to be an adjudication of the question of the net impression of the ads at issue in this case. Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, “Free TurboTax” is the overall net impression even though it is possible to dissect the challenged ads and find certain qualifying phrases and disclaimers. (*See, e.g.*, FF-481; FF-484; FF-486-FF-487; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618—FF-620; FF-623; FF-635—FF-662; FF-666—FF-668; FF-740—FF-741).

24. *First*, Complaint Counsel failed to prove that the challenged ads’ inclusion of the specific “product name,” *Telebrands*, 140 F.T.C. at 286, was insufficient to prevent reasonable consumers from forming the net impression that all TurboTax products were free, that a TurboTax product was free for everyone, or any of the other claims alleged by Complaint Counsel. One of Complaint Counsel’s witnesses conceded this at trial. PFF ¶317. The ads’ inclusion of the product name was itself sufficient to prevent reasonable consumers from misunderstanding that all TurboTax products were free. *See* PFF ¶¶317-321.

Response to Conclusion No. 24:

The primary evidence of what representations an advertisement conveys to reasonable consumers is the advertisement itself.” *In re Telebrands Corp.*, 140 F.T.C. 278, 290 (2005); *see also In re Novartis Corp.*, 127 F.T.C. 580, 680 (1999), *aff'd*, 223 F.3d 783, 343 U.S. App. D.C. 111 (D.C. Cir. 2000). Intuit ignores the fact that the TurboTax free claims are so powerful that they overwhelm the less interesting, less prominent, less conspicuous, less understandable qualifying phrases and disclaimers deployed in the challenged ads. *See e.g., In re Book-of-the-Month Club*, 48 F.T.C. 1297, 1312 (1952) (“The word ‘free’ is a lure. It is the bait. It is a

powerful magnet that draws the best of us against our will “to get something for nothing.”), as modified, 50 F.T.C. 778; Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251.1 (“Because the purchasing public continually searches for the best buy, and regards the offer of “Free” merchandise or service to be a special bargain, all such offers must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived.”) (*see also* FF-488 & FF-489).

To this extent this Conclusion is a factual assertion that seeks adjudication of the impact Intuit’s identifying the SKU, or any other similar qualification, in its free ads had on the net impression of those ads, it is improper. Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, evidence shows that specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609).

25. *Second*, the inclusion of the phrase “simple tax returns only” (or substantively identical language) in each of the challenged ads conveyed to reasonable consumers that not all tax returns were covered by the product being advertised and thus that not all consumers would qualify to use the product. *See, e.g., Estrella-Rosales v. Taco Bell Corp.*, 2020 WL 1685617, at *2 (D.N.J. Apr. 7, 2020) (approving disclosure with less detail); *Little Caesars Enterprises, Inc. v. Smith*, 895 F.Supp. 884, 888, 899 (E.D. Mich. 1995) (same). The “simple tax returns only” language communicated the existence of qualifications, which is enough to defeat Complaint Counsel’s claim. PFF ¶131. That language also told consumers that the ability to use the free TurboTax offer depended on the complexity of the consumer’s tax returns and that only those with “simple tax returns” would qualify. PFF ¶¶134-136, 322. That language prevented consumers from forming the net impression Complaint Counsel allege.

Response to Conclusion No. 25:

Same response as RCL-24 and RCL-27. (*See also* RFF ¶¶131, 134-136, 322).

26. Complaint Counsel argue that consumers do not understand the precise meaning of the phrase “simple tax returns.” PFF ¶130. But consumers did not need to understand exactly what the phrase “simple tax returns” means to form the net impression that only certain qualifying consumers could use the free TurboTax product advertised. PFF ¶¶131, 314. The phrase “simple tax returns” is sufficient to leave an accurate impression even if consumers do not understand its precise meaning because the phrase at the very least communicates to consumers that there is a restriction and that the category of the restriction relates to tax complexity. PFF ¶¶131, 314-315.

Response to Conclusion No. 26:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the entire question of the effectiveness of Intuit’s “simple tax returns” disclosure. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports finding “simple tax returns” disclosure is inadequate. (*See, e.g.*, RFF ¶¶130, 131, 314-315).

27. Courts routinely approve disclosures that put consumers on notice of qualifications without fully detailing the qualifications in the advertisement itself. One court, for example, held that a disclosure that a fast-food promotion was available “[a]t participating locations for a limited time” and that “[p]rices may vary” was “consistent with ‘the norm of reasonable business practice’” in television advertising and sufficient to put reasonable consumers on notice of the promotion’s restrictions, even though the disclosure did not specify the participating locations, the limited time, or the range of prices. *Estrella-Rosales*, 2020 WL 1685617, at *2 *see also DirectTV*, 2018 WL 3911196, at *15 (reasonable consumers “understand the limitations of how information is presented in a” space-constrained ad for a complex product like tax-preparation software). Another court likewise approved a disclosure that a particular price applied “at participating stores” because that phrase told consumers “that not *all* franchises may follow the advertised price,” even though it did not specify *which* franchises did so. *Little Caesars Enterprises*, 895 F.Supp. at 888, 899 (emphasis added).

Response to Conclusion No. 27:

Qualifying disclosures must be understandable. Deception Policy Statement, 103 F.T.C. at 180. To prevent an ad from being misleading, disclosures must convey material information in clear language “understandable to the intended audience.” *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013),¹ at 21 (“For disclosures to be effective, consumers must be able to understand them.”).

¹ [ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising](https://www.ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising)

This is especially important when the central claim in the advertisement is a free claim. Claims that a product or service is free require a heightened standard of disclosure of all material terms, and all such offers must be made with extreme care to avoid any possibility that consumers will be misled or deceived. “Free” claims are hard to disclaim, are powerful, and draw consumers. (FF-488 & FF-489). Thus, when a product or service is offered for free, all the terms and conditions of the offer should be made clear at the outset. *See* Guide Concerning Use of the Word “Free” and Similar Representations 16 C.F.R. § 251.1(c) (“[C]onditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be 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. Stated differently, all of the terms, conditions and obligations should appear in close conjunction with the offer of ‘Free’ merchandise or service. For example, disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer, is not regarded as making disclosure at the outset”); *FTC v. Johnson*, 96 F. Supp. 3d 1110,1146 (D. Nev. 2015) (holding that websites advertising “free” products were deceptive for failing to disclose negative option membership and upsells and reasoning that “[t]he mere fact that the sites contained disclosures in smaller print and described the upsells as ‘bonuses’ and trials at the bottom of the order pages, does not alter the deceptive net impression as to the cost and nature of the product because consumers would not be inclined to seek out this information”). Further, hidden or poorly disclosed costs or conditions are deceptive. *FTC v. Willms*, No. 11-cv-828, 2011 WL 4103542, at *6 (W.D. Wash. Sept. 13, 2011) (holding that the FTC was likely to prevail on the merits where “enrollment fees and recurring costs [were] poorly disclosed” when they appeared only after the consumer had seen the landing page and four additional webpages after that); *see also United States v. Adteractive, Inc.*, 07-cv-5940 (N.D. Cal. Nov. 26, 2007) (GX355) (consent case alleging that defendants deceptively advertised “free” merchandise without disclosing in their advertising or landing page that consumers had to accept and pay for a certain number of goods in order to be eligible for the “free” merchandise, which many consumers only discovered

after spending significant time trying to qualify for the product); *see also Book-of-the-Month Club*, 48 F.T.C. at 1311 (“A seller may not make one representation in one part of his advertisement and withdraw it in another part since there is no obligation on the part of the customer to protect himself against such a practice by pursuing an advertisement to the bitter end.”). “Notice that the offer was qualified” (the new standard for disclosure that Intuit urges) (Br. at 45) is simply not enough.

28. *Third*, inclusion of language in the challenged ads inviting consumers to “see if you qualify” or “see details” at the TurboTax website further conveyed to reasonable consumers that there were qualifications or details associated with the free TurboTax offer, that not all consumers would qualify to use the product, and that a particular consumer could visit the TurboTax website to learn if that particular consumer would qualify. PFF ¶¶254, 270, 285, 323-329. That language prevented consumers from forming the net impression Complaint Counsel allege.

Response to Conclusion No. 28:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the entire question of the effectiveness of Intuit’s “see if you qualify” or “see details” disclosures. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports finding “see if you qualify” or “see details” disclosures are inadequate. (*See, e.g.*, RFF ¶¶254, 270, 285, 323-329).

29. Qualifying language that is sufficiently “legible and understandable” to leave an accurate impression about the claim conveyed precludes liability for allegedly deceptive advertising. FTC Policy Statement on Deception, 103 F.T.C. at 180. The qualifying language just discussed, *supra* ¶¶24-28, was all sufficiently “legible” to ensure that consumers would notice it. PFF ¶¶232, 257, 272, 287, 296.

Response to Conclusion No. 29:

Same response as RCL-27. Additionally, to this conclusion is a factual assertion and seeks adjudication the legibility and understandability of Intuit’s disclaimers, it is improper.

Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence that Intuit’s disclaimers, including its qualifying language, were legible and understandable. *See, e.g.*, RFF ¶¶24-28, 232, 257, 272, 287, 296).

30. Complaint Counsel failed to offer any evidence that this qualifying language could not be seen (or heard) by reasonable consumers. PFF ¶¶230-231, 255-256, 271, 286, 295. In fact, their witnesses repeatedly acknowledged that the challenged ads included the qualifying language, *see* PFF ¶¶223, 233, 306-307, 317, and it was clear that the challenged ads shown during trial contained prominent qualifying language like “simple returns only,” a proposition with which Complaint Counsel agreed, PFF ¶¶208, 308.

Response to Conclusion No. 30:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the factual question of whether Intuit’s disclosures were adequate. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports that Intuit’s disclosures are inadequate. (*See, e.g.*, RFF ¶¶208, 230-233, 255-256, 271, 286, 295, 306-308, 317).

31. Intuit presented significant evidence that the qualifying language was legible. Unrebutted trial testimony from Professor Peter Golder, for example, confirms that the qualifications in the challenged ads were statistically comparable or superior to those in the video and social media ads of 18 benchmark companies across four industries in terms of the qualifying language’s placement, height, color, duration, repetition, proximity in time to the claim being qualified, and the presence or absence of distracting factors—metrics that are both (1) drawn from the FTC’s “.com Disclosures” guidelines and (2) responsive to Complaint Counsel’s criticisms of the challenged ads. PFF ¶¶234-238, 258-259.

Response to Conclusion No. 31:

Same response as RCL-30. (*See also* RFF¶¶234-238, 258-259).

32. The appearance of the qualifications in the challenged ads meets or exceeds the standards established by case law, which has found disclosures to be adequate even when qualifications appeared only “in the closing seconds of the commercial,” *Estrella-Rosales*, 2020

WL 1685617, at *2, or where qualifications are “smaller than most of the text in the advertisement,” *DirecTV*, 2018 WL 3911196, at *8.

Response to Conclusion No. 32:

To the extent this Conclusion is not a conclusion of law, but purports to be a factual assertion and seeks adjudication of the factual question of whether Intuit’s disclosures were adequate, it is improper. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports that Intuit’s disclosures are inadequate. (*See, e.g.*, RFF ¶¶208, 230-233, 255-256, 271, 286, 295, 306-308, 317).

Qualifying disclosures must be understandable. Deception Policy Statement, 103 F.T.C. at 180. To prevent an ad from being misleading, disclosures must convey material information in clear language “understandable to the intended audience.” *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013),² at 21 (“For disclosures to be effective, consumers must be able to understand them.”).

This is especially important when the central claim in the advertisement is a free claim. Claims that a product or service is free require a heightened standard of disclosure of all material terms, and all such offers must be made with extreme care to avoid any possibility that consumers will be misled or deceived. “Free” claims are hard to disclaim, are powerful, and draw consumers. (FF-488 & FF-489). Thus, when a product or service is offered for free, all the terms and conditions of the offer should be made clear at the outset. *See* Guide Concerning Use of the Word “Free” and Similar Representations 16 C.F.R. § 251.1(c) (“[C]onditions and

² [ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising](https://www.ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising)

obligations upon which receipt and retention of the ‘Free’ item are contingent should be 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. Stated differently, all of the terms, conditions and obligations should appear in close conjunction with the offer of ‘Free’ merchandise or service. For example, disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer, is not regarded as making disclosure at the outset”); *FTC v. Johnson*, 96 F. Supp. 3d 1110,1146 (D. Nev. 2015) (holding that websites advertising “free” products were deceptive for failing to disclose negative option membership and upsells and reasoning that “[t]he mere fact that the sites contained disclosures in smaller print and described the upsells as ‘bonuses’ and trials at the bottom of the order pages, does not alter the deceptive net impression as to the cost and nature of the product because consumers would not be inclined to seek out this information”). Further, hidden or poorly disclosed costs or conditions are deceptive. *FTC v. Willms*, No. 11-cv-828, 2011 WL 4103542, at *6 (W.D. Wash. Sept. 13, 2011) (holding that the FTC was likely to prevail on the merits where “enrollment fees and recurring costs [were] poorly disclosed” when they appeared only after the consumer had seen the landing page and four additional webpages after that); *see also United States v. Adteractive, Inc.*, 07-cv-5940 (N.D. Cal. Nov. 26, 2007) (GX355) (consent case alleging that defendants deceptively advertised “free” merchandise without disclosing in their advertising or landing page that consumers had to accept and pay for a certain number of goods in order to be eligible for the “free” merchandise, which many consumers only discovered after spending significant time trying to qualify for the product); *see also Book-of-the-Month Club*, 48 F.T.C. at 1311 (“A seller may not make one representation in one part of his advertisement and withdraw it in another part since there is no obligation on the part of the customer to protect himself against such a practice by pursuing an advertisement to the bitter end.”).

33. The presence of noticeable qualifications is by itself sufficient to defeat Complaint Counsel’s claim. Reasonable consumers seeing (or hearing) those qualifications could

not reasonably form the net impression that they could file for free using TurboTax regardless of their tax situation. PFF ¶¶239, 314.

Response to Conclusion No. 33:

Same response as RCL-30 and RCL-32. (*See also* RFF¶¶239, 314).

34. Finally, an advertiser’s “intent is powerful evidence” of the claim that “in fact was conveyed to consumers.” *Telebrands*, 140 F.T.C. at 304. Here, Complaint Counsel failed to prove Intuit ever intended for any of the challenged ads to imply any of the alleged claims—and the evidence overwhelmingly shows that it did not. Unrebutted evidence indicates that Intuit intended to convey that a specific TurboTax product was free, that it was free only for qualifying consumers, and often that there was additional information on the TurboTax website. PFF ¶¶167-174, 190, 192-202, 405, 852, 857, 860, 870; *see also* PFF ¶¶353-363. That unrebutted evidence of what Intuit “intended to convey ... provides further support for” the foregoing “facial analysis” of the challenged ads, *Telebrands*, 140 F.T.C. at 304, establishing that the ads did not imply any of the claims Complaint Counsel allege.

Response to Conclusion No. 34:

It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 153 F.T.C. 964, 1334–35 (2012) (Initial Decision) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged. It would be incongruous, at best, if intent could be used as a sword but not a shield.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)).

Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent to the truth. The evidence relevant to Intuit’s knowledge includes:

- Intuit’s own marketing research; (FF-597—FF-610)
- Feedback Intuit received directly from consumers; (FF-619—FF-623; FF-635—FF-662)

- Intuit’s marketing strategy plans; (FF-611—FF-618)
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website”; (FF-917—FF-918)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019; (FF-923—FF-927)
- A multi-state investigation starting in 2019; (FF-906, FF-909—FF-910)
- Complaint Counsel’s own investigation. (FF-906; FF-909—FF-910).

Knowingly engaging in deceptive advertising demonstrates intentionality.

35. Intuit’s commitment to clarity, and its business interest in being clear with consumers, distinguish this case from other deceptive-advertising cases where companies seek to “profit by deceiving their customers,” *Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina Khan and Commissioner Alvaro M. Bedoya Regarding the Issuance of a Notice of Penalty Offenses on Substantiation of Product Claims* (Mar. 31, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/rks_substantiation_pno_statement_lk_ab_final.pdf. Here, the unrebutted evidence establishes that the deception alleged by Complaint Counsel would have hurt, not helped, Intuit’s business. PFF ¶¶73, 96, 647. That Intuit’s business interests are aligned with its stated intent to be clear in its advertising provides further “powerful evidence” that the ads did not imply any of the false or misleading claims Complaint Counsel allege. *Telebrands*, 140 F.T.C. at 304.

Response to Conclusion No. 35:

Same response as RCL-34.

Complaint Counsel additionally responds to refute that “the unrebutted evidence establishes that the deception alleged by Complaint Counsel would have hurt, not helped, Intuit’s business.” As an initial matter, this is not a conclusion of law and is therefore improper. It is also wrong. Intuit has not proved that deception would have hurt its business; in fact, Intuit could benefit from exactly the kind of deception Complaint Counsel alleges. (*See e.g.*, RFF ¶¶73, 96, 452, 647, 651, 755).

36. Complaint Counsel failed to prove that any of the challenged brand video ads implicitly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. PFF ¶¶209-212, 243-244.

Response to Conclusion No. 36:

Same response as RCL-20.

37. Complaint Counsel failed to prove that any of the challenged display ads implicitly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. PFF ¶¶209-212, 261-262.

Response to Conclusion No. 37:

Same response as RCL-20.

38. Complaint Counsel failed to prove that any of the challenged paid-search ads implicitly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. PFF ¶¶209-212, 274-275.

Response to Conclusion No. 38:

Same response as RCL-20.

39. Complaint Counsel failed to prove that any of the challenged email ads implicitly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. PFF ¶¶209-212, 289-290.

Response to Conclusion No. 39:

Same response as RCL-20.

40. Complaint Counsel failed to prove that any of the challenged radio ads implicitly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. PFF ¶¶209-212, 298-299.

Response to Conclusion No. 40:

Same response as RCL-20.

III. Complaint Counsel Failed To Prove That A Significant Minority Of Reasonable Consumers Was Likely To Be Deceived

41. “An ad is misleading if at least a significant minority of reasonable consumers are likely to take away the misleading claim.” *Telebrands*, 140 F.T.C. at 291. Complaint Counsel

thus had the burden to prove that the challenged ads were “likely to mislead consumers acting reasonably under the circumstances,” *DirectTV*, 2018 WL 3911196, at *5. Not just any consumers, but “reasonable consumers.” *Telebrands*, 140 F.T.C. at 291 (emphasis added). And not just any number of those consumers, but a “significant minority” of them. *Id.* (emphasis added).

Response to Conclusion No. 41:

Complaint Counsel has no specific response.

42. Complaint Counsel failed to carry their burden to prove that at least a significant minority of reasonable consumers was likely to take away a misleading claim from the challenged ads. Their claim independently fails for that reason.

Response to Conclusion No. 42:

This is not a conclusion of law; it purports to be an adjudication of the entire matter (or, in additional proposed conclusions below, with regard to a subset of Intuit’s ads). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that the challenged ads expressly or impliedly conveyed the deceptive *free* claims that Complaint Counsel alleges to at least a significant minority of reasonable consumers.

43. None of the challenged brand video ads misled reasonable consumers into believing that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel.

Response to Conclusion No. 43:

Same response as RCL-42.

44. None of the challenged display ads misled reasonable consumers into believing that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel.

Response to Conclusion No. 44:

Same response as RCL-42.

45. None of the challenged paid-search ads misled reasonable consumers into believing that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel.

Response to Conclusion No. 45:

Same response as RCL-42.

46. None of the challenged email ads misled reasonable consumers into believing that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel.

Response to Conclusion No. 46:

Same response as RCL-42.

47. None of the challenged radio ads misled reasonable consumers into believing that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel.

Response to Conclusion No. 47:

Same response as RCL-42.

48. Extrinsic evidence further demonstrates that Complaint Counsel failed to prove that at least a significant minority of reasonable consumers was likely to take away a misleading claim from the challenged ads.

Response to Conclusion No. 48:

Same response as RCL-42.

A. Complaint Counsel Failed To Prove Deception For The Threshold Reason That Their Theory Of Deception Is Inapposite

49. According to Complaint Counsel, the challenged ads conveyed some version of the claim that “TurboTax will be free for the consumer watching the ad,” PFF ¶206, and that claim was “likely to mislead reasonable consumers” because “[i]t was not true for two-thirds of American taxpayers,” PFF ¶463. But the “appropriate denominator” to “assess who qualifies” for free TurboTax products is not “[a]ll U.S. taxpayers” because that is “not the target market in this case.” PFF ¶464. The relevant denominator is limited to those consumers actually “in the market for an online tax preparation product.” PFF ¶464.

Response to Conclusion No. 49:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of numerous factual questions such as what message the ads conveyed and what population of consumers those ads were targeted to. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All

legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, Complaint Counsel points the Court to the relevant factual responses. (*See, e.g.*, RFF ¶¶206, 463-464).

50. Independently, Complaint Counsel have failed to offer a viable theory of what it means for consumers to have been deceived in this case. Complaint Counsel contend that the challenged ads functioned as “deceptive door-openers,” PFF ¶467—that is, that the ads were deceptive simply by virtue of driving consumers to the TurboTax website, where consumers encountered more detailed information about Intuit’s product lineup.

Response to Conclusion No. 50:

Complaint Counsel disputes this Proposed Conclusion of Law. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports that Intuit’s ads act as deceptive door openers. (*See, e.g.*, RFF ¶467).

51. The theory Complaint Counsel initially alleged in the complaint was that consumers were deceived by TurboTax ads into coming to the TurboTax website, and that the website then further duped consumers into spending substantial time and effort before Intuit performed a “bait and switch,” telling consumers at the last minute that their taxes would not be free. PFF ¶11. No evidence was adduced to support this theory, and Professor Novemsky, Complaint Counsel’s principal expert, acknowledged that by the time consumers had invested time and effort in preparing their taxes, they had ample opportunity to learn of the qualifications for Free Edition. PFF ¶370; *see also* PFF ¶452. Intuit’s fact witnesses likewise walked through the website repeatedly, demonstrating that consumers had a full and fair opportunity to learn of the qualifications to file for free on TurboTax before consumers even gave Intuit their name. PFF ¶¶364-441.

Response to Conclusion No. 51:

Same response as RCL-50. (*See also* RFF ¶¶11, 370, 452).

52. In any event, Complaint Counsel’s “deceptive door-opener” theory fails. As a threshold matter, it is misplaced in this case because simply visiting the TurboTax website is

meaningful only if, once there, the consumer pays money that they otherwise would not have or is deceived into doing something they would not otherwise have done that is deleterious. The mere fact of the door “opening” in this case is not enough to establish deception. *See, e.g., Washington v. Hyatt Hotels Corp.*, 2020 WL 3058118, at *5 (N.D. Ill. June 9, 2020) (rejecting deception claim even where consumers had to spend significant time on a website before encountering price disclosures); *Harris v. Las Vegas Sands L.L.C.*, 2013 WL 5291142, at *2, *5-6 (C.D. Cal. Aug. 16, 2013) (same).

Response to Conclusion No. 52:

Filing one’s taxes is a far cry from booking a hotel room. In *Hyatt Hotels*, for example, the court was considering a checkout process that took the consumer three clicks through a website or app to identify, select, and then confirm a booking. If Intuit is correct that these three clicks represent a “significant” amount of time, than it is fundamentally at odds with Mr. Deal’s analysis of the Turbo tax upgrade screen data, in which he argues that for the 50% of consumers who do not encounter an upgrade screen for at least 30 minutes, this is a “small amount of time.” (See FF-866—FF-867).

53. Complaint Counsel’s “deceptive door-opener” theory fails because courts assessing deceptive-advertising claims must consider all “information *readily available* to the consumer that could easily resolve the alleged ambiguity,” *Moore v. Trader Joe’s Co.*, 4 F.4th 874, 882 (9th Cir. 2021) (emphasis added). The TurboTax website was “readily available to the consumer,” *id.*, and made complete product information accessible instantaneously. The website was expressly mentioned and/or linked by every one of the challenged ads. *See* PFF ¶¶215, 218, 222, 244. Consumers could readily reach it by clicking on any of the challenged display, paid-search, or email ads, PFF ¶¶253-254, 269-270, 284-285, as well as “through search results,” “TurboTax Blog content,” “press releases,” and “articles written by the media,” PFF ¶387, 469, 871. In fact, any consumer “interested in trying to use TurboTax” *had* to “access the product through” the TurboTax website (or mobile app equivalent). PFF ¶364; *see also* PFF ¶469. It took only “a few seconds” to get to the website, and once on the website it took only “five to ten seconds” to encounter full eligibility information for free TurboTax offers. PFF ¶364. That information, moreover, was accessible before consumers “ha[d] to input their name or any other personal information.” PFF ¶469. Under these circumstances, the information on the TurboTax website surely qualifies as “readily available to the consumer” and thus must be considered in assessing Complaint Counsel’s claim, *Moore*, 4 F.4th at 882.

Response to Conclusion No. 53:

In *Moore v. Trader Joe’s Co.*, the court was asked to resolve whether the labeling on a jar of honey sold at Trader Joe’s as “100% New Zealand Manuka Honey” was deceptive in violation of state law. 4 F.4th 874 (9th Cir. 2021). Because the claim in *Moore* itself was found to be

ambiguous (was the honey 100% from New Zealand, 100% from the nectar of the Manuka flower, or something else), other information (such as the low price of the honey or the fact that honey, by its nature, is produced by bees that pollenate various kinds of flowers) was considered in determining how a reasonable consumer might interpret the label. *Moore*, 4 F.4th at 882.

There is no ambiguity about Intuit's claim, however; as it has said the likes of: "[Y]ou can file on TurboTax for absolutely nothing" and "That's right, TurboTax Free is free. Free, free free free." (FF-66—FF-67, FF-99—FF-100 & FF-104). More fundamentally, the Ninth Circuit in *Moore* never considered whether the label on the honey was a deceptive door opener, and its *dicta* isn't persuasive.

To the extent Intuit is actually seeking a factual finding, Complaint Counsel disputes those claims, as set out more fully in its briefing. (See RFF ¶¶215, 218, 222, 244, 253-254, 269-270, 284-285, 364, 387, 469, 871).

54. Case law applying the "deceptive door-opener" concept confirms that Complaint Counsel's reliance on the concept is misplaced. The concept originated in *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962 (9th Cir. 1975), a case about a rental-car company that called itself "Dollar-A-Day," only to reveal that its rental cars were in fact *not* a dollar-a-day after consumers physically traveled to a brick-and-mortar facility, see *Resort Car Rental System, Inc.*, 83 F.T.C. 234, 281-282 (1973). Unlike in *Resort Car*, in this case, the product advertised as free *was* free and obtaining full product information on the TurboTax website entailed virtually no time or effort. See PFF ¶¶364-370, 484, 526-527, 790-791. Moreover, in this case, consumers could browse multiple, competing products simultaneously, PFF ¶¶55, 509—something not possible in the physical stores for which the "deceptive door-opener" concept was developed. Put simply, the online context is different, and courts in that context have rejected deception claims where price disclosures occurred *at the point of sale*, i.e., much later than consumers see qualifications on the TurboTax website. See, e.g., *Washington*, 2020 WL 3058118, at *5; *Harris*, 2013 WL 5291142, at *2, *5-6.

Response to Conclusion No. 54:

A deceptive door-opening first contact is illegal in all circumstances, not only for physical, in-person sales. See *E.M.A. Nationwide*, 767 F.3d at 632 (applying principle to telemarketing sales).

In *Resort Car Rental System Inc.*, the Ninth Circuit found that a rental-car company calling itself "Dollar-A-Day" that, in fact, did not offer any cars at that price, violated the FTC

Act. Br. at 53-54 (discussing *Resort Car Rental*, 518 F.2d at 964). Without engaging with the legal reasoning or policy behind the *Resort Car Rental System*, Intuit instead cherry picks a few factual differences between the cases, such as the fact that the consumer had to travel to a brick-and-mortar store to learn the true price of the car rental, or that consumers in the 1970's could not comparison shop simultaneously as one can in web browsers. Br. at 53-54. Because determining whether advertisements are deceptive is a "fact intensive" exercise, *Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 478 (7th Cir. 2020), it is unsurprising that Intuit can draw distinctions on the facts to a case that existed before the internet. In effect, Intuit asks that this Court deem its ads permissible not based on what occurs when the Intuit "knocks" (TurboTax ads), but on the basis of what happens inside the "house" (here, its website). Citing to cases that are not directly on point, Intuit argues that court should "take into account all the information available to consumers," and, where there is ambiguity about a claim, "consider[] other information readily available to the consumer that could easily resolve the alleged ambiguity." Br. at 52 (citing *Bell*, 982 F.3d at 477; *Moore v. Trader Joe's Co.*, 4 F.4th 874, 882 (9th Cir. 2021)). Here, of course, the additional information available to consumers is the website.

To the extent Intuit is actually seeking a factual finding, Complaint Counsel disputes those claims, as set out more fully in its briefing. (See RFF ¶¶364-370, 484, 526-527, 790-791).

55. Other case law further confirms that the door-opener concept is inapposite here. In *FTC v. DirecTV, Inc.*, the court held the "deceptive door opener" concept "inapplicable" where (1) "nothing in [the advertisement at issue] contradicts the true terms of [the advertiser's] provision of services" and (2) the advertisement at issue is "for a complex product," because "a reasonable consumer would understand the limitations of how information is presented in a" space- or time-constrained ad for a complex product. 2018 WL 3911196, at *15. The same is true in this case: Nothing in the challenged ads contradicts the true terms of the advertised offers. See *supra* Part II. And evidence from both parties indicates that "the level of information that's contained in the eligibility requirements [for Intuit's free TurboTax offers] could not be effectively communicated in a" space- or time-constrained ad, PFF ¶841, and that that level of information "would be out of step with what consumers" expect, PFF ¶845, see also PFF ¶¶829-835, 839-844, 846-847.

Response to Conclusion No. 55:

“The Federal Trade [Commission] Act is violated if [Respondent] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract.” *Resort Car Rental*, 518 F.2d at 964; *see also Carter Prods., Inc. v. FTC*, 186 F.2d 821, 824 (7th Cir. 1951) (accord); *FTC v. OMICS Grp. Inc.*, 374 F. Supp. 3d 994, 1010 (D. Nev. 2019) (accord), *aff’d* 827 F. App’x 653 (9th Cir. 2020); *Fleetcor*, 2022 WL 3273286, at *12 (“post-hoc disclosures cannot cure earlier misleading representations”); *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 632 (6th Cir. 2014) (granting summary decision on telemarketing misrepresentations despite more accurate representations in written documents and contracts; “A court need not look past the first contact with a consumer to determine the net impression from that contact[.]” (citation omitted)); Deception Policy Statement, at 180 & n.37 (“[P]oint-of-sale material will not necessarily correct a deceptive representation or omission. Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.”); *see, e.g., In re Encyc. Britannica, Inc.*, 87 F.T.C. 421, 495-97, 531 (1976), *aff’d sub nom Encyc. Britannica, Inc. v. FTC*, 605 F.2d 964 (7th Cir. 1979), *as modified*, 100 F.T.C. 500 (1982); *see also In re Grolier, Inc.*, 99 F.T.C. 379, 383 (1982), *aff’d sub nom Grolier Inc. v. FTC*, 699 F.2d 983 (9th Cir. 1983), *as modified*, 104 F.T.C. 639 (1984); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999) (“because each representation must stand on its own merit, even if other representations contain accurate, non-deceptive information, th[e] argument [that later disclaimers cured advertising misrepresentations] fails”), *aff’d*, 265 F.3d 944 (9th Cir. 2001).

To the extent Intuit is actually seeking a factual finding, Complaint Counsel disputes those claims, as set out more fully in its briefing. (*See* RFF ¶¶829- 835, 839-844, 846-847).

56. Complaint Counsel’s door-opener theory independently fails because it is refuted by the record in this case. The results of Dr. John Hauser’s Disclosure Efficacy Survey were “inconsistent with the hypothesis that TurboTax’s ad[s] served as misleading door openers” because if the ads had been door-openers as Complaint Counsel allege, the survey would have shown “fewer people statistically considering” TurboTax when Dr. Hauser “change[d] the advertisements” in the manner Complaint Counsel seek to require, and instead when Dr. Hauser

made those changes, there was “no statistical difference” in the number of consumers who would consider TurboTax. PFF ¶¶737-738. Thus, even if prompting consumers to visit the TurboTax website could constitute actionable deception under a “door-opener” theory (and it cannot, *see supra* ¶¶51-55), Complaint Counsel’s theory would still fail because the criticized characteristics of the challenged ads are not what caused consumers to consider using TurboTax to start their return.

Response to Conclusion No. 56:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of whether Intuit’s ads served as deceptive door openers driving consumers to the TurboTax website. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, Complaint Counsel points the Court to the relevant factual responses. (*See, e.g.*, RFF ¶¶737-738).

57. In sum, the “deceptive door-opener” concept is inapplicable and finds no support in the record.

Response to Conclusion No. 57:

Same response as RCL-50— RCL-56.

B. Reasonable Consumers Understand That Free Offers Are Qualified And Are Skeptical Of Those Offers

58. As noted, to prevail, Complaint Counsel had to prove that Intuit’s advertising was deceptive to “not just any consumers,” but to a significant minority of “consumers acting reasonably.” *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1436 (9th Cir. 1986). And reasonable consumers are presumed to understand concepts that “are commonplace in the [relevant] market,” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016), including when qualifications or requirements are “often ... associated with” a product, *Marksberry*, 606 F.Supp.3d at 1081. The evidence in this case regarding “the background knowledge of the reasonable consumer,” *Dinan v. Sandisk LLC*, 2019 WL 2327923, at *6 (N.D. Cal. May 31, 2019), makes clear that reasonable consumers in the tax-preparation industry were not likely to be misled by the challenged ads.

Response to Conclusion No. 58:

Intuit attempts to establish some mystical reasonable tax preparation consumers, but the cases it relies on are inapposite. Intuit relies on *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016)—a case about whether consumers understood how a tube of lip balm worked—for the proposition that consumers are unlikely to be misled because of their experience with and understanding of the tax preparation industry. Br. 56. But tax preparation is more complicated than figuring out how much lip balm is in a tube. Intuit’s reliance on *Marksberry v. FCA US LLC*, 606 F.Supp.3d 1075, 1081 (D. Kan. 2022), a case dealing with a Kansas statute related to deception predicated on willfulness, is similarly misplaced. (*Compare Marksberry*, 606 F. Supp. 3d at 1083 (“The Kansas Supreme Court has found that the use of ‘willful’ in the KCPA includes an intent to harm the consumer.” (cleaned up)), with *POM Wonderful*, 153 F.T.C. at 1334–35 (“it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged”) (Chappell, C.A.L.J.) (citing cases).

Moreover, the *Dinan v. Sandisk LLC*, 2019 U.S. Dist. LEXIS 91633, *19-21 (N.D. Cal. May 31, 2019) is distinguishable from this matter because in that case, the consumer confusion arose from two competing interpretations of the term “GB” (which could be measured in metric or the decimal measuring system). In this instance, there is no question about the meaning of the word “free.” What is more, advertising capable of being interpreted in a misleading way should be construed against the advertiser.” *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975). Moreover, as the record shows, Complaint Counsel have provided ample evidence specific to taxpaying consumers. (RFF-470—RFF-484).

59. Ample evidence supports the conclusion that reasonable consumers understand that free offers in the context of tax-preparation products are qualified, even if those qualifications are not articulated in advertisements. PFF ¶¶471-484. All major players in the tax-preparation industry use the same business model, offering a basic free product for consumers with simple tax returns and paid products for more complex tax situations. *See* PFF ¶¶481-482; *see also United States v. H&R Block, Inc.*, 833 F.Supp.2d 36, 46-48 (D.D.C. 2011) (describing this model as “an entrenched part of the [online tax preparation] market”). The model’s ubiquity leads consumers to expect free tax-preparation offers to have qualifications— even if those qualifications are not expressly stated. PFF ¶¶483-484.

Response to Conclusion No. 59:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the entire question of the understanding of reasonable consumers regarding free tax preparation (or, in additional proposed conclusions below, with regard to consumer familiarity with tax preparation and free offers). As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”) Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that a significant minority of reasonable consumers seeking tax preparation services are under the impression that TurboTax is free for them when that is not the case. (*See, e.g.*, RFF-470—RFF-484).

60. Many consumers are also familiar with TurboTax’s particular offerings. Nearly [REDACTED] of tax returns filed online are filed using TurboTax, and nearly [REDACTED] of TurboTax customers each year are returning customers, meaning that most consumers using TurboTax to file their taxes have already used TurboTax in the past. PFF ¶¶48, 93. Many of those consumers are aware of TurboTax’s paid products based on their past experiences with TurboTax. PFF ¶¶669-670. That familiarity with paid products would prevent reasonable consumers from believing that all TurboTax products were free or that TurboTax necessarily would be free for them. PFF ¶¶671. Instead, those consumers would understand at a minimum that they would need to determine whether they qualified for a free TurboTax product in a given year. PFF ¶¶671.

Response to Conclusion No. 60:

Same response as RCL-59. (*See also* RFF-48; RFF-93; RFF-669—RFF-671).

61. Even beyond the tax-preparation market, reasonable consumers routinely encounter free offers, and so are aware that free offers are qualified even when the qualifications are not expressly stated. Support for that conclusion includes (1) evidence that reasonable consumers understand that for-profit companies (like Intuit) need to make money to stay in business, *see* PFF ¶¶483-485, 487-488, 493; (2) evidence that consumers are exposed to a wide variety of free offers that are virtually always qualified, even when no qualification is stated, *see* PFF ¶¶473-474; (3) evidence that consumers harbor significant “free skepticism,” i.e., “a natural expectation that ... costs are involved,” PFF ¶¶485-490; and (4) evidence that consumers exhibit “care and consideration,” including by consulting a variety of information sources and evaluating alternatives, before selecting a tax-preparation product, PFF ¶¶506, 513, 783; *see also* PFF ¶¶471-472, 487, 502-509, 507-508.

Response to Conclusion No. 61:

Same response as RCL-59. (*See also* RFF-471—RFF-474; RFF-483—RFF-490; RFF-487—RFF-488; RFF-493; RFF-502—RFF-509).

62. The fact that consumers would see Intuit’s ads before completing, or even starting, the high-involvement selection process of purchasing a tax-preparation product further reduces the likelihood of deception. PFF ¶¶158-160, 180-181, 183, 188-190, 512-513. The various stages of consumer awareness of a product or brand is often described in terms of a “marketing funnel.” PFF ¶¶156-157. Television and other advertising are at the top of TurboTax’s marketing funnel, and these ads are designed to “drive awareness and consideration of the brand and its products.” PFF ¶¶157, 159, 510. Reasonable consumers expect and understand that information conveyed at the top of the marketing funnel will be limited, and that more information is available. PFF ¶511. Those consumers are thus not likely to be misled by that top-of-funnel advertising. PFF ¶¶510-513.

Response to Conclusion No. 62:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the entire question of the understanding of reasonable consumers regarding free tax preparation television advertising. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that Intuit’s top-of-the-funnel advertising deceives reasonable consumers. (*See also* RFF-156—RFF-160; RFF-180—RFF-181; RFF-183, RFF-188—RFF-190; RFF-510—RFF-513).

63. Consumers’ understanding of and interactions with online ads underscore Complaint Counsel’s failure to prove that reasonable consumers were likely to be misled by the challenged ads. 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 ability to quickly gain access to complete details about a free offer, and consumers’ understanding that they can do so, reinforce 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. In fact, consumers would be overwhelmed if full details were provided in that format. PFF ¶¶522-524. Complaint Counsel offered no evidence specific to online ads (or any other kind of ad) demonstrating that consumers were likely to be misled.

Response to Conclusion No. 63:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the entire question of the understanding of reasonable consumers regarding free tax preparation advertising. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that Intuit’s “free” advertising deceives reasonable consumers. (*See also* RFF-520; RFF-522-RFF-524).

64. Complaint Counsel pointed in their pretrial brief to a single tax-prep product purportedly offered “at no charge to all consumers,” PFF ¶494—but that product does not support Complaint Counsel both because there is [REDACTED] for that little-used product, PFF ¶495, and, more significantly, because that product is *not* in fact free for “all consumers,” PFF ¶496.

Response to Conclusion No. 64:

This is not a conclusion of law; it purports to be a factual assertion regarding Intuit’s competitor. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that Intuit’s competitor’s offering appeared to be free to both Intuit and reasonable consumers. (*See also* RFF-494).

65. Complaint Counsel are also wrong that the existence of “many online products” that *are* free—such as Google, Facebook, YouTube, and Spotify—would lead reasonable consumers to understand that all TurboTax products were free. PFF ¶400. Rather than identifying “completely free” products, Complaint Counsel have mostly identified additional examples of products that have free offers with restrictions along with paid options with additional features. PFF ¶500. These examples confirm that consumers are familiar with (and thus would expect) free offers to have certain restrictions while being accompanied by paid

options. PFF ¶¶478-480, 500. And regardless, none of Complaint Counsel's examples involves a tax-preparation product; those examples thus say nothing about what is commonplace in the relevant market in this case, *Ebner*, 838 F.3d at 965; *see also Critcher v. L'Oreal USA Inc.*, 2019 WL 3066394, at *5 (S.D.N.Y. July 11, 2019), *aff'd*, 959 F.3d 31 (2d Cir. 2020).

Response to Conclusion No. 65:

The first half of this statement is not a conclusion of law; it purports to be a factual assertion regarding other free products. Complaint Counsel has provided a response to these factual assertions in its Reply Findings of Fact. (RFF-400; RFF-478—RFF-480; RFF-500). Moreover, Complaint Counsel have provided an example of what Intuit itself considered an entirely free tax preparation provider. (RFF-494—RFF-497). Moreover, the cases Intuit cites are not inconsistent with the proposition that reasonable consumers, accustomed to using online products without paying for them, might expect to be able to use a different online product, TurboTax, for free to file their taxes. In both *Ebner* and *Critcher* the courts found that consumer expectations regarding how much cosmetic product consumers could retrieve from a container were shaped by their experiences with the cosmetics industry more generally. *See Ebner*, 838 F.3d at 967 (discussing the “context of the high-end cosmetics market packaging for such product.”); *Critcher*, 2019 U.S. Dist. LEXIS 116365, *12 (S.D.N.Y. July 11, 2019), *aff'd*, 959 F.3d 31 (2d Cir. 2020) (discussing how “pump dispensers proliferate the market for cosmetics.”) Moreover, in the *Ebner* matter, a reasonable consumer, upon learning that some product left in a lip balm tube was not accessible through the usual mechanism, could have retrieved the product, for example with a finger or a small tool. *Ebner*, 838 F.3d at 965-966. That makes the case distinguishable from the matter at hand, where, upon learning they do not qualify for free TurboTax, there is nothing consumers can do to receive TurboTax for free.

C. The Ads Communicated To Consumers The Limitations On The Free Offer Being Advertised

66. The challenged ads themselves belie any theory of deception. Again, none of those ads ever conveyed, expressly or implicitly, that the free offer being advertised was unqualified. *Supra* Part II. Instead, the ads made consumers aware of the category of qualification and where consumers could learn more.

Response to Conclusion No. 66:

This is not a conclusion of law; it purports to be a factual assertion regarding the express and implied claims in Intuit's ads. As an initial matter, the purported conclusion of law does not cite to any portion of the evidentiary record or to legal authority and should be disregarded. Order on Post-Trial Filings at 2 ("All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority."). Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that Complaint Counsel has proven that record shows that the challenged ads make express and implied claims that are not qualified in a clear and conspicuous manner.

67. To start, many of the challenged ads expressly informed consumers of the specific SKU being advertised. See PFF ¶¶212, 215, 226-228, 250-251, 281, 294, 306, 310. Most display ads, for instance, stated that the ad was for "TurboTax Free Edition" or "TurboTax Live Basic." PFF ¶¶250-251. And over the last several years, the company has mandated that its Free Edition video ads include the logo of the SKU being advertised. PFF ¶¶103, 173.

Response to Conclusion No. 67:

This is not a conclusion of law; it purports to be a factual assertion regarding the qualifications in Intuit's ads. As an initial matter, the purported conclusion of law does not cite to any portion of the evidentiary record or to legal authority and should be disregarded. Order on Post-Trial Filings at 2 ("All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority."). Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that Complaint Counsel has proven that record shows that the challenged ads make express and implied claims that are not qualified in a clear and conspicuous manner. (See RFF ¶¶103, 173, 212, 215, 226-228, 250-251, 281, 294, 306, 310).

68. The FTC's ".com Disclosure" guidelines specify that "[w]hen identifying the[] claims" in an ad, the analysis must "consider the ad as a whole, including the ... product name." PFF ¶320. The challenged ads' identification of a specific product made clear to reasonable consumers that there were multiple TurboTax SKUs and that only the one being advertised was free. PFF ¶319.

Response to Conclusion No. 68:

This is not a conclusion of law; it purports to be a factual assertion regarding whether Intuit's disclosures are consistent with the .com Disclosure guidelines. As an initial matter, the purported conclusion of law does not cite to any portion of the evidentiary record or to legal authority and should be disregarded. Order on Post-Trial Filings at 2 ("All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority."). Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that Complaint Counsel has proven that record shows that are consistent with the .com Disclosure guidelines. (See RFF ¶¶319-320).

69. Complaint Counsel failed to prove that consumers do not understand the phrase "simple tax returns." A "reasonable consumer understands" concepts that "are commonplace in the [relevant] market." *Ebner*, 838 F.3d at 965. And the phrase "simple tax returns" is ubiquitous in the tax-preparation industry, used by the IRS, other government entities, and all major private players in the industry. PFF ¶¶119, 122-123, 141-143, 453-454, 458-459. Reasonable consumers are therefore deemed to understand that phrase as a matter of law. See *Ebner*, 838 F.3d at 965.

Response to Conclusion No. 69:

Ebner v. Fresh, Inc., 838 F.3d 958 (9th Cir. 2016) is a case about whether consumers understood how a tube of lip balm worked, an analysis that's unhelpful to support the proposition that consumers are unlikely to be misled by TurboTax because of their experience with and understanding of the tax preparation industry.

"[C]onditions and obligations upon which receipt and retention of the 'Free' item are contingent should be 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. Stated differently, all of the terms, conditions and obligations should appear in close conjunction with the offer of 'Free' merchandise or service. For example, disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer, is not regarded as making disclosure at the outset." 16 C.F.R. § 251.1(c).

70. Even if the phrase “simple tax returns” were not commonplace in the market, Complaint Counsel failed to prove that consumers did not understand it, and in fact the evidence shows that they do. *See* PFF ¶¶122-123, 134, 136, 635, 869.

Response to Conclusion No. 70:

This is not a conclusion of law; it purports to be a factual assertion regarding whether consumers understand the phrase “simple tax returns.” As an initial matter, the purported conclusion of law does not cite to any portion of the evidentiary record or to legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that Complaint Counsel has proven that consumers do not understand the phrase “simple tax returns.” (*See* RFF ¶¶122-123, 134, 136, 635, 869).

71. Complaint Counsel have suggested that what qualified as a “simple tax return” changed repeatedly over the years, which they say proves that consumers did not understand that phrase. *See* Complaint Counsel’s Pretrial Brief at 7 (Feb. 17, 2023); Complaint Counsel’s Pretrial Proposed Findings of Fact at 3-4 (Feb. 17, 2023). That argument is mistaken. Intuit has always defined “simple tax return” as returns filed using the most basic form made available by the IRS. PFF ¶¶119-123, 147. And while Intuit has occasionally expanded the tax situations covered by Free Edition, those expansions meant only that a taxpayer with an [REDACTED] would not [REDACTED] PFF ¶148.

Response to Conclusion No. 71:

Same response as RCL-70. (*See also* RFF ¶¶119-123, 147, 148).

72. Intuit also introduced un rebutted evidence that the level of detail provided by the phrase “simple tax returns only” was appropriate for both the media and the stage of the buying process in which the phrase was used. Lengthier disclosures 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, 838, 840-842, 845-846.

Response to Conclusion No. 72:

Same response as RCL-70. (*See also* RFF ¶¶138-140, 323-333, 523, 838-842, 845-846).

73. The phrase “simple tax returns” has the added benefit of being straightforward and avoiding complicated tax jargon that would have confused consumers. PFF ¶¶122-123, 135-136, 139-140, 333. Reasonable consumers understand the phrase “simple tax returns” better than references to specific IRS forms when describing the qualifications for free tax-preparation

products. PFF ¶139. Likewise, qualitative consumer feedback confirms that more detailed disclosures would overload consumers with excessive information. PFF ¶140.

Response to Conclusion No. 73:

Same response as RCL-70. (*See also* RFF ¶¶135, 139-140, 333).

74. Finally, even if reasonable consumers were uncertain about whether they had a “simple tax return,” they would conduct research—and the answer was easy to find, in the places reasonable consumers knew to look, including in online reviews and on the TurboTax website (which many of the ads specifically invited consumers to visit for more information). *See* PFF ¶¶131-133, 503-509, 786.

Response to Conclusion No. 74:

Same response as RCL-70.

75. “To analyze whether ... ambiguity could mislead a reasonable consumer,” courts “consider[] other information readily available to the consumer that could easily resolve the alleged ambiguity,” *Moore*, 4 F.4th at 882. That approach is consistent with “the general principle 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). The fact that many of the challenged ads directed consumers to the TurboTax website, or linked directly to the website, forecloses Complaint Counsel’s contention that the ads were ambiguous and/or left a misleading net impression.

Response to Conclusion No. 75:

“What matters most is how real consumers understand and react to the advertising.” *Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 476 (7th Cir. 2020). “Consumer-protection laws do not impose on average consumers an obligation to question the labels they see and to parse them as lawyers might for ambiguities.” *Id.* The court in *Bell* also acknowledged that “where an advertisement conveys more than one meaning, one of which is false, the advertiser is liable for the misleading variation.” *Bell*, 982 at 478 (collecting cases, overruling the district court’s holding to the contrary).

Complaint Counsel disputes: “The fact that many of the challenged ads directed consumers to the TurboTax website, or linked directly to the website, forecloses Complaint Counsel’s contention that the ads were ambiguous and/or left a misleading net impression.” This is not a conclusion of law; it purports to be a factual assertion regarding the net impression of Intuit’s ads. As an initial matter, the purported conclusion of law does not cite to any portion of

the evidentiary record or to legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). The net impression of the ad is unambiguous: “[Y]ou can file on TurboTax for absolutely nothing” and “That’s right, TurboTax Free is free. Free, free free free.” (FF-66—FF-67, FF-99—FF-100 & FF-104).

76. Courts have approved disclosures that, like the ones challenged here, “put consumers on notice that the complete details of the” offer may be found elsewhere. *Platt v. Winnebago Industries, Inc.*, 960 F.3d 1264, 1277 (10th Cir. 2020). For instance, the court in *Marksberry* held that “the mere fact that each advertisement” for a vehicle warranty “did not set forth all the details or requirements of the Warranty *on the advertisement* does not indicate” deception because “[t]he advertisements informed consumers to review the Warranty for full details, and the full details were included in the warranty booklet.” 606 F.Supp.3d at 1083.

Response to Conclusion No. 76:

Disclaimers must be “prominent and unambiguous to change the apparent meaning and leave an accurate impression... [a]nything less is only likely to cause confusion by creating contradictory double meanings.” *Removatron*, 884 F.2d at 1497. Disclosures cannot change the net impression of an ad if they are not clear and readily visible. “Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression.” *Removatron*, 884 F.2d at 1497; *see also* Deception Policy Statement, at 180 (“Qualifying disclosures must be legible and understandable.”); *Fleetcor*, 2022 WL 3273286, at *10 (“the Court concludes as a matter of law that the tiny, inscrutable print of the disclaimers does not cure the net impression of the representations in the ads cited”). What’s more, disclaimers are not always effective and are not a defense if the net impression is still misleading. *Cyberspace.com*, 453 F.3d at 1200 (fine print disclaimer no defense if net impression is still misleading); *FTC v. Connelly*, No. 6-CV-701, 2006 WL 6267337 at *10 (C.D. Cal. Dec. 20, 2006) (disclaimers are particularly inadequate when they appear in a different context than the claims they purport to repudiate); *QT*, 448 F. Supp. 2d at 924 n.15 (“Defendants’ inconspicuous small-font statement appearing just six times during the 30-minute infomercial that ‘this product is not intended to

diagnose, treat, cure or prevent disease’ is wholly inadequate to change the net impression of the pain relief claims made in the infomercial.”).

Marksberry is not instructive, as the court was dealing with a Kansas statute related to deception predicated on *willfulness*. *Marksberry v. FCA US LLC*, 606 F.Supp.3d 1075, 1081 (D. Kan. 2022); *compare Marksberry*, 606 F. Supp. 3d at 1083 (“The Kansas Supreme Court has found that the use of ‘willful’ in the KCPA includes an intent to harm the consumer.” (cleaned up)), *with POM Wonderful*, 153 F.T.C. at 1334–35 (“it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged”) (Chappell, C.A.L.J.) (citing cases).

77. In a similar vein, courts have held that consumers’ ability to easily access complete offer details suffices to render an advertisement not deceptive even where, unlike here, the advertisement does *not* specify where those details can be found. For instance, one court held that “the absence of complete price information in the advertisements” for a pharmacy did not render the ads misleading because “the information which the state would require plaintiff to include in the advertisements[—]complete information as to the price of every prescription drug offered at plaintiff’s store[—was] readily available to consumers,” including “by telephoning the store ... or by asking store personnel.” *South Ogden CVS Store, Inc. v. Ambach*, 493 F.Supp. 374, 380 (S.D.N.Y. 1980). The qualifying language here is adequate because it *does* specify where complete offer information is available. *See Platt*, 960 F.3d at 1277; *Marksberry*, 606 F.Supp.3d at 1083.

Response to Conclusion No. 77:

When a product or service is offered for free, all the terms and conditions of the offer should be made clear at the outset. *See* 16 C.F.R. § 251.1(c) (“[C]onditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be 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. Stated differently, all of the terms, conditions and obligations should appear in close conjunction with the offer of ‘Free’ merchandise or service. For example, disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer, is not regarded as making disclosure at the outset”); *Johnson*, 96 F. Supp. 3d at 1146 (holding that websites advertising “free” products were deceptive for failing to disclose negative option membership and upsells

and reasoning that “[t]he mere fact that the sites contained disclosures in smaller print and described the upsells as ‘bonuses’ and trials at the bottom of the order pages, does not alter the deceptive net impression as to the cost and nature of the product because consumers would not be inclined to seek out this information”).

Nothing Intuit cites changes this. *South Ogden CVS Store, Inc. v. Ambach*, 493 F.Supp. 374 (S.D.N.Y. 1980) is not instructive, as it is a more than four-decade old case in which defendants challenged on First Amendment grounds a state pharmacy regulation that regulated specific price-disclosure language in pharmacy ads. Intuit has not cited any more recent case applying similar analysis in the context of FTC cases or law, nonetheless in the context of overt free claims.

78. The challenged ads’ instruction to visit the website was particularly appropriate given the stage in the buying process at which consumers viewed the ads. PFF ¶¶160, 241, 313, 326. That invitation reinforced what consumers already knew to do, and what they routinely do for “high-involvement” products like tax-preparation software (especially products that consumers use and/or purchase online): go to the product’s website for further details. PFF ¶¶326, 369-370, 505, 526, 790. It is not deceptive for an ad to give consumers accurate information (that they expect to receive) about where they can learn complete information about a free product or offer being advertised.

Response to Conclusion No. 78:

This is not a conclusion of law; it purports to be a factual assertion regarding whether, for example, Intuit’s advertisements, including its instruction to go to the TurboTax website for details, were deceptive. As an initial matter, the purported conclusion of law does not cite to any portion of the evidentiary record or to legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that Complaint Counsel has proven that consumers are deceived by Intuit’s advertisements regardless of the ad’s direction to see details at the TurboTax website. (See RFF ¶¶160, 241, 313, 326, 369-370, 505, 526, 790).

79. “Because the advertisement[s] adequately disclose[d]” the advertised products’ qualifications, “the net impression of the advertisement[s] on [their] face would not be likely to mislead a reasonable consumer.” *DirecTV*, 2018 WL 3911196, at *9.

Response to Conclusion No. 79:

Same response as RCL-55.

D. Professor Novemksy’s Survey Does Not Show That Intuit’s Ads Were Likely To Deceive Reasonable Consumers

80. Complaint Counsel rely on the survey conducted by Professor Nathan Novemsky to attempt to quantify whether reasonable consumers were likely to be deceived by free TurboTax ads. But that survey is unreliable and offers no support for Complaint Counsel’s claim.

Response to Conclusion No. 80:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the entire question of the reliability of the perception survey. As an initial matter, the purported conclusion of law does not cite to any portion of the record or legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports finding the perception survey reliable. (*See, e.g.*, RFF-529; RFF-540—RFF-545; RFF-548—RFF-549; RFF-551—RFF-554; RFF-558; RFF-560—RFF-562; RFF-564—RFF-567; RFF-569—RFF-574; RFF-576-RFF-781; RFF-584; RFF-586—RFF-591; RFF-593—RFF-598; RFF-600—RFF-607).

81. *First*, the survey is unreliable because Professor Novemsky declined to show respondents any of the challenged ads or the TurboTax website. *See* PFF ¶¶534-536. As Professor Novemsky acknowledged, survey participants would have answered the questions “having seen whatever they saw in the world”—which may well not have included any TurboTax ads. PFF ¶538. Moreover, given that participants were not shown any TurboTax marketing, they had to answer entirely from memory. PFF ¶536. This kind of “memory test” is essentially “useless.” *Instant Media, Inc. v. Microsoft Corp.*, 2007 WL 2318948, at *15 (N.D. Cal. Aug. 13, 2007). That is why courts have excluded surveys like this one that were “little more than a memory test.” *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 297 (2d Cir. 1999).

Response to Conclusion No. 81:

Cases cited by Intuit are distinguishable and are neither analogous to the instant case nor persuasive as they relate to surveys regarding trademark issues which are distinguishable because they by their nature relate to consumer confusion between two different trademarks. *Instant Media, Inc. v. Microsoft Corp.*, 2007 WL 2318948 at *15 (N.D. Cal. Aug. 13, 2007) (where, when trying to establish confusion between two trademarks, it was insufficient to show consumers only one of the two trademarks together with the name of the company associated with that trademark); *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 297 (2d Cir. 1999) (where consumers were briefly shown a number of shoes, and subsequently asked to identify the mark of the shoes from memory). The perception survey does not attempt to establish confusion between dueling options. Rather, it measures perceptions currently in the marketplace regarding TurboTax, for which its design is entirely appropriate. (FF-531—FF-533; FF-535—FF-540; *see also* RFF-534—RFF-536; RFF-538).

82. *Second*, Professor Novemsky’s survey is unreliable because it does not use a test-and-control methodology. “[C]ourts routinely hold[that] a survey’s lack of a control group or control questions constitutes [a] ground for granting a Rule 702 motion to exclude.” *Valador, Inc. v. HTC Corp.*, 242 F.Supp.3d 448, 463 (E.D. Va.), *aff’d*, 707 F.App’x 138 (4th Cir. 2017); *Reinsdorf v. Skechers U.S.A.*, 922 F.Supp.2d 866, 878-879 (C.D. Cal. 2013) (excluding a survey that lacked a control because it lacked “fundamental reliability”). Because Professor Novemsky did not employ a test-and-control methodology, PFF ¶¶531-540, his survey cannot be relied upon to determine whether the challenged ads caused any deception. Professor Novemsky’s failure to use a control group also means he had no way of preventing the survey questions from influencing his results. PFF ¶539.

Response to Conclusion No. 82:

The absence of a control group does not mean that a survey is unreliable. *See, e.g., Clicks Billiards, Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1262 (9th Cir. June 1, 2001); *see also Moroccanoil, Inc. v. Marc Anthony Cosmetics, Inc.*, 2014 U.S. Dist. LEXIS 184585, *25 (C.D. Cal. Oct. 7, 2014). The decision not to employ a control group can be mitigated by “other methods to prevent bias, e.g., including ‘none of the above,’ ‘don’t know/can’t recall’ and ‘other’ as possible answers to closed-ended questions.” *In re NJOY Consumer Class Action Litig.*, 120 F.

Supp. 3d 1050, 1078 (C.D. Cal. Aug. 14, 2015). These are precisely the measures employed by Professor Novemsky in the design of the Survey. (FF-524; *see also* FF-521—FF-523, FF-525—FF-527). The cases Intuit relies on for this proposition are again distinguishable because they are unique to copyright disputes where a test/control design failed to use a control group, *Reinsdorf v. Skechers U.S.A.*, 922 F.Supp.2d 866, 873, 877-879 (C.D. Cal. 2013) (excluding a survey purportedly measuring “relative audience appeal of the joint authors’ contributions” where the survey showed consumers images, asked them questions about those images, and did not include a quasi-filter “don’t know” answer option), and a trademark where test/control design is commonly used to measure consumer perceptions between two trademarks, including “forward confusion” and “reverse confusion.” *Valador, Inc. v. HTC Corp.*, 242 F.Supp.3d 448, 453, 463 (E.D. Va. 2017) (explicitly addressing test/control design when testing confusion between competing trademarks, and concluding that “a properly constructed likelihood of trademark confusion survey” includes a “control mark”), *aff’d*, 707 F.App’x 138 (4th Cir. 2017). (*See also* RFF-531—RFF-540).

83. *Third*, Professor Novemsky’s survey was unreliable because the results are based on two questions that were both “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), *aff’d sub nom. Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020); *see Macmillan, Inc., et al.*, 96 F.T.C. 208 (1980) (noting that “[b]ias can be introduced through ... the manner in which questions are asked in a survey,” and that “[a]nything which suggests one answer as opposed to another has the potential for creating bias”). The first question (“TAT240”) was the question Professor Novemsky used to identify the survey participants that were under a misimpression about their ability to file for free, and its answers included the options “I think I can file ... for free” and “I don’t think I can file ... for free,” which encouraged respondents to guess about what they “thought” might be true. PFF ¶¶567-569. Moreover, respondents were encouraged to select “I think I can file ... for free” in particular, because TAT240 was preceded by several other questions about whether “TurboTax” was free; by repeatedly raising the issue of TurboTax being free, respondents were primed into thinking that “I think I can file for free” was the answer to TAT240 that the survey was looking for. PFF ¶569. Indeed, several participants actually voiced that they believed they could file for free because of what the survey had indicated to them. PFF ¶¶575-576. Those responses suggest a more widespread problem with the survey, rendering its results unreliable. PFF ¶577.

Response to Conclusion No. 83:

The facts in *Fish v. Kobach*, 309 F.Supp.3d 1048, 1060 (D. Kan. 2018), aff'd sub nom. are wholly distinguishable from the facts in this matter. In that case, a survey was excluded because a statement regarding the purpose of the survey questions was read to survey respondents before they answered a set of questions, and because the survey included a “loaded” question. *Id.* at 1060-1061. The question was “In 2011 because of evidence that aliens were registering and voting in Kansas elections, the Kansas legislature passed a law requiring that people who register to vote for the first time must prove that they are United States citizens before they can become registered. Do you support or oppose this law?” *Id.* at 1060-1061. Professor Novemsky employed no “loaded” questions, which he confirmed by conducting a pretest. (FF-523). Similarly, the Commission’s decision in *Macmillan, Inc.*, 1980 FTC LEXIS 33, *152-153 (F.T.C. 1980), is distinguishable because there, the question was framed in a leading way and preceded by a letter informing the survey respondents of the purpose of the survey. The question was framed as whether “LaSalle Extension University, either through its advertising material or its representative, lead you to believe...”. *Id.* The perception survey did not frame questions in such a leading manner, or ask respondents whether “TurboTax lead them to believe” anything. (*See* IFF-592). The remainder of Intuit’s Conclusion No. 83 is not a conclusion of law; it purports to be factual assertions regarding the reliability of question TAT240. As an initial matter, the portion of purported conclusion of law that does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence shows that the perception survey, including TAT240, was reliable. (*See* RFF-567—RFF-569; RFF-575—RFF-577).

84. The second key question in the survey (“TAT255”) was used to identify the source of the survey participants’ purported misimpressions. PFF ¶¶591-592. Two of the five answer

choices in that question conformed to Complaint Counsel’s allegations in this case, increasing the likelihood that participants would respond in a way that Professor Novemsky was hoping for. PFF ¶593. In addition, by the time survey participants reached TAT255, they had already seen “TurboTax” mentioned twelve times over the course of just five questions. PFF ¶594. As a result, the participants likely understood that the researcher wanted them to choose one of the TurboTax-related answers that conformed to Complaint Counsel’s allegations. PFF ¶594. If Professor Novemsky had used a control group, he could have measured the magnitude of this effect and subtracted it out of his results. PFF ¶¶539, 595. But without a control group, he had no way of preventing the survey itself from influencing the results. PFF ¶¶539, 595.

Response to Conclusion No. 84:

This is not a conclusion of law; it purports to be factual assertions regarding the perception survey. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence shows that the perception survey, including TAT255, was reliable. (*See also* RFF-529; RFF-540—RFF-545; RFF-548—RFF-549; RFF-551—RFF-554; RFF-558; RFF-560—RFF-562; RFF-564—RFF-567; RFF-569—RFF-574; RFF-576-RFF-781; RFF-584; RFF-586—RFF-591; RFF-593—RFF-598; RFF-600—RFF-607).

85. *Fourth*, Professor Novemsky’s survey was unreliable because of its “woefully low response rate.” *In re Autozone, Inc.*, 2016 WL 4208200, at *17 (N.D. Cal. Aug. 10, 2016). The 607 people who completed the survey represented less than *five percent* of the 12,249 who started it. PFF ¶542. Low response rates render surveys unreliable and pose an impermissible risk of bias. *See, e.g., Autozone*, 2016 WL 4208200, at *17 (citing cases in excluding as unreliable a survey with a response rate of 3.43%); *University of Kansas v. Sinks*, 2008 WL 755065, at *4 (D. Kan. Mar. 19, 2008) (noting that a 2.16% response rate is “by any standard ... quite low” and that it was “extremely likely that [such a low response rate] exerted a bias on the results” (citation omitted)).

Response to Conclusion No. 85:

The matter at hand is distinguishable from the cases cited by Intuit. First, to the extent the proposed conclusion is a factual assertion regarding the response rate of the perception survey the evidence shows that the perception survey’s completion rate was reliable, and significantly higher than is represented by Intuit, at least 78%. (*See* RFF-542). Intuit reaches a lower

“response rate” because it incorrectly includes in the calculation survey respondents who started the survey without regard to who was actually eligible, but that is not survey practice and is the incorrect calculation for response rates. *Vasquez v. Leprino Foods Co.*, 2023 U.S. Dist. LEXIS 22303, *19 (N.D. Cal. June 14, 2020) (“nonresponse bias...is a form of bias that can occur when particular systematic segments of the *target population* or sample do not provide responses to a survey.”) (emphasis added); see also *In re Autozone, Inc.*, 2016 U.S. Dist. LEXIS 105746, *60 (N.D. Cal. Aug. 10, 2016) (noting that nonresponse bias is “a form of bias that can occur when particular systematic segments of the target population or sample do not provide responses to a survey.”). Considering only those who actually qualified for the perception survey, the survey completion rate was 78%, (RFF-542) which courts have found to be reliable. Cf. *Vasquez v. Leprino Foods Co.*, 2023 U.S. Dist. LEXIS 22303, *25-26 (finding a response rate of 16% reliable) (citing *Nucci v. Rite Aid Corp.*, 020 U.S. Dist. LEXIS 104164, *20 (N.D. Cal. June 14, 2020)); see also *Wallace v. Countrywide Home Loans Inc.*, 2012 U.S. Dist. LEXIS 190575, *11 (C.D. Cal. Aug. 31, 2012) (“high response rates—80% or higher—generally eliminate the need to address the issue of potential bias from nonresponse”) (quoting *Federal Judicial Center's Reference Manual on Scientific Evidence* 361, 384 (3d ed. 2011)) (cleaned up).

86. *Fifth*, the survey is unreliable because Professor Novemsky’s survey population included only respondents who were likely unfamiliar with TurboTax’s advertising and products. Professor Novemsky excluded from his survey pool (1) all participants who indicated they would have simple returns and therefore qualify to file for free, PFF ¶¶543-545, and (2) all participants who had already filed their tax return for Tax Year 2021 by the time they took the survey in March 2022, PFF ¶¶546-549. Professor Novemsky also designed Group A—which he called his “main group of interest”—to include only participants who had not used TurboTax in the last three years and were thus unlikely to have seen or paid attention to TurboTax advertising. PFF ¶¶550-552.

Response to Conclusion No. 86:

This is not a conclusion of law; it purports to be factual assertions regarding the perception survey and the survey population. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the

proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence shows that the perception survey population was reliable. (See RFF-543—RFF-549; RFF-550—RFF-552).

87. Courts routinely reject surveys that have an unrepresentative and biased survey population. See *Citizens Financial Group, Inc. v. Citizens National Bank of Evans City*, 383 F.3d 110, 118-121 (3d Cir. 2004) (affirming the exclusion of a survey that used an unrepresentative sample); *Amstar Corp. v. Domino’s Pizza, Inc.*, 615 F.2d 252, 264 (5th Cir. 1980) (“[W]e do not believe that the proper universe was examined, and the results of the survey must therefore be discounted.”); *In re Fluidmaster, Inc., v. Water Connector Components Product Liability Litigation*, 2017 WL 1196990, at *28 (N.D. Ill. Mar. 31, 2017) (finding survey testimony unreliable where the expert did not survey a representative sample population); *Malletier v. Dooney & Bourke, Inc.*, 525 F.Supp.2d 558, 630-631 (S.D.N.Y. 2007) (finding a survey methodology unreliable where respondents were not representative of the consumers whose confusion mattered in the case).

Response to Conclusion No. 87:

The cases cited by Intuit regarding biased survey populations are distinguishable, which perhaps explains why Intuit makes no effort to apply them to the instant matter. In *Citizens Financial Group, Inc. v. Citizens National Bank of Evans City*, 383 F.3d 110, 118-121 (3d Cir. 2004), the court held that conducting a survey about a bank in a geographic area in which the bank was not present, outside of the bank’s market, was improper. There is no question that the perception survey population included consumers in the TurboTax market. (FF-510—FF-511). In *Amstar Corp. v. Domino’s Pizza, Inc.*, 615 F.2d 252, 264 (5th Cir. 1980), the court determined that the survey universe was flawed because it surveyed consumers in cities that did not have a Domino’s Pizza location, which was improper because “the appropriate universe should include a fair sampling of those purchasers most likely to partake of the alleged infringer’s goods or service.” The perception survey sampled consumers who were considering using an online tax software to file their 2021 taxes (FF-510), and easily could have decided to use TurboTax. In *In re Fluidmaster, Inc., Water Connector Components Product Liability Litigation*, 2017 WL 1196990, at *28 (N.D. Ill. Mar. 31, 2017), the court found a surveyed population unrepresentative where the product at issue was a toilet primarily purchased by wholesale

plumbing companies, but the survey population consisted of individual consumers, a minority of whom would have purchased the toilet directly. These facts again are distinct from the perception survey population of individual consumers because TurboTax is, by its nature, purchased directly by the consumer. Finally, Intuit misplaces its reliance on *Malletier v. Dooney & Bourke, Inc.*, 525 F.Supp.2d 558, 630-631 (S.D.N.Y. 2007), where the Court found that surveying consumers in low- to midscale malls was not the correct population to identify consumers who might purchase a Louis Vuitton handbag. Once again, the perception survey population of consumers who were considering using an online tax preparation provider (FF-510) was precisely the group most likely to use TurboTax, making the *Malletier* case entirely distinguishable.

88. *Sixth*, Professor Novemsky failed to safeguard against potential biases within his survey population, rendering the survey unreliable. Because bias causes “lack of reliability,” “it is imperative to make the effort to avoid it.” *Macmillan, Inc.*, 96 F.T.C. 208; *see also Standard Oil Co. of California*, 84 F.T.C. 1401 (1974) (faulting survey due to “the possibility of various kinds of bias”). Professor Novemsky failed to make an effort to avoid bias by, for example, failing to screen out participants who might have been biased against Intuit due to awareness about the FTC’s investigation into the company. PFF ¶¶560-564.

Response to Conclusion No. 88:

Complaint Counsel agrees that bias can cause lack of reliability in surveys, and that it is imperative to make an effort to avoid bias. However, the cases cited by Intuit are distinguishable from the facts of the perception survey as they address bias caused a wide variety of issues, including by telling respondents about the purpose of the survey before they answered any questions, *In re Macmillan, Inc.*, 1980 FTC LEXIS 33, *199 (F.T.C. 1980), which the perception survey avoided. Moreover, the survey at issue in *Macmillan* introduced bias through a variety of ways that the perception survey guarded against. *Id.* at 152-153, 201-203 (noting also that the survey failed to provide “don’t know” answer options, did not control for order effects, and included leading questions that asked survey respondents whether “LaSalle Extension University, either through its advertising material or its representative, lead you to believe...”). To the extent this conclusion is a factual assertion regarding a purported bias in the perception survey population, without repeating everything contained in all of Complaint Counsel’s Post-

Trial Filings, it suffices to say that the evidence shows that the perception survey population was not biased. (*See* RFF-560—RFF-564).

89. Professor Novemsky introduced another likely source of bias into the survey by allowing respondents to opt out. When participants completed the survey, they were informed that the survey was “being conducted on behalf of the [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,” and that respondents’ answers “could help [the FTC] further [its] mission under the FTC Act to protect consumers.” PFF ¶¶555-556. Upon receiving that information, over 20% of the participants chose to opt out of the survey, and their answers to the survey questions were deleted. PFF ¶557.

Response to Conclusion No. 89:

This is not a conclusion of law; it purports to be factual assertions regarding the perception survey respondents who opted out. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence shows that the perception survey population was not biased by respondent opt-outs. (*See* RFF-555—RFF-557).

90. By allowing participants to opt out after disclosing the survey’s sponsor and purpose, Professor Novemsky created a large risk that individuals with favorable views towards Intuit—who would not want to contribute to something that would be harmful to the company—would be disproportionately likely to opt out. PFF ¶¶558-559. The results from such a non-representative survey are unreliable. As the Commission itself has recognized, “complete[] transparen[cy] about the nature or purpose of a survey” may “create bias in ... consumers’ decision to participate in the survey or potentially result in biased responses”—a flaw that “would affect the accuracy and validity of the information collected and effectively nullify the survey.” PFF ¶558. The Commission has repeatedly argued to federal courts that revealing a survey’s sponsor and purpose is an error that, at minimum, warrants giving the survey less weight. FTC’s Mot. To Exclude Expert Testimony (Dkt. 155) at 7, *FTC v. LendingClub Corp.*, No. 3:18-cv-02454 (N.D. Cal. Feb. 27, 2020); FTC’s Reply ISO Mot. for Summ. J. (Dkt. 315) at 8, *FTC v. Kutzner*, No. 8:16-cv-00999 (C.D. Cal. Aug. 14, 2017); *see also Autozone*, 2016 WL 4208200 at *8 (excluding a survey because its purpose “was no mystery,” creating “a problem of self-interest bias”).

Response to Conclusion No. 90:

Courts have found that disclosure of a survey's sponsor is not fatal to a survey's reliability. *FTC v. LendingClub Corp.*, 2020 U.S. Dist. LEXIS 95703, at *42 (N.D. Cal. June 1, 2020). What is more, the perception survey's high completion rate (RFF-542), may "eliminate the need to address the issue of potential bias from nonresponse" all together. *Wallace v. Countrywide Home Loans Inc.*, 2012 U.S. Dist. LEXIS 190575, *11 (C.D. Cal. Aug. 31, 2012) (holding that a survey response rate of 80% or higher eliminated the need to address issues of potential bias from nonresponse.). The cases cited by Intuit are also distinguishable. First, the FTC brief cited by Intuit in *FTC v. Kutzner*, No. 8:16-cv-00999 (C.D. Cal. Aug. 14, 2017) argues that the survey in that matter was distinguishable from the survey in the *Autozone* matter in that it did not disclose the "the nature or purpose of the survey" FTC's Reply ISO Mot. for Summ. J. (Dkt. 315) at 8-9, *FTC v. Kutzner*, No. 8:16-cv-00999 (C.D. Cal. Aug. 14, 2017). But the survey in that matter did disclose that the survey was being conducted on behalf of the FTC. See Expert Report Submitted by Bruce Isaacson (Dkt. 284-6) at 9, *FTC v. Kutzner*, No. 8:16-cv-00999 (C.D. Cal. July 7, 2017). The court found the survey in that matter, including disclosure of the survey's sponsor, to be reliable. Order Re Plaintiff's Motion for Summary Judgment (Dkt. 347) at 7, *FTC v. Kutzner*, No. 8:16-cv-00999 (C.D. Cal. Sept. 5, 2017). The *Autozone* matter is distinguishable because, in that case, survey respondents were told explicitly that the survey was related to a class action matter, a disclosure the court found likely to create self-interest bias because respondents could have answered in a way to ensure they could benefit from the class action, an issue that was not present with the perception survey opt-out question. *In re Autozone, Inc.*, 2016 U.S. Dist. LEXIS 105746, *63 (N.D. Cal. Aug. 10, 2016) (respondents were told "[y]our contact information was obtained as part of a class action lawsuit involving individuals who worked at Autozone in the state of California between July 2005 and December 2012. . . . The information you provide will be used in connection with this lawsuit to help resolve it.").

91. *Seventh*, Professor Novemsky's results are inconsistent with other metrics concerning consumers' understanding of their ability to file for free using TurboTax. PFF ¶¶609-

610, 702-711, 743-745. The significant gap between Professor Novemsky's results and the rest of the evidence in this case provides further support for finding Professor Novemsky's survey unreliable. *See* PFF ¶¶612-613.

Response to Conclusion No. 91:

This is not a conclusion of law; it purports to be factual assertions regarding purported data inconsistencies. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that the evidence shows that the perception survey results were not inconsistent with other metrics in this case. (*See* RFF-609—RFF-610; RFF-612—RFF-613; RFF-702—RFF-711; RFF-743—RFF-745).

92. *Finally*, Professor Novemsky overstated the results of the survey, which in fact reveal that only a small percentage of the respondents who attributed their misimpression to the TurboTax advertisements and/or website did so with any reasonable degree of reliability. PFF ¶614. The proportion of respondents who (1) were mistaken about their Free Edition eligibility, (2) gave consistent survey responses, and (3) named only TurboTax advertisements and/or the TurboTax website as the source of their impression was just 5.6%. PFF ¶¶620-622; *see also* PFF ¶¶615-619. That 5.6% is far below what is required to prove deception. *See Telebrands*, 140 F.T.C. at 446-448 (“FTC cases suggest that the Commission would be justified in considering levels of ten percent net takeaway sufficient,” and citing cases holding similarly).

Response to Conclusion No. 92:

This is not a conclusion of law; it purports to be factual assertions regarding the number of consumers in the perception survey who had the misimpression that they could file for free based on TurboTax advertising. Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that the evidence shows that the perception survey results showed that a majority, or at least a significant minority (over 10%) of consumers were deceived by TurboTax advertising. (*See* RFF-615—RFF-622).

E. The Number Of Consumer Complaints Identified By Complaint Counsel Proves That No Significant Minority Of Reasonable Consumers Was Deceived

93. Complaint Counsel point to 228 consumer complaints found in the FTC's Consumer Sentinel database in support of their argument that reasonable consumers were likely to be deceived by the challenged ads. PFF ¶¶627-630. That reliance is misplaced.

Response to Conclusion No. 93:

This is not a conclusion of law; it purports to be factual assertions regarding the number of consumers complaints in Consumer Sentinel. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that the evidence shows that consideration of the Consumer Sentinel Complaints was appropriate. (*See* RFF-627—RFF-630). Moreover, to prevail on the deception count in this matter, Complaint Counsel is not required to show, through consumer complaints or otherwise, that any one consumer was actually deceived by relying on Intuit's advertising. *In re Viral Response Systems, Inc.*, 1991 FTC LEXIS 409, *1 (Aug. 28, 1991); *FTC v. Wilcox*, 926 F. Supp. 1091, 1099 (S.D. Fla. 1995) (finding that the FTC “is only required to show that it is likely, not that it is certain, that a reasonable consumer would be [sic] misled.”) (quoting *FTC v. US Sales Corp.*, 785 F. Supp. 737, 748 (N.D. Ill. 1992) (internal quotations omitted); *see also In re Consumers Products of America, Inc.*, 72 F.T.C. 533, 557 n.13 (F.T.C. 1967); *Independent Directory Corp. v. FTC*, 188 F.2d 468, 471 (2nd Cir. 1951).

94. To start, the 228 complaints identified by Complaint Counsel are likely not all relevant or reliable. Several complaints do not relate to the deception alleged here, and for many others the relevance is unclear. PFF ¶¶634-636. Some complaints, for instance, appear to parrot reporting about Intuit in the news media, PF ¶634, making it unclear whether the complaints are describing the consumers' actual experiences. Complaint Counsel's investigator also recognized that many consumers did not include all relevant information in their complaints. PFF ¶¶633, 918.

Response to Conclusion No. 94:

This is not a conclusion of law; it purports to be factual assertions regarding the number of consumers complaints in Consumer Sentinel and their reliability and relevance. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence shows consideration of the Consumer Sentinel Complaints included in the record was appropriate. (*See* RFF-633—RFF-636; RFF-918). Moreover, courts have found that “[t]he meaning of a lack of complaints to the BBB is indeterminate.” *FTC v. Voc. Guides, Inc.*, 2006 U.S. Dist. LEXIS 82308, *40 (M.D. Tenn. 2006); *see also U.S. v. Lassetter*, 2005 U.S. Dist. LEXIS 23426, 2005 WL 1638735 at *4 (M.D. Tenn. 2005) (“[F]ailure by consumer victims to file a complaint with the FTC does not indicate that the Defendant has complied with the [FTC] Act.”); *In re Brake Guard Prods., Inc.*, 125 F.T.C. 138, 247 (1998) (“The number of consumer complaints has no bearing on whether the public is being harmed by the respondents’ false or unsubstantiated claims.”).

95. Given the uncertain relevance and reliability of many of the complaints, it was important to verify the complaints’ accuracy and confirm that they had probative value in this proceeding. Yet Complaint Counsel did not contact most of the consumers or otherwise confirm the complaints’ accuracy or relevance. PFF ¶633. Instead, Complaint Counsel’s investigator attempted to contact just twelve complainants, and ultimately spoke to only two. PFF ¶918. Moreover, Complaint Counsel’s investigator did not read most of the complaints she compiled for this proceeding. PFF ¶917. Irrelevant and unreliable complaints do not support Complaint Counsel’s claim.

Response to Conclusion No. 95:

This is not a conclusion of law; it purports to be factual assertions regarding the number of consumers complaints in Consumer Sentinel and their reliability and relevance. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited

to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence shows consideration of the Consumer Sentinel Complaints included in the record was appropriate. (*See* RFF-633; RFF-917—RFF-918). Moreover, courts have found consumer complaints submitted to the FTC to be reliable and trustworthy. *See FTC v. Figgie Int’l*, 994 F.2d 595, 608 (9th Cir. 1993) (discussing admissibility of consumer complaints); *see also, e.g., FTC v. Ewing*, No. 2:07-cv-479, 2014 WL 5489210, at *2–3 (D. Nev. Oct. 29, 2014); *FTC v. AMG Servs., Inc.*, No. 2:12-cv-536, 2014 WL 317781, at *15–16 (D. Nev. Jan. 28, 2014); *FTC v. Mag. Sols., LLC*, No. 07-cv-692, 2009 WL 690613, at *2–3 (W.D. Pa. Mar. 16, 2009); *FTC v. Direct Benefits Grp., LLC*, No. 6:11-cv-1186, 2012 WL 5508050, at *2 (M.D. Fla. Nov. 14, 2012); *FTC v. Zamani*, No. 09-cv-977, 2011 WL 2222065, at *1 (C.D. Cal. June 6, 2011), as amended (Sept. 28, 2011); *FTC v. Cyberspace.com, LLC*, No. 00-cv-1806, 2002 WL 32060289, at *3 n.5 (W.D. Wash. July 10, 2002).

96. Even considering all 228 complaints identified by Complaint Counsel, that small number proves that no significant minority of reasonable consumers was deceived. PFF ¶631. The 228 complaints represent just 0.0003% of the 86.4 million TurboTax customers who completed at least one return during the Tax Year 2015 to 2021 period. PFF ¶¶631-632. When calculated in terms of complaints per 1,000 consumers, the complaint rate would be only 0.0025—much lower than the range of 0.35 to 143.8 in other FTC consumer protection cases. PFF ¶¶641-642; *see also* PFF ¶¶643-644, 646. And when calculated based on the contention that over 100 million consumers could have been deceived, the complaint rate is so low that Complaint Counsel’s rebuttal expert, Mr. Yoeli, said he “can’t keep track of the zeros.” PFF ¶645. Those small complaint rates do not support a finding that a significant minority of reasonable consumers was deceived.

Response to Conclusion No. 96:

This is not a conclusion of law; it purports to be factual assertions regarding the number of consumers complaints in Consumer Sentinel. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the

evidence shows consideration of the Consumer Sentinel Complaints included in the record was appropriate. (See RFF-631—RFF-632; RFF-641—RFF-646). Moreover, courts have found that “[t]he meaning of a lack of complaints to the BBB is indeterminate.” *FTC v. Voc. Guides, Inc.*, 2006 U.S. Dist. LEXIS 82308, *40 (M.D. Tenn. 2006); see also *U.S. v. Lasseter*, 2005 U.S. Dist. LEXIS 23426, 2005 WL 1638735 at *4 (M.D. Tenn. 2005) (“[F]ailure by consumer victims to file a complaint with the FTC does not indicate that the Defendant has complied with the [FTC] Act.”); *In re Brake Guard Prods., Inc.*, 125 F.T.C. 138, 247 (1998) (“The number of consumer complaints has no bearing on whether the public is being harmed by the respondents’ false or unsubstantiated claims.”).

97. The small number of complaints is also inconsistent with the allegation of widespread deception given how many times the challenged ads ran. Over the six-year period in which the 228 complaints were submitted, Intuit’s ads were distributed tens of billions of times. PFF ¶637. During just two of the years covered in the complaint—Tax Years 2020 and 2021—the ads at issue were displayed over 15 billion times and clicked on over 130 million times. PFF ¶637. Even considering only the advertisement clicks from Tax Years 2020 and 2021, and ignoring consumers who would have seen ads through other mediums in other years, the full set of 228 complaints amount to just 0.000175% of those who clicked a TurboTax ad. PFF ¶637. A complaint rate that low does not support finding that a significant minority of reasonable consumers was deceived.

Response to Conclusion No. 97:

This is not a conclusion of law; it purports to be factual assertions regarding the number of consumers complaints in Consumer Sentinel. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence shows consideration of the Consumer Sentinel Complaints included in the record was appropriate and did not show a lack of deception. (See RFF-637). Moreover, courts have found that “[t]he meaning of a lack of complaints to the BBB is indeterminate.” *FTC v. Voc. Guides, Inc.*, 2006 U.S. Dist. LEXIS 82308, *40 (M.D. Tenn. 2006); see also *U.S. v. Lasseter*, 2005 U.S.

Dist. LEXIS 23426, 2005 WL 1638735 at *4 (M.D. Tenn. 2005) (“[F]ailure by consumer victims to file a complaint with the FTC does not indicate that the Defendant has complied with the [FTC] Act.”); *In re Brake Guard Prods., Inc.*, 125 F.T.C. 138, 247 (1998) (“The number of consumer complaints has no bearing on whether the public is being harmed by the respondents’ false or unsubstantiated claims.”).

98. If Intuit had engaged in a multi-year marketing campaign that was deceptive, as Complaint Counsel contend, one would expect to see a significant number of consumer complaints. PFF ¶¶624-625, 647. But, as in *DirecTV*, “this case did not involve the type of strong proof the Court would expect to see in a case ... based on a claim that” millions of consumers were exposed to deceptive ads over a period of several years. *DirecTV*, 2018 WL 3911196, at *19; *see also* PFF ¶647.

Response to Conclusion No. 98:

Intuit’s reliance *FTC v. DirecTV, Inc.*, No. 15-cv-01129, 2018 WL 3911196 (N.D. Cal. Aug. 16, 2018) to argue that an absence of customer complaints indicates an absence of deception is entirely misplaced and does not reflect any holding from that case (in fact, the *DirecTV* matter cited by Intuit does not involve any discussion of “complaints” at all). Rather, in the - matter, the court considered consumer satisfaction scores as part of its assessment of evidence proffered by the FTC regarding findings made by *DirecTV*’s Customer Experience Steering Committee. *Id.* at *18. The court did not conclude that high consumer satisfaction scores meant that the company did not violate the FTC Act. Rather, the court found that the FTC’s evidence regarding the Committee failed to support a finding that the Act was violated. *Id.*; *see also Intuit*, 2023 WL 1778377, at *12 n.13 (discussing *DIRECTV*); *see also* RFF-624—RFF-625; RFF-647).

99. Professor Golder’s complaint benchmarking analysis provides further evidence that consumers have not complained about Intuit’s advertising at rates that reflect deception. PFF ¶¶638-640. That far fewer consumers complained about Intuit relative to other companies further undermines the suggestion that Intuit engaged in a deceptive advertising campaign, much less in a widespread and long-term one.

Response to Conclusion No. 99:

This is not a conclusion of law; it purports to be factual assertions regarding Professor Golder’s flawed and uninformative benchmarking exercise. Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence shows that Professor Golder’s benchmarking was uninformative and unreliable. (See RFF-638—RFF-640). Moreover, to prevail on the deception count in this matter, Complaint Counsel is not required to show, through consumer complaints or otherwise, that any one consumer was actually deceived by relying on Intuit’s advertising. *In re Viral Response Systems, Inc.*, 1991 FTC LEXIS 409, *1 (Aug. 28, 1991); *FTC v. Wilcox*, 926 F. Supp. 1091, 1099 (S.D. Fla. 1995) (finding that the FTC “is only required to show that it is likely, not that it is certain, that a reasonable consumer would be [sic] misled.”) (quoting *FTC v. US Sales Corp.*, 785 F. Supp. 737, 748 (N.D. Ill. 1992) (internal quotations omitted); see also *In re Consumers Products of America, Inc.*, 72 F.T.C. 533, 557 n.13 (F.T.C. 1967); *Independent Directory Corp. v. FTC*, 188 F.2d 468, 471 (2nd Cir. 1951).

F. Data Concerning Consumers’ Experiences Show That Reasonable Consumers Were Not Deceived

100. Numerous metrics concerning consumers’ experiences with TurboTax provide evidence that those experiences were consistent with consumers’ expectations, including expectations created by the challenged ads. See *DirecTV*, 2018 WL3911196, at *18.

Response to Conclusion No. 100:

Intuit’s reliance *FTC v. DirecTV, Inc.*, No. 15-cv-01129, 2018 WL 3911196 (N.D. Cal. Aug. 16, 2018) to argue that “numerous metrics” (itself a phrase so vague as to make this Conclusion meaningless, and improper) provide evidence inconsistent with deception is entirely misplaced and does not reflect any holding from that case (in fact, the *DirecTV* matter cited by Intuit does not involve any discussion of “metrics” at all). Regardless “metrics” Intuit refers to, the determination of whether a representation or omission is deceptive turns on whether it is likely to mislead, not whether it has caused actual deception. Deception Policy Statement at 176; *Thompson Med. Co. v. FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986); *Trans World Accts., Inc. v. FTC*,

594 F.2d 212, 214 (9th Cir. 1979) (“[p]roof of actual deception is unnecessary to establish a violation of Section 5”).

101. Intuit data demonstrates that reasonable consumers were not misled into believing that all TurboTax products were free or that TurboTax would be free for them, only to find out later that was not the case. PFF ¶¶648-662. For example, consumers abandon TurboTax’s paid and free products at the same 22% rate, reflecting that consumers were not abandoning because they expected to file for free but were then informed that they must pay to file with TurboTax. PFF ¶¶656-658. Moreover, more than █████ of consumers between Tax Years 2014 and 2021 started and finished in the same TurboTax SKU, demonstrating that Intuit is successful in getting customers started in the right SKU for their tax situation and not misleading those consumers. *See* PFF ¶¶661-662; *see also* PFF ¶¶659-660. Intuit’s 83% retention rate for paid TurboTax customers—the consumers who allegedly were deceived into inaccurately thinking they could file for free—further reflects that TurboTax consumers were not deceived. PFF ¶¶649-651. And TurboTax’s consistently high customer ratings and positive reviews exhibit the absence of consumer anger or frustration that would be expected if Intuit had deceived those consumers. PFF ¶¶652-654.

Response to Conclusion No. 101:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the factual question of what inferences to make from Intuit’s data, including the reliability of Mr. Deal’s expert opinion. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record... All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports that Intuit’s data does not preclude deception. (*See, e.g.*, RFF ¶¶648-662).

102. Reliable testimony and expert analysis from Bruce Deal further undermines Complaint Counsel’s claim that the challenged ads were likely to have deceived reasonable consumers. As Mr. Deal explained, Intuit’s Tax Year 2021 customer-level data reflects that only 510 customers, less than 1% of the Tax Year 2021 customer base, even potentially viewed themselves as having been deceived. PFF ¶¶679-682; *see also* PFF ¶¶663-678.

Response to Conclusion No. 102:

Same response as RCL-101. (*See also*, RFF ¶¶663-682).

G. Reliable Consumer Testing And Survey Evidence Reflects That No Significant Minority Of Reasonable Consumers Was Deceived

103. Where deceptiveness is not apparent from the face of the challenged advertising, courts “will not find” a likelihood of deception “unless extrinsic evidence allows [it] to conclude” that reasonable consumers were likely to be deceived. *Telebrands*, 140 F.T.C. at 429; *see also United States v. Bayer Corp.*, 2015 WL 5822595, at *11 (D.N.J. Sept. 24, 2015); *accord FTC v. National Urological Grp., Inc.*, 645 F.Supp. 2d 1167, 1193 (N.D. Ga. 2008), *aff’d*, 356 Fed. Appx. 358 (11th Cir. 2009). This Court will not find a likelihood of deception where the “available extrinsic evidence” cuts *against* such a finding. *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992).

Response to Conclusion No. 103:

Intuit misstates the law. “In determining the meaning of individual advertisements, [the Court] primarily relie[s] on [its] knowledge and experience to determine what impression or impressions an advertisement as a whole is reasonably likely to convey to a consumer. When [its] initial determination is confirmed by the expert testimony of complaint counsel or respondent, [it] rest[s]. When [its] initial determination disagree[s] with that of expert testimony, which [is] often conflicting, [the Court] reexamine[s] the advertisement in question, and further consider[s] other record evidence such as copy tests and other consumer research before reaching a final determination. [The Court does] not rel[y] on such extrinsic evidence when, after careful study and reflection, [the Court finds] it to be unpersuasive and contrary to the weight of evidence.” *POM Wonderful*, 153 F.T.C. at 1334–35 (Chappell, C.A.L.J.) (quoting *Thompson Med., Inc.*, 104 F.T.C. at 688 at ¶ 79 (1984)). Here, Intuit mischaracterizes the holding in *Telebrands*, where the Commission determined that “if, based on [an] initial review of the evidence from the advertisement itself, we cannot conclude with *confidence* that an advertisement can *reasonably be read* to contain a particular implied message, we will not find the ad to have made the claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable.” *Telebrands*, 140 F.T.C. at 429 (quoting *Kraft*, 114 F.T.C. at 121) (emphasis added). In this case, the Court can determine that Intuit’s free ads can “reasonably be read” to contain the message that TurboTax is free.

104. Complaint Counsel did not offer any reliable consumer testing that supports their claim that reasonable consumers were likely to be deceived by the challenged ads. Their primary

evidence—Professor Novemsky’s survey—cannot be relied on for all the reasons given above. *See* PFF ¶¶528-622. Complaint Counsel have not offered any other survey evidence establishing that reasonable consumers were likely to be deceived.

Response to Conclusion No. 104:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the factual question of the reliability and implications of the survey evidence Provided by Professor Novemsky. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports the reliability of the perception survey. (*See, e.g.*, RFF-528—RFF-622).

105. Intuit, meanwhile (despite having no burden of proof), offered reliable consumer testing and survey evidence establishing that the challenged ads were not likely to deceive reasonable consumers. *See* PFF ¶¶683-721.

Response to Conclusion No. 105:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the evidence presented by Intuit and the implications of that evidence. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence, including evidence provided by Intuit, establishes that the challenged ads were likely to deceive reasonable consumers. (*See, e.g.*, RFF-683—RFF-721).

106. Reliable expert survey evidence further reflects that no significant minority of reasonable consumers was deceived by the challenged ads. *See* PFF ¶¶722-760.

Response to Conclusion No. 106:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the expert survey evidence presented by Intuit and the implications of that evidence. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence, including the unreliable expert survey evidence provided by Intuit, establishes that the challenged ads were likely to deceive reasonable consumers. (*See, e.g.*, RFF-722—RFF-760).

H. Detailed Information Is Clear, Upfront, And Ubiquitous On TurboTax.com

107. To the extent consumers were uncertain or confused about whether a free TurboTax offer being advertised was qualified or whether it was free for them, TurboTax’s website would have promptly made clear both the existence and the specifics of the qualifications for the offer. Because the information on the TurboTax website is “readily available to the consumer,” it must be considered. *Moore*, 4 F.4th at 882.

Response to Conclusion No. 107:

Same response as RCL-53.

108. At the TurboTax website, consumers were (and are) presented with clear, prominent, and repeated information about the qualifications for TurboTax’s free offers. PFF ¶¶374-378, 390, 396-397, 415-416. The presence of repeated hyperlinks also informs consumers of the existence of a restriction, thereby making clear the free TurboTax offer is not unqualified. PFF ¶314; *see also* PFF ¶¶520-521; *cf.* RX96 (FTC .com Disclosures Guidelines) at 11-13, A-8. Moreover, this information is visible before consumers begin preparing their returns or even give TurboTax their name. PFF ¶396. 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.

Response to Conclusion No. 108:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the factual question of whether Intuit’s disclosures were adequate. As an initial matter, the

purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports that Intuit’s disclosures are inadequate. (*See, e.g.*, RFF ¶¶ 314, 369-370, 374-378, 390, 396-397, 415-416, 520-521).

109. When consumers clicked a “simple returns” hyperlink on any of the TurboTax webpages, a window detailing the qualifications for the free offer in question popped up on the screen. PFF ¶¶379-383, 391, 415-416. Including these details in a pop-up screen made them more noticeable because it “disrupt[ed] the consumer’s viewing pattern to draw their attention to something that’s really important.” PFF ¶383. Using a pop-up screen was also important because doing so avoided overwhelming consumers with too much information that they would be likely to tune out. PFF ¶¶379, 383.

Response to Conclusion No. 109:

Same response as RCL-108. (*See also* RFF ¶¶ 379, 383).

110. The TurboTax Products & Pricing page and SKU selector tool, seen by all new customers before starting their tax return, also serve as a bulwark against deception. PFF ¶¶408-409. That page provided additional details about each TurboTax product, including the prices of each and relevant qualifications, PFF ¶¶413-414, and multiple disclosures stating that TurboTax Free Edition is available for “simple tax returns only,” PFF ¶¶415-416. The Products & Pricing also included a “SKU selector” tool, which enables consumers to receive a recommendation for the TurboTax SKU most likely suited to their tax situation. PFF ¶¶419-420.

Response to Conclusion No. 110:

Same response as RCL-108. (*See also* RFF ¶¶ 408-409, 413-416, 419-420).

111. TurboTax’s website (1) provided consumers with all the information they would need to determine whether they qualified for a free offer, (2) presented that information in a way most likely to be useful to consumers, and (3) made that information available before consumers started preparing their return. The ample disclosures of free product eligibility and tools to assist consumers in their SKU selection process on TurboTax’s website further undermine any claim that consumers were deceived.

Response to Conclusion No. 111:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of the factual question of whether Intuit’s website cures its deceptive ads or is itself deceptive. As

an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports that Intuit’s website fails to cure consumer deception and is itself deceptive. (*See, e.g.*, FF-483, *see also* FF-455—FF-466).

IV. Complaint Counsel Failed To Prove Materiality

112. To establish liability, Complaint Counsel had the burden to prove that any alleged deception was material, i.e., “likely to affect a consumer’s choice of or conduct regarding a product,” FTC Policy Statement on Deception, 103 F.T.C. at 182. Complaint Counsel failed to meet that burden. They have not argued that any purportedly misleading claim allegedly conveyed by the challenged ads “was likely to influence consumers’ purchasing decisions,” *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 68 (2d Cir. 2016), nor have they offered evidence that any such claim was likely to affect any other relevant conduct.

Response to Conclusion No. 112:

Complaint Counsel disagrees that it has not provided evidence that the challenged ads were likely to influence consumer behavior. The record is clear that Intuit knew the “free” ads were likely to influence consumers, and further demonstrates that the challenged ads did, in fact, influence consumers. (*See e.g.*, FF-26; FF-28—FF-29; FF-596; FF-614—FF-615; FF-619; FF-621—FF-623; FF-635—FF-637; FF-642—FF-647; FF-649—FF-651; FF-655—FF-660; FF-665; FF-804—FF-806). Moreover, to the extent Intuit suggests Complaint Counsel had the burden to show that consumer conduct was actually affected by the ads, even though the record is clear, it is not a requirement to prove deception. “Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions.” *FTC v. Figgie Int’l*, 994 F.2d 595, 605 (9th Cir. 1993); *see also In re ECM BioFilms, Inc.*, 2015 FTC LEXIS 22, *597 (F.T.C. January 28, 2015). Moreover, express and intentional claims as those at issue in this matter are presumptively material. *In re Thompson Medical Co., Inc.*, 104 F.T.C. 648, 788 (1984); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095-96 (9th Cir. 1994);

Deception Policy Statement, 103 F.T.C. at 182; *In re Intuit Inc.*, 2023 FTC LEXIS 18, *38 (F.T.C. January 31, 2023); *Kraft Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992); *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 856 (D. Mass. 1992). Lastly, the case cited by Intuit is distinguishable, where the court and the parties attempted to parse the meaning of images of a sun and a moon printed in a brochure, and where plaintiffs provided no extrinsic evidence whatsoever regarding consumer impressions. *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 66-68 (2d Cir. 2016). The claims in this case are clear on their face, and what is more, Complaint Counsel has provided extensive evidence of consumer perceptions and misimpressions regarding those claims.

113. Complaint Counsel's theory of materiality—that the alleged deception was material because consumers were drawn to the TurboTax website by the challenged ads and thus wasted time, effort, and in some cases money, amounting to harm that “can't be remedied by subsequent disclosures,” PFF ¶781—is refuted by the record in this case.

Response to Conclusion No. 113:

Intuit misstates Complaint Counsel's position. Intuit correctly recites Complaint Counsel's theory regarding Intuit's deceptive door openers. *See* RCL 52–56. But as laid out in Complaint Counsel's opening statement, and in its Pretrial Brief, Post-Trial Brief, and Motion for Summary Judgment, Complaint Counsel's position on materiality is that “price, especially whether something is free or not, is material to consumers.” Evans (Complaint Counsel) Tr. 50; *see also* Complaint Counsel's Pretrial Brief at III.C; Complaint Counsel's Post-Trial Brief at III.C.; Complaint Counsel's Motion for Summary Decision at III.C). A claim is material if it “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.” *FTC v. Cyberspace.com*, 453 F.3d 1196, 1201 (9th Cir. 2006) (quotation omitted); *see also* Deception Policy Statement, at 182; *Kraft*, 970 F.2d at 322; *Jerk*, 159 F.T.C. at 891. The record in this matter clearly establishes that price is important to consumers. (RFF-781).

114. Consumers do not make a decision about whether to purchase a TurboTax product until they have completed their tax return and are about to file it, which occurs after seeing the

TurboTax website, any upgrade screens encountered within a TurboTax product (if any), and a final summary of the products they are purchasing. PFF ¶782. As Complaint Counsel have recognized, “consumers learn that TurboTax Free Edition is not free for them prior to purchasing a paid version of TurboTax.” PFF ¶782. Professor Golder further explained that consumers have not “already made their purchase decision” when they arrive at the TurboTax website, in part because the selection of a particular tax-filing method entails “a high-involvement purchase process,” which consumers approach with “care and consideration” and “in a thoughtful, deliberative manner.” PFF ¶782.

Response to Conclusion No. 114:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of factual questions regarding consumer conduct on the TurboTax website. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports that Intuit’s website fails to cure consumer deception and is itself deceptive. (*See, e.g.*, RFF-782).

115. Complaint Counsel offered no evidence proving that advertisements seen before arriving on the TurboTax website are material to consumers’ ultimate purchasing decision. PFF ¶779.

Response to Conclusion No. 115:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of factual questions regarding the evidence in the trial record regarding the importance of Intuit’s free claims to consumers before they reach the TurboTax website. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial

Filings, it suffices to say that the evidence supports that Intuit's free claims are material. (*See, e.g., RFF-779*).

116. Complaint Counsel also failed to prove that any allegedly misleading claim conveyed by the challenged ads was responsible for driving consumers to the TurboTax website or causing consumers to pay for TurboTax. PFF ¶784. And other unrebutted evidence shows that reasonable consumers do not rely solely (or even primarily) on ads when making decisions to try or purchase a tax-preparation product, but rather consult multiple sources, including friends and family, internet research, third-party reviews, and the IRS website. *See* PFF ¶¶505, 736-742, 786-787. That undermines any suggestion that the claims in the challenged ads were material.

Response to Conclusion No. 116:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of factual questions regarding evidence of what brought consumers to the TurboTax website and what consumers rely on in deciding what tax preparation service to use. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record... All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that the evidence supports that Intuit's free claims are material. (*See, e.g., RFF-505; RFF-736—RFF-742; RFF-784; RFF-786—RFF-787*).

117. Complaint Counsel's theory independently fails because even if the claims allegedly conveyed by Intuit's ads drove consumers to the TurboTax website, that does not establish materiality. It takes only “a few seconds” to access the TurboTax website and the full product information presented there. PFF ¶790; *accord* PFF ¶793. This full product information was always accessible before consumers “ha[d] to input their name or any other personal information.” PFF ¶791. And for consumers who did input information to start the process of filing a return, they typically encountered a required upgrade screen, if such a screen were encountered at all, within just 30 minutes (a figure that likely overstates how long consumers were actively using the website). PFF ¶¶668, 792-793. Complaint Counsel have not met their burden to prove how, under these circumstances, merely visiting the TurboTax website is sufficient to establish materiality. *See* 16 C.F.R. §3.43(a)

Response to Conclusion No. 117:

This is not a conclusion of law; it purports to be a factual assertion and adjudication of factual questions regarding when consumers learn that they cannot file their taxes for free with TurboTax. Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that the evidence supports that Intuit's free claims are material. (*See, e.g.,* RFF-668; RFF-790—RFF-793). Moreover, regardless of when consumers learn that they cannot use TurboTax for free, the FTC Act "is violated if [Respondent] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract." *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975); *see also* Deception Policy Statement, at 180 & n.37; *Fleetcor*, 2022 WL 3273286, at *12 (citing cases); *FTC v. OMICS Grp. Inc.*, 374 F. Supp. 3d 994, 1010 (D. Nev. 2019), *aff'd* 827 F. App'x 653 (9th Cir. 2020); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001).

118. Finally, the challenged ads are not presumptively material simply because they mention the word free. Because the products advertised in the challenged ads *were* free, any alleged misrepresentation was not about the *cost* of the advertised product, but rather about the product's *qualifications*, i.e., about particular consumers' ability to use the product (at the accurately advertised free price). This distinguishes this case from the authority relied upon by Complaint Counsel, in which a "free" claim was deemed material because the product *was not actually free*; rather, consumers had to either "assume the obligation to purchase at least four books ... over a period of a year," or subsequently "pay[] for the so-called 'free' book," *Book-of-the-Month Club*, 48 F.T.C. 1297, 1299 (1952).

Response to Conclusion No. 118:

This argument assumes that the message TurboTax advertising conveys to consumers is TurboTax "Free Edition" alone is free—which Intuit's own marketing research shows is the case for only 5% of surveyed consumers, (RFF-795; FF-609), and which the Court can determine through common sense and experience is not the message that the ads convey. If the Court finds that Intuit's ads conveyed a message to reasonable consumers that TurboTax would be free for them, the claim is material, as the Commission has long recognized. *E.g., In re Book-of-the-Month Club*, 48 F.T.C. 1297, 1312 (1952).

Even assuming, *arguendo*, that the misrepresentations related to eligibility to use a product for a set price (here, free), rather than to price, the question of whether a consumer is qualified for the advertised product “seems no less a central characteristic of that product than its purpose, efficacy, performance, or quality, all of which are presumptively material...Indeed, a product has no ‘efficacy’ for a consumer who is ineligible to use it. *In re Intuit Inc.*, 2023 FTC LEXIS 18, *38-40 (F.T.C. January 31, 2023) (citing Deception Statement, 103 F.T.C. at 182; *see also Cap. Choice Consumer Credit*, 2004 U.S. Dist. LEXIS 32306, 2004 WL 5149998, at *33).

119. Complaint Counsel failed to prove that any of the claims allegedly conveyed in any of the challenged brand video ads were material.

Response to Conclusion No. 119:

This is not a conclusion of law; it purports to be an adjudication of materiality regarding all brand video ads. Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that the challenged ads expressly or impliedly conveyed the deceptive *free* claims and that such claims are material to consumers. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports that Intuit’s free claims in brand video ads are material.

120. Complaint Counsel failed to prove that any of the claims allegedly conveyed in any of the challenged display ads were material.

Response to Conclusion No. 120:

This is not a conclusion of law; it purports to be an adjudication of materiality regarding all display ads. Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the

evidence, that the challenged ads expressly or impliedly conveyed the deceptive *free* claims and that such claims are material to consumers. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports that Intuit’s free claims in display ads are material.

121. Complaint Counsel failed to prove that any of the claims allegedly conveyed in any of the challenged paid-search ads were material.

Response to Conclusion No. 121:

This is not a conclusion of law; it purports to be an adjudication of materiality regarding all paid search ads. Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that the challenged ads expressly or impliedly conveyed the deceptive *free* claims and that such claims are material to consumers. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports that Intuit’s free claims in paid search ads are material.

122. Complaint Counsel failed to prove that any of the claims allegedly conveyed in any of the challenged email ads were material.

Response to Conclusion No. 122:

This is not a conclusion of law; it purports to be an adjudication of materiality regarding all email ads. Without repeating everything contained in all of Complaint Counsel’s Post-Trial

Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that the challenged ads expressly or impliedly conveyed the deceptive *free* claims and that such claims are material to consumers. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports that Intuit’s free claims in the email ads are material.

123. Complaint Counsel failed to prove that any of the claims allegedly conveyed in any of the challenged radio ads were material.

Response to Conclusion No. 123:

This is not a conclusion of law; it purports to be an adjudication of materiality regarding all radio ads. Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that the challenged ads expressly or impliedly conveyed the deceptive *free* claims and that such claims are material to consumers. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel’s Post-Trial Filings, it suffices to say that the evidence supports that Intuit’s free claims in the radio ads are material.

124. Complaint Counsel failed to prove that any of the claims allegedly conveyed in any of the challenged ads were material.

Response to Conclusion No. 124:

This is not a conclusion of law; it purports to be an adjudication of materiality regarding all Intuit ads. Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that Complaint Counsel has proven, by at least a preponderance of the evidence, that the challenged ads expressly or impliedly conveyed the deceptive *free* claims and that such claims are material to consumers. As an initial matter, the purported conclusion of law does not cite to any legal authority and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record...All legal contentions, including, but not limited to, contentions regarding liability and the proposed remedy, shall be supported by applicable legal authority.”). Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that the evidence supports that Intuit's free claims in the ads at issue are material.

V. Complaint Counsel Failed To Prove That A Cease-And-Desist Order Is Warranted

125. In addition to their burden to prove deception, Complaint Counsel bear the burden of “satisfy[ing] the court that relief [for any deception] is needed.” *Benco Dental Supply Co.*, 2019 WL 5419393, at *75 (F.T.C. Oct. 15, 2019) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)).

Response to Conclusion No. 125:

Complaint Counsel has no specific response.

126. The only remedy available in this proceeding is “an order requiring [Intuit] to cease and desist from using any act or practice found to be deceptive.” 15 U.S.C. §45(b).

Response to Conclusion No. 126:

Complaint Counsel has no specific response.

127. A cease-and-desist order is appropriate only “to prevent illegal practices in the future.” *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). Such an order may not be issued “to fasten liability on [Intuit] for past conduct.” *FTC v. Cement Institute*, 333 U.S. 683, 706 (1948); *see also Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964) (“The Commission ... is not empowered to issue a cease and desist order as punishment for past offenses.”).

Response to Conclusion No. 127:

Complaint Counsel has no specific response, though full context for the citations above is helpful:

Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. Moreover, the Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices disclosed. Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said that the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952) (cleaned up).

Furthermore, administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence. And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress.

FTC v. Cement Inst., 333 U.S. 683, 705–06 (1948) (cleaned up).

It has long been well settled that § 5 of the Federal Trade Commission Act, from its enactment in 1914 to its present form, clothes the Commission with broad discretion to determine whether a cease and desist order is needed to make certain that a method of competition or a trade practice it has found unlawful will be stopped and not resumed. The Commission, however, is not empowered to issue a cease and desist order as punishment for past offenses. It has power only to put a stop to present unlawful practices and to prevent their recurrence in the future. On this basis the Court of Appeals for the Seventh Circuit in the National Lead case set aside as arbitrary a cease and desist order entered against a corporation which was no longer engaged in the lead pigment industry in which the unlawful practice had occurred and had divested itself of its production properties. See also Eugene

Dietzgen Co. v. FTC, in which the court said: “If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered.”

The petitioners assert that the unlawful practice found by the Commission occurred only in connection with Coro’s business with catalogue houses, and they say that the practice surely stopped when Coro abandoned that line of business without any intention to resume it. It is true that the specific unlawful pricing practice occurred only in Coro’s business with catalogue houses. And it is also true that it gave up that line of business a few months before the Commission filed its complaint and that its officers testified that they had no intention to resume it. But Coro gave the line of business up only after the Commission had started to investigate its practices therein and only a few months before the Commission filed its complaint, and we have only the current corporate officers’ expression of intention not to resume the business. Coro has not disposed of its plant. It is still in the costume jewelry business and there is nothing to suggest that it does not intend to continue in that general industry. We think the Commission did not exceed its statutory powers in issuing a cease and desist order against Coro.

Coro, Inc. v. FTC, 338 F.2d 149, 153 (1st Cir. 1964) (cleaned up).

128. To obtain a cease-and-desist order, Complaint Counsel bore the burden of proving the existence of “some cognizable danger of recurrent violation.” *W. T. Grant*, 345 U.S. at 633; *see also Benco Dental*, 2019 WL 5419393, at *75.

Response to Conclusion No. 128:

Complaint Counsel has no specific response, though full context for the citations above is helpful:

Along with its power to hear the case, the court’s power to grant injunctive relief survives discontinuance of the illegal conduct. The purpose of an injunction is to prevent future violations, and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor’s decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.

United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953) (cleaned up).

It is well established that once a violation of the antitrust laws has been shown, the Commission has wide discretion with respect to cease and desist orders.

It is also settled that the power to grant injunctive relief survives discontinuance of the illegal conduct. Thus, voluntary cessation of an illegal practice, even where proven, does not by itself render the entry of a cease and desist order inappropriate. Although persuasive of a less harsh order than otherwise, termination of illegal conduct, even if it occurs prior to the issuance of a complaint, does not wholly absolve a respondent.

Still, Complaint Counsel, as the moving party in this case, must satisfy the court that relief is needed. Where challenged conduct has ceased, this burden includes demonstrating that there exists some cognizable danger of recurrent violation, something more than the mere possibility. The propriety of an order in such case depends on a consideration of all the surrounding facts and circumstances. The court's discretion is necessarily broad. The factors relevant to the question whether to issue an order when a respondent professes to have ceased the complained-of activities are: the bona fides of the respondent's expressed intent to comply with the law in the future; the effectiveness of the claimed discontinuance; and the character of the past violations.

In re Benco Dental Supply Co., 168 F.T.C. 415, 507–08 (2019) (initial decision not appealed to the Commission) (Chappell, C.A.L.J.) (cleaned up), *available at* 2019 WL 5419393, at *75.

129. The “cognizable danger” standard is more rigorous than the “mere possibility” standard that governs mootness. *W. T. Grant*, 345 U.S. at 633.

Response to Conclusion No. 129:

Complaint Counsel has no specific response.

130. Complaint Counsel failed to carry their burden to prove that there is a cognizable danger of recurrent violations in the future. To the contrary, the evidence establishes that there is no such cognizable danger here.

Response to Conclusion No. 130:

This proposed conclusion on one of the ultimate issues in this case is expansive, despite its brevity. For the reasons stated in Complaint Counsel's Post-Trial Brief Part III.E, Complaint Counsel's Post-Trial Reply Brief Part II.D, and RCL-131—RCL-146, it is incorrect.

A. Complaint Counsel Do Not Challenge Intuit's Current Ads And Unrebutted Evidence Shows That Those Ads Are Not Deceptive

131. Complaint Counsel offered no evidence that any *current* advertisements are deceptive, and in fact conceded at trial that they are not challenging Intuit's Tax Year 2022 ads, *see* PFF ¶803. Instead, Complaint Counsel expressly limited the relevance of Intuit's current ads to "remedy." PFF ¶803.

Response to Conclusion No. 131:

Under Rule 3.11(a), "an adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint." 16 C.F.R. § 3.11(a). Necessarily, a complaint makes allegations about conduct that has occurred before, or is occurring at the time of, the issuance of the complaint. A complaint cannot predict the future. Thus, the Complaint in this action makes allegations about Intuit's conduct prior to, and at the time of, its issuance in March 2022. Intuit's TY 2022 ads, which aired in 2023, did not exist when the Commission issued the Complaint and are not at issue for liability on Count I of the Complaint. However, under the *W.T. Grant* test, discussed RCL-128, Intuit's TY 2022 ads are relevant in determining whether there is a "cognizable danger of recurrent violation."

There is evidence in the record showing that Intuit's TY 2022 TurboTax free claims are still deceptive—most importantly, the ads themselves. "The primary evidence of what representations an advertisement conveys to reasonable consumers is the advertisement itself." *In re Telebrands Corp.*, 140 F.T.C. 278, 290 (2005); *see also In re Novartis Corp.*, 127 F.T.C. 580, 680 (1999), *aff'd*, 223 F.3d 783, 343 U.S. App. D.C. 111 (D.C. Cir. 2000). Intuit argues that these ads are not deceptive because "[n]ot only do these ads have the same features that rendered past ads nondeceptive—identifying the specific SKU being advertised, noting that the offer is only for simple tax returns, and informing consumers that more information can be found on the TurboTax website—but those features have also been enhanced." Br. at 104 (citation omitted); (*see also* IFF-335). Intuit's argument fails because Intuit is incorrect in asserting that those features were effective in rendering its past ads nondeceptive, and merely enhancing the same ineffective features offers no improvement. For a full discussion, see Complaint Counsel's Post-Trial Reply Brief Part II.D.1, and RCL-133.

132. Although it did not have the burden of doing so, Intuit has produced un rebutted evidence that its current ads are not deceptive. For example, earlier this year Intuit [REDACTED] PFF ¶¶702-713. The results from this copy testing are inconsistent with the notion that reasonable consumers would be misled by Intuit's current ads into believing that all of TurboTax is free.

Response to Conclusion No. 132:

This is not a conclusion of law but a statement of purported fact about TY 22 copy testing, which was unreliable [REDACTED] (See RFF-706; RFF-709).

133. The Tax Year 2022 ads, and the improvements made to the disclosures in those ads, further demonstrate that those ads are not deceptive. PFF ¶¶337-338, 343, 825. The verbal disclosures say that the offer is only available to consumers "filing a simple return" and tell consumers to "see if you qualify at turbotax.com." PFF ¶¶338, 343. Furthermore, Intuit has increased the size of the written disclosures in many of its ads, and added additional disclosures that make them plainly legible. PFF ¶340.

Response to Conclusion No. 133:

Intuit is incorrect in asserting that those features were effective in rendering its past ads nondeceptive, and merely enhancing the same ineffective features offers no improvement.

Noting That the Offer Is Only for Simple Tax Returns. As discussed in Complaint Counsel's Post-Trial Reply Brief Part **Error! Reference source not found.**, at pg. 19–20, this is also not an effective disclaimer. What "simple" means is subject to Intuit's reinterpretation nearly every tax season. (See FF-13, FF-15—FF-18 & FF-20). Intuit's competitors use the term "simple returns" differently than Intuit does. (FF-697). And most importantly, Professor Novemsky's survey revealed that consumers do not understand what this disclaimer means. (FF-496—FF-503). Simply making an ineffective disclaimer bigger does not make it better; nor does reading it aloud. If consumers didn't know what it meant when it was in fine print, there is no indication they will suddenly understand the same word better in a bigger font size.

Informing Consumers That More Information Can Be Found on the TurboTax Website. As also discussed in Complaint Counsel's Post-Trial Reply Brief Part II.A.2.a, at pg. 20, & § II.B.1, at pg. 36–38, referring consumers to one's website to cure deceptive door-opening

advertising is legally impermissible. *FTC v. OMICS Grp. Inc.*, 374 F. Supp. 3d 994, 1010 (D. Nev. 2019), *aff'd* 827 F. App'x 653 (9th Cir. 2020); *see also Fleetcor*, 2022 WL 3273286, at *12. Adding this disclaimer to the ads' voiceover in addition to the fine print at the bottom of the screen at the end of the ad does not change this analysis.

B. Intuit's Free TurboTax Advertising Is Already Subject To Injunctive Terms Enforceable By Every State And The District Of Columbia That Prohibit All The Conduct Complaint Counsel Seek To Enjoin

134. Because Intuit's current ads are not deceptive, Complaint Counsel had to find something else to establish the "cognizable danger of recurrent violation" that is required for prospective relief, *W. T. Grant*, 345 U.S. at 633. They did not do so, including because any potentially deceptive conduct that might hypothetically occur in the future is already enjoined.

Response to Conclusion No. 134:

This is not a conclusion of law; this is commentary pasted in from Intuit's Brief. In any event, Intuit's current ads are little improved from their predecessors and are still deceptive. *See* Complaint Counsel's Post-Trial Reply Brief Part II.D.1, and RCL-131—RCL-133. And "any potentially deceptive conduct that might hypothetically occur in the future" is *not* effectively enjoined by the State Consent Order. *See* Complaint Counsel's Post-Trial Reply Brief Part II.D.2, and RCL-135—RCL-139.

135. "[A] suit becomes moot[] 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). That is the situation here. Complaint Counsel's proposed order, and any order this Court would have authority to issue, would overlap with the Consent Order with the attorneys general of every state and the District of Columbia, by which Intuit has been legally bound since June 2022, PFF ¶809, because the latter already precludes Intuit from engaging in the advertising practices alleged in this case to have been deceptive, as well as substantially similar practices. For example, the "Free, Free, Free" television ads—which Intuit had already voluntarily pulled from the airwaves, *see* PFF ¶¶7-8—are specifically barred by the Consent Order. *See* PFF ¶213. Additional provisions of the order require "Clear and Conspicuous" disclosures in Intuit's advertising, including written disclosures that not all taxpayers qualify and, in all video ads eight seconds or longer, corollary verbal disclosures. *See* PFF ¶¶809-819.

Response to Conclusion No. 135:

After the Commission issued the Complaint in this matter, Intuit entered into a Consent Order with the States and the District of Columbia "to resolve an investigation of the Attorneys

General into Intuit’s marketing, advertising, promotion, and sale of certain online tax preparation products and whether Intuit’s conduct constituted deceptive or unfair business acts or practices in violation of the States’ consumer protection laws.” (FF-935). Intuit asserts that it is complying with the Consent Order, Br. at 106, which necessarily means that Intuit views its current ads to be compliant with the Consent Order. But Intuit’s current ads making free claims with regard to TurboTax have not improved in any way that makes them less deceptive than their forebearers. *See* Complaint Counsel’s Post-Trial Reply Brief Part II.D.1, and RCL-131—RCL-133. That alone demonstrates that the Consent Order is not sufficient to curb Intuit’s deceptive advertising.

Additionally, specific loopholes in the Consent Order discussed in Complaint Counsel’s Post-Trial Brief include: (1) 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. (FF-937). This contradicts the black letter law principles articulated in the .com Disclosures, at 10, among other FTC sources. (2) 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”—and not even that in a video of 8 seconds or less, as is often the case for social media video posts. (FF-938). Plus, this entire provision sunsets after ten years. (FF-938). This contradicts the black letter law principles articulated in the Deception Policy Statement, at 180, and the TV Ad Policy Statement, among other FTC sources. The Consent Order defines “Space-Constrained Advertisements” as any “that has space, time, format, size, or technological restrictions that limit Intuit from being able to make the disclosures required by this Assurance.” (FF-939). (3) The Consent Order allows hyperlinks to disclosures on Intuit’s website, without specifying that information integral to the claim cannot be hidden behind a hyperlink. (FF-940).

Beyond just arguing that the Consent Order obviates the need for an FTC cease and desist order, Intuit argues here the Consent Order moots this action as a matter of law. Not so. Intuit’s argument is nothing more than the discredited mootness argument the Supreme Court rejected more than seventy years ago in *United States v. W.T. Grant Co.* There, the defendants argued that

they could not be sued because they were no longer engaged in the alleged conduct. 345 U.S. at 630. The Supreme Court disagreed, stating that such a case could only “be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated.” *Id.* at 633 (cleaned up). The Court cautioned that “[t]he burden is a heavy one,” and explained that lack of ongoing activity plus protestations that they would not engage in the conduct again “does not suffice.” *Id.* Significantly, “voluntary cessation of allegedly illegal conduct does not ... make the case moot.” *Id.* at 632 (citing cases). Mootness is affirmative defense that Intuit raised in its Answer, and it has the burden of proof on such a defense. *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Dep’t of Energy*, 232 F.3d 1300, 1303 (9th Cir. 2000). Intuit has not met its burden. *See FTC v. Affordable Media*, 179 F.3d 1228, 1237–38 (9th Cir. 1999).

136. Because the Consent Order provides substantively the same relief Complaint Counsel are seeking and potentially entitled to in this proceeding, “[t]here is nothing for this court to enjoin” and a cease-and-desist order is unwarranted and improper. *Wold v. Robart*, 2018 WL 1135396, at *5 (E.D. Wis. Feb. 28, 2018).

Response to Conclusion No. 136:

Same response as RCL-135.

137. Complaint Counsel have offered no basis for the Court to have a “reasonable expectation” that the complained-of conduct could recur even though the Consent Order bars it. *South Carolina State Board of Dentistry*, 138 F.T.C. 229, 262 (2004) (citing *W. T. Grant*, 345 U.S. at 632); *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 97 (2013) (finding a case moot, in light of a “covenant promising” no future violations of the type alleged); *iMortgage Services, LLC v. Louisiana Real Estate Appraisers Board*, 2023 WL 2254528, at *2-5 (M.D. La. Feb. 27, 2023) (finding a case moot because any relief would be “redundant” to FTC consent decree, and prospect of FTC enforcement “preclude[d] a reasonable expectation that the wrong w[ould] be repeated”).

Response to Conclusion No. 137:

Same response as RCL-135.

138. Although it did not have the burden of doing so, Intuit presented un rebutted evidence of its intent to comply with the Consent Order. Such evidence included testimony about how Intuit has complied with the Consent Order since it became effective, PFF ¶¶823-828, as well as testimony about the internal steps Intuit has taken to ensure compliance going forward, PFF ¶¶821-822. In light of this uncontroverted testimony, and the lack of contrary evidence from Complaint Counsel, the notion that Intuit might fail to comply with the Consent Order’s

terms in the future is too speculative to avoid mootness. *See iMortgage Services*, 2023 WL 2254528, at *4.

Response to Conclusion No. 138:

Same response as RCL-135 regarding mootness; same response as RCL-140 regarding the sincerity of Intuit’s assurances against future violations.

139. At the very least, the Consent Order provides “powerful assurances of [Intuit’s] future compliance” with the FTC Act, preventing any “cognizable danger” of future violations and precluding prospective relief. *TRW, Inc. v. FTC*, 647 F.2d 942, 954 (9th Cir. 1981). The Consent Order is part of a binding California court judgment, enforceable against Intuit by 51 attorneys general. Under these circumstances, there is “no reasonable expectation” of future violations of the sort challenged in this proceeding, *W. T. Grant*, 345 U.S. at 633. Intuit’s evidence—including the binding Consent Order and changes Intuit has made to comply with that order—demonstrates that it “is not attempting and does not intend to violate the law,” *New Standard Publishing Co. v. FTC*, 194 F.2d 181, 183 (4th Cir. 1952).

Response to Conclusion No. 139:

Same response as RCL-140.

C. Intuit Is Committed To Clarity In Its Free Advertising

140. A respondent’s “intent to comply with the law in the future” is a factor that militates against a cease-and-desist order. *Benco Dental*, 2019 WL 5419393, at *75. When such intent to comply exists, prospective relief based on “substantially outdated” advertising is unwarranted. *FTC v. Merchant Services Direct, LLC*, 2013 WL 4094394, at *3 (E.D. Wash. Aug. 13, 2013). Intuit’s evidenced lack of deceptive intent cuts against entry of a cease-and-desist order. *See Benco Dental*, 2019 WL 5419393, at *75. At the very least, because “deliberateness of the violation” is a factor “used by the Commission to determine” the proper scope of relief, *Stouffer Foods Corp.*, 118 F.T.C. 746, 811 (1994), the lack of deceptive intent limits the scope of any order that may be issued.

Response to Conclusion No. 140:

Intuit has shown that it is incapable of complying the law in the absence of a cease and desist order. The Commission and the courts do not accept a defense of voluntary discontinuance “when the discontinuance is after the commencement of investigation, i.e., when the Commission’s ‘hand is on one’s shoulder.’” *In re Lovable Co.*, 67 F.T.C. 1326, 1332–33 (1965). That is the case here. Intuit’s assurances against future violations are too little, too late.

Intuit’s materials demonstrate that it has long known about the powerful effect its free advertising has on consumers. For example:

- A 2014 marketing strategy document found that a “Free/Free offer is compelling enough to drive considerable (1.2M) incremental customer growth.” (FF-615).
- Intuit’s FY ‘19 Go-to-Market White Paper admitted that: [REDACTED]
[REDACTED]
[REDACTED] (FF-612; *see also* FF-611—FF-614).
- In September 2019, Mary Ann Somers, then the SVP and Chief Growth Officer of Intuit’s consumer group, told a podcast: “But the key insight for us was, when you start talking about free, that’s what people hear. They hear free. You can say a lot of other things, but what they hear is free.” (FF-618).
- Intuit’s FY ’20 Go-to-Market Plan stated a goal to: [REDACTED]
[REDACTED]
[REDACTED] (FF-615).
- A March 2020 presentation to Intuit from its television advertising agency, Wieden+Kennedy, stated: [REDACTED]
[REDACTED]
[REDACTED] (FF-616).

At the same time, for years Intuit ignored red flags that it was deceiving consumers with its free claims in TurboTax advertising. For example:

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (FF-619).
- Consumer ad testing presented to Intuit in December 2018 showed that 73% of 250 survey respondents took away from the “Spelling Bee” ad the message: “That i [sic] can file my taxes for free.” (FF-606—FF-608).

- Marketing research conducted by Intuit in 2019 showed that 49% of consumers “are confident that Free Edition is truly free.” (FF-597).
- TY 2020 copy testing also showed that a significant percentage of consumers perceived that they could use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600—FF-601; FF-604—FF-605).
- Over recent years, Intuit has received substantial complaints from consumers complaining that they thought TurboTax would be free for them but turned out not to be. (FF-624—662).

Intuit also let legal actions involving its advertising accumulate until finally deciding to pull its worst ads on the eve of the Commission issuing the Complaint in this matter. This includes:

- On May 6, 2019, the Los Angeles City Attorney sued Intuit alleging, in part, that Intuit engaged in unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-918).
- On September 6, 2019, the Santa Clara County Counsel sued Intuit alleging, in part, that: “Intuit deliberately implemented a scheme to draw taxpayers to TurboTax’s revenue-producing URL with false representations that they could file their taxes for free using TurboTax and then to charge taxpayers significant sums to file through additional false and misleading statements.” (FF-919—FF-922).
- On September 13, 2019, a Consolidated Class Action Complaint was filed against Intuit alleging, in part, that: “Intuit implemented a pervasive, nationwide marketing and advertising campaign during the 2018 tax filing season promoting its offering of ‘free’ tax filing services, even though the vast majority of users would actually be charged to file their returns.” (FF-923—FF-925).

- Between October 1, 2019 and October 23, 2020, approximately 127,000 current and former Intuit customers filed demands for individual arbitration against Intuit alleging, in part, that they “were lured to Intuit’s website with promises of its Free Edition, only to learn later that they were ineligible for that free product and would have to pay to use TurboTax.” (FF-926—FF-928).
- On June 29, 2021, Complaint Counsel shared a draft complaint with Intuit that included a count alleging that Intuit’s free TurboTax claims were deceptive. (IFF-3).

After all this: “On March 24, 2022, Intuit informed FTC Chair Lina M. Khan that it was voluntarily retracting its ‘Free, Free, Free’ ads after a meeting with her in which concerns about those ads were expressed.” (IFF-7). So, after years of embracing a marketing strategy that Intuit knew left a “free” message with consumers, while simultaneously disregarding numerous red flags raised in consumer testing, consumer complaints, government lawsuits, consumer lawsuits, consumer arbitrations, and a draft FTC lawsuit, it took no less than a meeting with the Chair of the Federal Trade Commission on the eve of fling for Intuit to finally decide to take action. That track record belies Intuit’s claim of an “intent to comply with the law in the future.” RCL-140.

Intuit waxes poetic about its “foundational values, long-term goals, and strategies for the TurboTax brand,” its “ethos,” its “commitment to clarity,” and its “business interests” and “economic incentives.” Br. at 107–10. But none of that can gloss over its actual history, factually or legally. A case that Intuit cites illustrates the point: “[Respondent] gave the line of business up only after the Commission had started to investigate its practices therein and only a few months before the Commission filed its complaint, and we have only the current corporate officers’ expression of intention not to resume the business. ... [Thus,] [w]e think the Commission did not exceed its statutory powers in issuing a cease and desist order against [Respondent].” *Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964).

The notion that voluntary discontinuance should not be trusted is consistent with weighty authority: “The fact that [Respondent] may have discontinued the offending practice before the

Commission issued the complaint in this case ... does not bar a cease-and-desist order, where the public interest otherwise requires it.” *Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir. 1976); *see also, e.g., FTC v. USA Fin., LLC*, 415 F. App’x 970, 975 (11th Cir. 2011) (past illegal conduct “indicated a reasonable likelihood of future violations”); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1201–02 (10th Cir. 2009); *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985); *FTC v. Qualcomm Inc.*, No. 17-cv-220, 2018 WL 6597273, at *15 (N.D. Cal. Dec. 13, 2018); *FTC v. Citigroup Inc.*, No. 1:01-cv-606, 2001 WL 1763439, at *3 (N.D. Ga. Dec. 27, 2001) (“An inference arises from illegal past conduct that future violations may occur. The fact that illegal conduct has ceased does not foreclose injunctive relief.” (quoting *SEC v. Koracorp Indus., Inc.*, 575 F.2d 692, 698 (9th Cir. 1978))); *FTC v. Triangle Media Corp.*, No. 18-cv-1388, 2018 WL 6305675, at *1 (S.D. Cal. Dec. 3, 2018) (rejecting argument that proposed new defendant could not be violating or about to violate the law where the FTC had already obtained a preliminary injunction); *FTC v. Sage Seminars, Inc.*, No. 95-cv-2854, 1995 WL 798938, at *6 (N.D. Cal. Nov. 2, 1995) (finding that “defendants’ claimed cessation of conduct [which] occurred only *after* defendants learned that the FTC had commenced an investigation into [defendant’s] practices” could “hardly be considered ‘voluntary’”); *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1086–87 (C.D. Cal. 1994) (rejecting argument that the FTC is “only empowered to enjoin present unlawful practices and prevent their recurrence in the future”).³

To recap: the Commission and the courts do not accept a defense of voluntary discontinuance “when the discontinuance is after the commencement of investigation, i.e., when the Commission’s ‘hand is on one’s shoulder.’” *In re Lovable Co.*, 67 F.T.C. 1326, 1332–33

³ Courts have also repeatedly ruled in other regulatory enforcement contexts that injunctions are appropriate based on past conduct. *See, e.g., CFTC v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1328 (11th Cir. 2018) (nature of past conduct can indicate likelihood of future conduct); *Murphy*, 626 F.2d at 655; *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (Defendant’s “continuing interest in investment opportunities strengthens the inference from his past conduct that he is likely to commit future violations”); *SEC v. Alpha Telecom, Inc.*, 187 F. Supp. 2d 1250, 1262 (D. Or. 2002) (“The key factor to consider is the past illegal conduct of the defendant.”), *aff’d sub nom. SEC v. Rubera*, 350 F.3d 1084 (9th Cir. 2003); *SEC v. Poirier*, 140 F. Supp. 2d 1033, 1046 (D. Ariz. 2001).

(1965). The self-serving testimony of Intuit’s executives does not carry much legal weight when compared to its actual track record. *See United States v. Or. State Med. Soc.*, 343 U.S. 326, 333 (1952) (“beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption”). Intuit’s protestations to the contrary, a cease and desist order is warranted.

141. Unrebutted testimony from Intuit’s executives establishes Intuit’s intent to comply with the law, rendering a cease-and-desist order unwarranted. PFF ¶¶7-8, 30, 33-38, 174, 850-852. Intuit also offered testimony from its executives explaining how it has voluntarily improved its TurboTax advertisements over the years, with the goal of communicating even more clearly than before the qualifications of free TurboTax products and offers. *See* PFF ¶¶353, 357, 363. Those improvements indicate that Intuit is matching its words with its actions, reinforcing the company’s stated intent to be clear with consumers.

Response to Conclusion No. 141:

Same response as RCL-140.

142. “[T]he character of the past violations” should be considered when assessing the ongoing risk of future abuse. *W. T. Grant*, 345 U.S. at 643. To that end, courts have relied on an alleged wrongdoer’s intent to break the law as a justification for forward-looking relief. *E.g.*, *FTC v. Walmart Inc.*, 2023 WL 2646741, at *21 (N.D. Ill. Mar. 27, 2023); *FTC v. Shkreli*, 581 F.Supp.3d 579, 639-640 (S.D.N.Y. 2022). Here, the only evidence regarding intent is that Intuit’s intentions were to be fully honest and transparent. These facts provide an additional reason a cease-and-desist order should be denied.

Response to Conclusion No. 142:

Same response as RCL-140 (citing evidence that Intuit ignored red flags signaling its deception for year).

D. Complaint Counsel’s Proposed Order Would Be Harmful To Consumers

143. Even if otherwise warranted, a cease-and-desist order may be denied based on “the public interest.” *ECM Biofilms, Inc.*, 159 F.T.C. 276, 646 (2015). For example, “the absence of any proof of consumer harm ... militates against a broad remedial order.” *Id.*

Response to Conclusion No. 143:

Respectfully, the Initial Decision that Intuit cites here, *In re ECM Biofilms, Inc.*, 159 F.T.C. 276 (2015), was reversed in part, including as to remedy, by the Commission’s Opinion and Final Order, *In re ECM Biofilms, Inc.*, 160 F.T.C. 652 (2015). Moreover, Intuit subsequently

contorts this discussion of “the public interest” into an argument that it may permissibly deceive consumers if the result is more consumers being able to file their taxes for free. Whatever role the public interest may have in shaping the bounds of a cease and desist order, Intuit extends it much too far. The full context of Intuit’s quotation demonstrates that the Court was concerned about the *scope* of the order, not whether to issue one in general.

Furthermore, as to Respondent’s second assertion, above, the fact that Respondent did not sell the ECM Additive directly to consumers is not determinative of whether the public interest is served by this action. A case affects the “public interest” where there is deception of the public. ECM Customers, and downstream customers, although not ordinary “consumers,” are nonetheless members of the public, and protecting them from deception is in the public interest.

While it may not be necessary to demonstrate that end-use consumers were harmed by Respondent’s deceptive claims in order for a remedial order to be in the public interest, the absence of any proof of such consumer harm in this case militates against a broad remedial order

In re ECM Biofilms, Inc., 159 F.T.C. 276, 646 (2015) (initial decision, Chappell, C.A.L.J.) (cleaned up), *reversed in part* 160 F.T.C. 652 (2015). In this case, there is “deception of the public,” and thus the “public interest” warrants protection from Intuit’s deception.

144. Complaint Counsel have not offered evidence showing that the proposed order would cure the deception alleged by helping consumers better understand free TurboTax advertising. Because the evidence indicates the relief sought would not improve consumers’ understanding of Intuit’s advertising, and often would be redundant of Intuit’s current advertising practices, no such relief is warranted.

Response to Conclusion No. 144:

Complaint Counsel is not Intuit’s ad agency. Complaint Counsel’s goal is to stop Intuit’s deception; the extent to which such cessation helps or hinders consumers to “better understand free TurboTax advertising” is a problem for Intuit to solve. Complaint Counsel’s proposed cease and desist order is essentially a follow-the-law injunction. Intuit appears to directly argue against only Section I of the proposed order, which provides:

Prohibition Concerning “Free” Offers

It is ordered that Respondent, Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, or offering for sale of any goods or services, must not represent that a good or service is “Free” unless:

A. Respondent offers the good or service for Free to all consumers; or

B. 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.

C. Further, if the goods or services are not Free for a majority of U.S. taxpayers, such a fact is disclosed Clearly and Conspicuously at the outset of any disclosures required by I[]B.⁴

Proposed Order § I. Intuit argues most strenuously against paragraphs B and C of the proposed language. Br. at 110–13. But this provision is little more than a basic instruction not to deceive people. Compare § I.B with the Guide Concerning Use of the Word “Free” and Similar Representations 16 C.F.R. 251.1(c): “[C]onditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be 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.” This proposed language echoes consumer protection fundamentals that have been in place for nearly seventy years.⁵

145. Evidence indicates that Compliant [sic] Counsel’s proposed relief would in fact be affirmatively harmful to consumers. The evidence establishes that Complaint Counsel’s proposed remedy would harm consumers by overloading them with information, PFF ¶¶138, 383, 834-835, 841-842, 844, exacerbating their natural skepticism of free offers, PFF ¶843, and ultimately causing fewer of them to file for free, PFF ¶843; *see also* PFF ¶¶833, 846. That harm independently militates against granting the relief sought. *See ECM Biofilms*, 159 F.T.C. at 646.

⁴ The Proposed Order, at § I.C, cross-references “II.B”—with apologies to the Court for the typo, it should cross-reference “I.B.”

⁵ The Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251.1, has been in place since 1971; it superseded an older trade practice rule on use of the word “free,” released by the Commission on December 3, 1953. *See* 36 Fed. Reg. 21,517.

Response to Conclusion No. 145:

Intuit also argues that any ad compliant with the proposed order “would in fact be affirmatively harmful to consumers.” But what is the purported harm? Disclosures “overload[] them with information” and “exacerbate[] their natural skepticism of free offers,” “ultimately causing fewer of them to file for free.” If the only way Intuit can make nondeceptive free TurboTax claims is to make ads so heavily laden with disclaimers that consumers will end up confused, that is a warning sign about the nature of the claims Intuit is making in the first place. If Intuit *cannot* hold itself to a basic standard of transparency, it may not make claims that would trigger the need for such clarifying disclosures. *See* .com Disclosures, at 6 (“If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, and if it is not possible to make the disclosure clear and conspicuous, then either the claim should be modified so the disclosure is not necessary or the ad should not be disseminated.”). But if Intuit did continue to make the claim, it has demonstrated a wealth of internal and external marketing and legal experts that can help it develop the right message without misleading consumers. The argument that full disclosure would increase consumer skepticism is also unavailing. The law requires truthful and accurate advertising. Intuit should not be permitted to do otherwise. Further, as Intuit knows, truly free online tax filing services—both on the commercial marketplace (*see* SF-8), and through a public-private partnership (*see* FF-31—FF-35)—are available. Further, many online products and services are routinely offered to consumers completely free of charge—*e.g.*, Google, Facebook, streaming audio and video content by YouTube and Spotify, online games. (*See* FF-490). Getting consumers to an offering that is free for them is a laudable goal; but not at the price of deceiving other consumers. Intuit cannot justify deceiving as many as two-thirds of taxpayers by providing a free service to the other third. Consumers are not harmed by truthful advertising; they are harmed by Intuit’s deception. (According to Judge Breyer: “The Court is left to do a back-of-the envelope calculation [of the harm caused by Intuit’s deception]: for a projected class of 19 million people, who paid an average of \$100 per-year for at least one year, a conservative estimate of Intuit’s

potential liability is \$1.9 billion.” (FF-930).) Beyond individual consumers, Intuit’s deception also harms the marketplace. (See FF-848—FF-850).

146. Finally, Complaint Counsel’s proposed order would run afoul of the constitution. While under current law the government may compel certain disclosures in commercial speech, it may do so only if the speech at issue is “noncontroversial and not unjustified or unduly burdensome.” *NIFLA v. Becerra*, 138 S.Ct. 2361, 2372 (2018). Complaint Counsel’s proposed order, and in particular its requirement to affirmatively disclose in all advertisements that a majority of taxpayers do not qualify to use TurboTax Free Edition, fails both these elements. The parties dispute whether the entire taxpayer population is the appropriate metric for measuring TurboTax Free Edition’s qualifications. And imposing such a requirement on TurboTax and not its competitors would, on this record, be unjustified. “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, 756 (9th Cir. 2019). The disclosures sought by Complaint Counsel impose such a burden and should be rejected for that reason too.

Response to Conclusion No. 146:

Intuit argues that “Complaint Counsel’s proposed order would run afoul of the constitution.” In this argument, Intuit only address one provision of the proposed order: “Further, if the goods or services are not Free for a majority of U.S. taxpayers, such a fact is disclosed Clearly and Conspicuously at the outset of any disclosures required by [the order].” Intuit argues that such a required disclosure fails the requirement articulated by the Supreme Court in *Nat’l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra* that required disclosures in commercial speech be “noncontroversial” and not “unjustified or unduly burdensome.” 138 S. Ct. 2361, 2372 (2018).⁶ Intuit’s argument on the “noncontroversial” element fails because: (1) Intuit’s argument

⁶ Intuit misquotes *NIFLA* in putting “noncontroversial and not unjustified or unduly burdensome” together in a single quotation, Br. at 112, but both requirements do appear on the page of *NIFLA* that Intuit cites. In *NIFLA*, the Supreme Court newly made mandatory observations from *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* that required disclosures in commercial speech should be “purely factual and uncontroversial information” and not “unjustified or unduly burdensome.” 471 U.S. 626, 651 (1985); see *NIFLA*, 138 S. Ct. at 2372, 2377; see also *CTIA - The Wireless Ass’n v. City of Berkeley, Cal.*, 928 F.3d 832, 844–45, 848–49 (9th Cir. 2019) (explaining *NIFLA*’s extension of *Zauderer*). Intuit only argues the “noncontroversial” and “unjustified or unduly burdensome” requirements are at play here. Br. at 112–13. Thus, Intuit has waived any argument that the proposed order’s disclosure requirement is not “purely factual.” See *CTIA*, 928 F.3d at 848 (party did not argue that one prong of *Zauderer/NIFLA* was at issue with regard to a certain dispute of fact (“whether radio-frequency radiation can be dangerous to cell phone users”), and thus made a “tacit admission” that the required disclosure satisfied that prong with regard to that fact).

about the correct denominator in measuring who is eligible for TurboTax Free Edition is a red herring, *see* Complaint Counsel’s Post-Trial Reply Brief Part II.B.1, at pg. 34; and (2) the parties’ quibbling over the correct denominator is hardly the controversial topic at issue in *NIFLA*—“abortion, anything but an ‘uncontroversial’ topic,” *NIFLA*, 128 S. Ct. at 2372. Intuit’s only argument on the “unjustified or unduly burdensome” prong is that: “[I]mposing such a requirement on TurboTax and not its competitors would, on this record, be unjustified. ... The disclosures sought by Complaint Counsel impose [an undue] burden and should be rejected for that reason too.” This argument is entirely conclusory. Intuit does not cite any facts at all in support of this contention, and has thus failed to demonstrate any specific burden that would satisfy the *Zauderer/NIFLA* test. Also, that Intuit’s competitors may also employ deceptive advertising is not a defense. Intuit’s competitors should carefully examine their own practices in light of any order this Court may issue against Intuit. *Cf.* 15 U.S.C. § 45(m)(1)(B). Simply requiring Intuit to be more factual about who qualifies for its free offers is a “minimal requirement” that “does not interfere with advertising or threaten to drown out messaging.” *CTIA*, 928 F.3d at 849. In sum:

This case is far from the boundary line staked out by *NIFLA*. Unlike in that case, the disclosure requirements here are directly targeted at promoting the State’s interest in dissipating the possibility of consumer confusion or deception. And they do so by providing information directly connected to the subject of the advertisement, rather than by compelling speech concerning unrelated or competing services.

Recht v. Morrissey, 32 F.4th 398, 417 (4th Cir.), *cert. denied*, 143 S. Ct. 527 (2022).

VI. Complaint Counsel’s Claim Is Untimely

A. The Statute Of Limitations Bars Consideration Of Outdated Ads

147. Although section 5 does not include an express statute of limitations, it is wrong to “assume that” this absence means “Congress intended that there be no time limit on actions.” *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). “[W]here there is no federal statute of limitations expressly applicable,” courts “‘borrow’ the most suitable statute or other rule of timeliness from some other source.” *Id.*

Response to Conclusion No. 147:

Intuit persistently overlooks the differences between civil litigation among private parties and government law enforcement actions. When that distinction is recognized, it is clear that *DelCostello* is not applicable. For example, in *FTC v. 4 Star Resolution, LLC*, the court refused to apply *DelCostello*, stating: “The actions at issue in that case were brought by individual employees against their employers and unions, not by the United States Government.” No. 15-cv-112S, 2015 WL 7431404, at *2 (W.D.N.Y. Nov. 23, 2015). The Supreme Court held in *E. I. Du Pont De Nemours & Co. v. Davis* that “an action on behalf of the United States in its governmental capacity ... is subject to no time limitation, in the absence of congressional enactment clearly imposing it.” 264 U.S. at 462; *see also United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997) (“the properly constructed rule is that—absent a clear expression of Congress to the contrary—a statute of limitation does not apply to claims brought by the federal government in its sovereign capacity”); *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1489 (9th Cir. 1993) (“In the absence of a federal statute expressly imposing or adopting one, the United States is not bound by any limitations period.”); *United States v. City of Palm Beach Gardens*, 635 F.2d 337, 339 (5th Cir. 1981) (“courts have long held that the United States is not bound by any limitations period unless Congress explicitly directs otherwise”). *DelCostello* did not address *E. I. Du Pont*, let alone overrule it. Intuit’s reliance on *DelCostello* is misplaced. Borrowing a statute of limitations from another source and applying it to this action is not supported by the applicable precedent.⁷

148. Typically, that other source is “the most closely analogous statute of limitations under state law.” *DelCostello*, 462 U.S. at 158. But where the statute of limitations for a federal cause of action is not borrowed from state law, a related federal law may supply the limitations period. *Reed v. United Transportation Union*, 488 U.S. 319, 324 (1989) (citing cases).

⁷ Intuit claims that “at least one court has already faulted the FTC” for the “oversight” of citing to authority that does not address *DelCostello*. Br. at 114 (citing *FTC v. Centro Natural Corp.*, No. 14-cv-23879, 2014 WL 7525697, at *7–8 (S.D. Fla. Dec. 10, 2014) (Intuit cites the case as “*Centro National [sic] Corp.*”). But even that court concluded: “Still, the weight of authority does appear to lie with the FTC” on this issue. *Centro Natural*, 2014 WL 7525697, at *7 (citing *FTC v. Instant Response Sys., LLC*, No. 13-cv-976, 2014 WL 558688, at *3 (E.D.N.Y. Feb. 11, 2014) (collecting cases)).

Response to Conclusion No. 148:

Same response as RCL-147.

149. Complaint Counsel have cited cases for the proposition that claims under section 5 of the FTC Act are not subject to a statute of limitations. *See* Complaint Counsel’s Opp. to Intuit’s Mot. *In Limine* to Exclude Outdated Advertisements at 3 (Fed. 24, 2023). But those cases all “fail[] to mention the widely recognized rule from *DelCostello*”—the same oversight for which the FTC has previously been faulted, *FTC v. Centro National Corp.*, 2014 WL 7525697, at *7-8 (S.D. Fla. Dec. 10, 2014).

Response to Conclusion No. 149:

Same response as RCL-147. Indeed, as the Commission has long held: “No statute of limitations attaches to administrative proceedings brought under Section 5 of the Federal Trade Commission Act ..., and neither equitable estoppel nor laches is a defense to an action brought by the government in the public interest.” *In re Rentacolor, Inc.*, 103 F.T.C. 400, 418–19 (1984) (initial decision adopted by the Commission); *see also In re Simeon Mgmt. Corp.*, 87 F.T.C. 1184, 1222 (1976) (initial decision adopted by the Commission).

Additionally: Intuit claims that “the FTC has previously been faulted” for the “oversight” of citing to authority that does not address *DelCostello*. Intuit Proposed Conclusion No. 149 (citing *FTC v. Centro Natural Corp.*, No. 14-cv-23879, 2014 WL 7525697, at *7–8 (S.D. Fla. Dec. 10, 2014) (Intuit cites the case as “*Centro National [sic] Corp.*”). But even that court concluded: “Still, the weight of authority does appear to lie with the FTC” on this issue. *Centro Natural*, 2014 WL 7525697, at *7 (citing *FTC v. Instant Response Sys., LLC*, No. 13-cv-976, 2014 WL 558688, at *3 (E.D.N.Y. Feb. 11, 2014) (collecting cases)).

150. Complaint Counsel have also argued that federal equitable claims never borrow statutes of limitations from other sources. *See* Complaint Counsel’s Opp. to Intuit’s Mot. *In Limine* to Exclude Outdated Advertisements at 3-4. But the Supreme Court has never so held, and appellate precedent shows that is not true, *e.g.*, *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197, 1200-1201 (10th Cir. 1990) (borrowing a state-law statute of limitations for an equitable cause of action under the Employee Retirement Income Security Act).

Response to Conclusion No. 150:

Same response as RCL-147.

151. Here, analogous state *and* federal laws point to a three-year statute of limitations. *See* Cal. Civ. Code §1783; D.C. Code §28-3904; N.Y. C.P.L.R. §214(2); 15 U.S.C. §57b(d).

Response to Conclusion No. 151:

Same response as RCL-147.

152. Borrowing from those closely analogous state or federal laws, section 5 claims like the one here are subject to a three-year statute of limitations.

Response to Conclusion No. 152:

Same response as RCL-147.

153. Applying that statute of limitations, any challenged advertisements that last ran before January 5, 2019—three years before the effective date of the tolling agreement in this case, PFF ¶5—may not be considered in this proceeding.

Response to Conclusion No. 153:

Same response as RCL-147.

154. Complaint Counsel’s assertion that the FTC Act is not subject to a statute of limitations, when combined with their position that laches is unavailable, *see infra* Part VI.B, presents significant constitutional problems. The Supreme Court has long “used particularly forceful language in emphasizing the importance of time limits” on government enforcement actions. *Gabelli v. SEC*, 568 U.S. 442, 452 (2013); *accord, e.g., Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (it would be “utterly repugnant to the genius of our laws” if government enforcement actions could “be brought at any distance of time”); *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 301 (1946) (time limits are “an almost indispensable element of fairness”). Complaint Counsel’s position that *no* time limitations apply offends due process.

Response to Conclusion No. 154:

Intuit has craftily edited the quotations above in such a manner as to make them almost offensive as a proposed conclusion of law for this Court to adopt. Intuit attempts to make it look like the law is on Intuit’s side when it isn’t, as laid out below:

Intuit’s Proposed Conclusion No. 154	Full Context
The Supreme Court has long “used particularly forceful language in emphasizing the importance of time limits” on government enforcement actions. <i>Gabelli v. SEC</i> , 568 U.S. 442, 452 (2013).	“Chief Justice Marshall used particularly forceful language in emphasizing the importance of time limits on penalty actions. ” <i>Gabelli v. SEC</i> , 568 U.S. 442, 452 (2013) (emphasis added).

Intuit’s Proposed Conclusion No. 154	Full Context
<p><i>Adams v. Woods</i>, 6 U.S. (2 Cranch) 336, 342 (1805) (it would be “utterly repugnant to the genius of our laws” if government enforcement actions could “be brought at any distance of time”)</p>	<p>“In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.”</p> <p><i>Adams v. Woods</i>, 6 U.S. 336, 342 (1805) (emphasis added).</p>
<p><i>Rothensies v. Electric Storage Battery Co.</i>, 329 U.S. 296, 301 (1946) (time limits are “an almost indispensable element of fairness”)</p>	<p>“It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.”</p> <p><i>Rothensies v. Elec. Storage Battery Co.</i>, 329 U.S. 296, 301 (1946) (emphasis added).</p>

By cutting off *Gabelli* just before the words “on penalty actions,” and concealing that *Adams* relates “to a pecuniary forfeiture,” and concealing that *Rothensies* relates to “income tax policy,” Intuit contorts these inapposite cases to fit its narrative. This is not an action for penalties. It is also not an income tax case. This is an administrative action for a cease and desist order “brought by the federal government in its sovereign capacity.” *Banks*, 115 F.3d at 919. Contrary to Intuit’s dubious citations, the weight of the authority from the Supreme Court, the Courts of Appeals, and the Commission has no concern with a lack of statutes of limitations in cases like this. *E. I. Du Pont*, 264 U.S. at 462; *Banks*, 115 F.3d at 919; *Dos Cabezas*, 995 F.2d at 1489; *City of Palm Beach Gardens*, 635 F.2d at 339; *Rentacolor*, 103 F.T.C. at 418–19; *Simeon Mgmt.*, 87 F.T.C. at 1222.

155. Courts do not lightly “assume that Congress intended to infringe constitutionally protected liberties.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction*

Trades Council, 485 U.S. 568, 575 (1988). This Court, accordingly, should not assume that Congress intended to exempt section 5 from the general rule that where no statute of limitations is expressly stated, an analogous statute of limitations (here, three years) is borrowed.

Response to Conclusion No. 155:

Intuit also takes this quotation out of context. The Court was discussing the rule of statutory construction that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” 485 U.S. 568, 575 (1988). The premise that “Courts do not lightly ‘assume that Congress intended to infringe constitutionally protected liberties’” is uncontroversial enough, but it is not support for Intuit’s mistaken argument on statutes of limitations.

156. The due-process imperative to apply *some* time limit also undermines Complaint Counsel’s argument that borrowing a statute of limitations is inappropriate in federal equitable cases, *supra* ¶150. To support that proposition, Complaint Counsel rely on dicta from *DelCostello* that paraphrased an earlier decision explaining that statutes of limitations should not be imported to actions where laches applies instead. See *DelCostello*, 462 U.S. at 162 (paraphrasing *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)). If Complaint Counsel are right that laches does not apply, then their argument that a statute of limitations cannot be borrowed in equitable cases is even more unsustainable.

Response to Conclusion No. 156:

Same response as RCL-147 and RCL-158.

B. Laches Bars Consideration of Outdated Ads

157. Laches applies where a defendant shows “unreasonable, prejudicial delay” by the plaintiff in commencing suit. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014).

Response to Conclusion No. 157:

Complaint Counsel agrees with this statement of the law. Additionally: “The defense of laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). “Laches is an affirmative defense. Accordingly, the burden of proving it rests with its proponent.” *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 38 (1st Cir. 2001) (citation omitted).

Moreover: “It is well settled that the United States is not ... subject to the defense of laches in enforcing its rights.” *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (citing cases); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) (citing cases); *In re Basic Research, LLC*, 2004 FTC LEXIS 211, at *14 (Nov. 4, 2004) (striking laches affirmative defense); *In re Metagenics, Inc.*, 1995 WL 17003144, at *1–2 (F.T.C. Jan. 5, 1995) (same); *Rentacolor*, 103 F.T.C. at 418–19; *In re Horizon Corp.*, 97 F.T.C. 464, 860 (1981); *In re SKF Indus., Inc.*, 94 F.T.C. 6, 83 n.8 (1979); *Simeon Mgmt.*, 87 F.T.C. at 1222; *In re Hollywood Carpets, Inc.*, 86 F.T.C. 784, 805 (1975) (initial decision adopted by the Commission); *In re Vulcanized Rubber & Plastics Co.*, 53 F.T.C. 920, 921–22 (1957) (initial decision adopted by the Commission).

158. The elements of a laches defense are all met here. The complained-of conduct was “known to the FTC for a considerable period of time” before Complaint Counsel initiated this action. PFF ¶14; *see also* PFF ¶¶1, 6. And Intuit “designed its [current] advertising disclosures in reliance on the settlement agreement[] reached with the attorneys general of all fifty states and the District of Columbia” during the pendency of this action. *FTC v. DirecTV, Inc.*, 2015 WL 9268119, at *2 (N.D. Cal. Dec. 21, 2015); *see id.* (noting that similar circumstances “facially support[ed] a finding of laches”). It would be inequitable to penalize Intuit for outdated ads when Complaint Counsel delayed filing suit for years, spanning three administrations. *See id.* at *2-3.

Response to Conclusion No. 158:

Intuit has adduced no evidence whatsoever to show that “[t]he elements of a laches defense are all met here.” In support of Conclusion No. 158, Intuit cites three facts:

- Intuit PFF ¶ 1: “The Federal Trade Commission (‘FTC’) initiated an investigation into Intuit’s allegedly deceptive advertising in May 2019.”
- Intuit PFF ¶ 6: “After starting its investigation, the FTC allowed nearly three full tax seasons to pass before suing Intuit in 2022.”
- Intuit PFF ¶ 14: “During [the TRO] hearing, U.S. District Judge Charles R. Breyer observed that the FTC’s purported emergency motion was made after extensive delay—as the conduct was ‘known to the FTC for a considerable period of time’— and that its timing was ‘entirely disruptive’ to Intuit.”

These facts, and Intuit's discussion of laches in its brief, make no showing of a "lack of diligence," let alone "prejudice" to Intuit. *Kansas*, 514 U.S. at 687. The timeline of Complaint Counsel's thorough investigation and lengthy attempts at settlement are documented in the record. (*See generally* GX312 (Complaint Counsel)). Other than simply stating lengths of time that have elapsed, Intuit has not provided any evidence of unreasonable delay. And Intuit has not provided any evidence from its witnesses or internal documents showing what prejudice it purportedly attributes to any such delay. (Judge Breyer was reflecting on the timing of an emergency motion for a temporary restraining order after the end of the tax season—not on the timeliness of case in general.) Intuit's argument boils down to one conclusory statement: "It would be inequitable to penalize Intuit for outdated ads when Complaint Counsel delayed filing suit for years, spanning three administrations." But Intuit fails to back that statement up with any actual evidence. Its claim of laches should be considered effectively abandoned.

Intuit makes an additional argument here that it did not make in its Post-Trial Brief: "Intuit 'designed its [current] advertising disclosures in reliance on the settlement agreement[] reached with the attorneys general of all fifty states and the District of Columbia' during the pendency of this action." Proposed Conclusion No. 158 (quoting *FTC v. DirecTV, Inc.*, 2015 WL 9268119, at *2 (N.D. Cal. Dec. 21, 2015)). This argument fails principally because it is devoid of factual support. Intuit put on lengthy testimony from three current or former Intuit executives at the Hearing, yet Intuit cites to none of that testimony, nor any of its many internal document exhibits, to support its claims of reliance and prejudice. Moreover, *DirecTV* dealt with an FTC request to strike an affirmative defense of laches—it was not a substantive ruling upholding *DirecTV*'s defense. That context is important for Intuit's assertion that *DirecTV* "not[ed] that similar circumstances 'facially support[ed] a finding of laches.'" The full quotation from *DirecTV* is: "As an initial matter, the FTC does not seriously dispute that the factual allegations pled in the Amended Answer at least facially support a finding of laches under this standard." *DirecTV*, 2015 WL 9268119, at *2. That is to say, *DirecTV*'s Amended Answer satisfied the basic pleading standard—not that its defense was actually effective. The Court should reject

Intuit’s attempt to cobble together a lack of facts and shaky legal support to set aside significant precedent holding that “[i]t is well settled that the United States is not ... subject to the defense of laches in enforcing its rights.” *Summerlin*, 310 U.S. at 416; *Utah Power & Light*, 243 U.S. at 409; *Basic Research*, 2004 FTC LEXIS 211, at *14; *Metagenics*, 1995 WL 17003144, at *1–2; *Rentacolor*, 103 F.T.C. at 418–19; *Horizon Corp.*, 97 F.T.C. at 860; *SKF Indus.*, 94 F.T.C. at 83 n.8; *Simeon Mgmt.*, 87 F.T.C. at 1222; *Hollywood Carpets*, 86 F.T.C. at 805; *Vulcanized Rubber & Plastics*, 53 F.T.C. at 921–22.

159. The FTC’s status as a federal government agency does not exempt it from a laches defense. See *DirectTV, Inc.*, 2015 WL 9268119, at *3; *FTC v. Hang-Ups Art Enterprises, Inc.*, 1995 WL 914179, at *4 (C.D. Cal. Sept. 27, 1995); see also *United States v. Lindberg Corp.*, 882 F.2d 1158, 1164 (7th Cir. 1989). Indeed, the D.C. Circuit recently rejected an argument that “‘sovereigns’ are exempt from laches.” *New York v. Meta Platforms, Inc.*, 66 F.4th 288, 296 (D.C. Cir. 2023) (citing Supreme Court cases).

Response to Conclusion No. 159:

In cases that suggest that laches might possibly be applicable against the government, courts often impose additional elements that Intuit has not even attempted to address. Intuit cites *FTC v. Directv, Inc.*, No. 15-cv-1129, 2015 WL 9268119, at *3 (N.D. Cal. Dec. 21, 2015), and *FTC v. Hang-Ups Art Enterprises, Inc.*, No. 95-cv-27, 1995 WL 914179, at *4 (C.D. Cal. Sept. 27, 1995)—both cases in which courts declined FTC requests to strike laches defenses from defendants’ answers. Both cases discuss footnote 10 of *United States v. Ruby Co.*, which opined, in dicta:

The traditional rule is that the doctrine of laches is not available against the government in a suit by it to enforce a public right or protect a public interest. It may be that this rule is subject to evolution as was the traditional rule that equitable estoppel would not lie against the government. However, in the analogous estoppel situation, the invocation of the doctrine against the government requires a showing of affirmative misconduct. Even if there were some allowance for laches against the government, there is no reason why that doctrine should not be subject to at least the same strictures as estoppel. In any event, on the facts of this case, we deem the policy considerations so strong as to compel denial of the defense of laches.

588 F.2d 697, 705 n.10 (9th Cir. 1978) (citation omitted); *see also Directv*, 2015 WL 9268119, at *3 (“*Hang-Ups* cited *Ruby* for the principle that laches may be a defense against the government if affirmative misconduct by the government is shown.” (cleaned up)). Complaint Counsel undertook a thorough investigation and afforded Intuit a lengthy window to try to settle the matter. (*See generally* GX312 (Complaint Counsel)). Intuit has not even raised the notion that the process was infected by “affirmative misconduct.” Again, Intuit’s claim of laches is so unsupported by the facts as to be effectively abandoned.

VII. The Proceeding Is Unconstitutional

160. Complaint Counsel’s claim fails because this proceeding is constitutionally infirm in four ways: *First*, the FTC’s administrative processes violate due process. *Second*, the separation of powers requires FTC commissioners and administrative law judges to be subject to direct presidential control, and prohibits combining the functions of all three branches of government in a single agency directly accountable to no one. *Third*, the non-delegation doctrine bars Intuit from being subjected to an administrative proceeding in which the Commission has unchecked authority to allocate some cases to agency adjudication and others to federal court. *Fourth*, because a disinterested observer could reasonably conclude that the Commission itself is not neutral in this case, Intuit has been denied its due-process right to a final administrative determination by a neutral arbiter.

Response to Conclusion No. 160:

This is not a conclusion of law; it is an introductory paragraph cribbed from the beginning of the section of Intuit’s Post-Trial Brief on its Constitutional defenses. Complaint Counsel’s responses to the specific items constituting this summary paragraph are provided below.

A. The FTC’s Internal Administrative Process Violates The Due Process Clause

161. Due process requires “a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion).

Response to Conclusion No. 161:

Complaint Counsel has no specific response.

162. “[A]n unconstitutional potential for bias”—i.e., a potential for a decision-maker not to be neutral—inevitably exists “when the same person serves as both accuser and adjudicator in a case.” *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). In *Williams*, for example,

the Supreme Court held that a Pennsylvania Supreme Court justice who had previously served as a prosecutor could not constitutionally adjudicate an appeal involving a defendant whom the justice had, in his service as a prosecutor, authorized the death penalty to be sought against. *Id.* at 4. Similarly, here, the FTC authorized the filing of the complaint against Intuit and, at the same time, will ultimately decide the merits of that same complaint. The potential for bias in such circumstances is substantial.

Response to Conclusion No. 162:

Intuit suggests that the Commission is like the Philadelphia district attorney who authorized his staff to seek a death sentence and later, as the Chief Justice of the Pennsylvania Supreme Court, voted to uphold the same sentence. The Supreme Court reversed, finding that the Justice should have been recused, a “conclusion [that] follows from the Court’s analysis in *In re Murchison*.” *Williams*, 579 U.S. at 9 (citing *In re Murchison*, 349 U.S. 133, 134–37 (1955)). But the Supreme Court had already distinguished *Murchison* from the agency adjudication context:

Plainly enough, *Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications. The Court did not purport to question the Cement Institute case, [*FTC v. Cement Inst.*, 333 U.S. 683 (1948)], or the Administrative Procedure Act [*see* 5 U.S.C. § 554] and did not lay down any general principle that a judge before whom an alleged contempt is committed may not bring and preside over the ensuing contempt proceedings. The accepted rule is to the contrary.

Withrow, 421 U.S. at 53. Thus *Williams*, which was based on *Murchison*, is inapposite here.

163. Under the FTC Act, the commissioners authorize the filing of a complaint and then ultimately decide the merits of that complaint. As in *Williams*, this combination of functions violates due process and requires dismissal of this proceeding.

Response to Conclusion No. 163:

Same response as RCL-162.

164. Were that not enough, the FTC’s win rate before itself is “a strong sign of an unhealthy and biased institutional process” that is incompatible with due process. PFF ¶934; *see also Axon Enterprise, Inc. v. FTC*, 143 S.Ct. 890, 907 n.1 (2023) (Thomas, J., concurring) (noting commissioners’ “tendency to overwhelmingly agree with their ... agency’s decisions”). As the Ninth Circuit observed two years ago, the “FTC has not lost a single case [in administrative proceedings] in the past quarter century”—a record that “[e]ven the 1972 Miami Dolphins would envy.” *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021). Just last month, the Commission again reversed this Court to rule in favor of itself. *See Order of the Commission, Illumina, Inc. & GRAIL, Inc.*, No. 9401 (F.T.C. Apr. 3, 2023).

Response to Conclusion No. 164:

Intuit argues that the Commission's recent history of finding respondents liable on the complaints it issues is "a strong sign of an unhealthy and biased institutional process." But Intuit needs more than recent statistics to show a due process violation.

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented. Very similar[] claims have been squarely rejected in prior decisions of [the Supreme] Court.

Withrow, 421 U.S. at 47. "In other words, an overlap of investigative and adjudicative functions alone, without further factual demonstration of bias or prejudice inherent in the particular application of the statutory scheme, does not violate due process." *Anderson v. Dolce*, 653 F. Supp. 1556, 1566 (S.D.N.Y. 1987) (citing *Withrow*, 421 U.S. at 47). "As the *Withrow* Court suggested, the situations that threaten the impartiality of an adjudicator can be divided into three categories: 1) pecuniary interest; 2) personal bias; and 3) predisposition to facts or law." *Id.* at 1568. Intuit has not alleged a pecuniary interest or personal bias. And statistics pertaining to a relatively small number of recent cases do not meet the "difficult burden of persuasion" to "overcome a presumption of honesty and integrity" and establish a predisposition to facts or law. *Withrow*, 421 U.S. at 47. In response, Intuit argues that *Withrow* was wrongly decided, Br. at 118—an argument that Intuit will have to wait to present to the Supreme Court itself. As an alternative, Intuit suggests that "special facts and circumstances present in the case" merit an exception to the presumption discussed in *Withrow*. Br. at 118 (quoting *Withrow*, 421 U.S. at 58). But Intuit does not go further down that path beyond conclusory statements that the agency has prejudged the matter. The Court should not indulge Intuit's prejudice conspiracy theories. *See also* Complaint Counsel's Post-Trial Reply Brief Part II.F.4.

165. *Withrow v. Larkin*, 421 U.S. 35 (1975), which held that the combination of a federal agency’s investigative and adjudicative functions, “without more,” does not violate due process, *id.* at 58, is not to the contrary. Even *Withrow* recognized that “special facts and circumstances present in the case” may demonstrate “that the risk of unfairness is intolerably high.” *Id.* The FTC’s concentration of governmental power, coupled with the evidence of case-specific prejudgment in this matter, *see infra* ¶¶185-188, renders the risk of unfairness here intolerable.

Response to Conclusion No. 165:

Same response as RCL-164.

166. The due-process problem with the FTC’s adjudication is amplified by the fact that this case implicates Intuit’s right to liberty, *see Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part) (describing “advertising” as “integral” to “liberty”), and thus involves “private rights,” *Axon*, 143 S.Ct. at 907 (Thomas, J., concurring). “[W]hen private rights are at stake, full Article III adjudication is likely required,” because “empowering entities that are not courts of competent jurisdiction to deprive citizens of core private rights” would violate due process. *Id.* at 907, 910.

Response to Conclusion No. 166:

Intuit argues that the alleged due process problems stemming from the Commission’s dual roles are “amplified by the fact that this case implicates Intuit’s right to liberty.” The only support Intuit provides for this argument is citation to two concurring opinions by Justice Thomas, which do not carry the force of law and, in any event, are inapposite here. In the cited portion of *44 Liquormart, Inc. v. Rhode Island*, Justice Thomas argues against the well-settled proposition that commercial speech enjoys less protection than noncommercial speech, principally citing two cases in which advertising was held to be protected by the freedom of the press (though Intuit is not a press organization). 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part); *contra Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–64 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770–73 (1976). But of course, in Intuit’s case, its advertising is deceptive, and “[t]he government may ban forms of communication more likely to deceive the public than to inform it.” *Cent. Hudson*, 447 U.S. at 563. In the cited portion of *Axon Enterprise, Inc. v. FTC*, Justice Thomas provides a review of the historical differences between the adjudication of “public” and “private” rights. 143 S. Ct. 890, 907, 910 (2023) (Thomas, J., concurring). Intuit asserts that

“advertising” is “integral” to “liberty,” “which is a ‘private right[.]’” Br. at 118 (quoting *Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part); *Axon*, 143 S. Ct. at 907 (Thomas, J., concurring)). But again, Intuit has no right to deceive people. *Cent. Hudson*, 447 U.S. at 563. Policing Intuit’s deception does not infringe on its corporate “right to liberty,” if such a right even exists.

B. The FTC’s Structure Violates The Separation Of Powers

167. The FTC’s structure contravenes article II of the Constitution because the commissioners and the FTC’s administrative law judges are each insulated from presidential removal. *See, e.g., Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2191 (2020); *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 484 (2010).

Response to Conclusion No. 167:

Intuit’s argument here asks this Court to declare that the Commission’s structure violates the separation of powers doctrine, overturning no less than *Humphrey’s Executor v. United States*, a foundational administrative law case in which the Supreme Court upheld the FTC’s structure eighty-eight years ago. 295 U.S. 602 (1935). *Humphrey’s Executor* is still good law today. The Commission’s structure is constitutional.

168. Article II vests “[t]he executive Power ... in a President,” U.S. Const. art. II, §1, cl. 1, who must “take Care that the Laws be faithfully executed,” *id.* art. II, §3. A core feature of the president’s authority is the power to supervise and remove “those who wield executive power on his behalf.” *Seila Law*, 140 S.Ct. at 2191.

Response to Conclusion No. 168:

Same response as RCL-167.

169. FTC commissioners exercise executive power. *See Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988). Yet those commissioners are shielded from at-will presidential removal. *See* 15 U.S.C. §41. That restriction on the president’s removal authority violates article II.

Response to Conclusion No. 169:

Same response as RCL-167.

170. Although the Supreme Court upheld the removal structure for FTC commissioners in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), the Court has repeatedly undermined that case in the subsequent eight-plus decades, including most recently in *Seila Law*. Indeed, *Seila Law* “repudiated almost every aspect of *Humphrey’s Executor*,” 140

S.Ct. at 2212 (Thomas, J., concurring in part and dissenting in part), by refusing to apply the decision to an agency with a slightly different structure to the 1935 FTC, *id.* at 2206. Two justices in *Seila Law* called *Humphrey's Executor* “a direct threat to our constitutional structure” that should be overruled in a future case. *Id.* at 2211-2212 (Thomas, J., concurring in part and dissenting in part).

Response to Conclusion No. 170:

Citing another concurring opinion by Justice Thomas, Intuit alleges that the Supreme Court has undermined *Humphrey's Executor*. Whatever the validity of that point may be, *Humphrey's Executor* is still good law today. The Commission's structure is constitutional.

171. The FTC's structure also unconstitutionally shields ALJs from removal.

Response to Conclusion No. 171:

Same response as RCL-173.

172. The president may not “be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer.” *Free Enterprise Fund*, 561 U.S. at 483-484. Yet FTC ALJs enjoy two layers of protection from presidential removal. Under 5 U.S.C. §7521(a), “[a]n action may be taken against an [ALJ] ... by the agency in which [he] is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.” And under 5 U.S.C. §1202(d), members of the Merit System Protection Board are themselves removable “by the President only for inefficiency, neglect of duty, or malfeasance in office.”

Response to Conclusion No. 172:

Same response as RCL-173.

173. This dual-layer protection violates article II. *See Free Enterprise Fund*, 561 U.S. at 492, 496. Indeed, relying on *Free Enterprise Fund* and *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018), the Fifth Circuit recently held that SEC ALJs, who do not differ in any material respect from FTC ALJs, are officers who cannot constitutionally enjoy two layers of removal protection. *Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023).

Response to Conclusion No. 173:

As its argument about the Commission's structure runs headlong into *Humphrey's Executor*, Intuit also offers a subsidiary argument: that this Court's structure violates the separation of powers doctrine, as the Administrative Law Judge is insulated from being removed from office by the President of the United States. In support, Intuit relies on *Jarkesy v. SEC*, in which the Fifth Circuit held that the statutory removal restrictions for SEC ALJs are

unconstitutional. 34 F.4th 446 (5th Cir. 2022), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023). No court has extended that ruling to the FTC, and it is not binding on this Court; moreover, it was wrongly decided. ALJs “perform adjudicative rather than enforcement or policymaking functions.” *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 507 n.10 (2010). The scope of the President’s constitutional power to remove and control adjudicators differs from the scope of the President’s power to remove and control other executive officers. In *Humphrey’s Executor*, the Court found it “plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers” charged with “quasi-judicial” duties. *Id.* at 629. In *Wiener v. United States*, the Court held that Congress could limit the President’s power to remove members of the War Claims Commission, an “adjudicatory body,” because of “the intrinsic judicial character of the task with which the Commission was charged.” 357 U.S. 349, 355–56. And in *Morrison v. Olson*, the Court observed that tenure protection may be “necessary to the proper functioning” of “an official performing ‘quasi-judicial’ functions.” 487 U.S. 654, 691 n.30 (1988).

174. Proper appointment does not salvage the actions of an officer with unconstitutional removal protection if that protection contributes to any harm inflicted. *See Collins v. Yellen*, 141 S.Ct. 1761, 1789 (2021). Here, the FTC Act’s “unconstitutional removal provisions inflicted harm” on Intuit because more accountability to the president “might have altered [the commissioners’] behavior in a way that would have benefited” Intuit. *Id.* With constitutionally appropriate oversight, the president could ensure that the commissioners decided this case based on the evidence. Indeed, it seems unlikely that commissioners would overturn the decisions of their ALJs as routinely as they do if the threat of removal required them to set aside their prior determination that a suit was appropriate and assess the evidence offered during the administrative proceeding.

Response to Conclusion No. 174:

Intuit quibbles with the “[s]ettled precedent” that “confirms that the unlawfulness of the removal provision does not strip [an officer] of the power to undertake the other responsibilities of [their] office.” *Collins v. Yellen*, 141 S. Ct. 1761, 1787–88 & n.23 (2021) (citing *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207–11 (2020)). Under that precedent, whatever the constitutionality of the removal protections for Commissioners and ALJs may be, it has no

bearing on the validity of any cease-and-desist order issued in these proceedings because all of the participating officials have been “properly appointed.” *Id.* Intuit argues that “[p]roper appointment does not salvage the actions of an officer with unconstitutional removal protection if that protection contributes to any harm inflicted.” But Intuit’s claim on that front is entirely speculative—“the [P]resident *could* ensure that the [C]ommissioners decided this case based on the evidence”; “it *seems unlikely* that [C]ommissioners would overturn the decisions of their ALJs as routinely as they do if the threat of removal required them to set aside their prior determination.” *Id.* (emphasis added). The Supreme Court gave far more concrete—and significant—examples in *Collins*:

Suppose, for example, that the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have “cause” for removal. Or suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way. In those situations, the statutory provision would clearly cause harm.

Collins, 141 S. Ct. at 1789. Courts interpreting *Collins*, including the district court on remand in *Collins*, “require a party challenging the agency action due to an unconstitutional removal scheme to establish ‘a nexus between the desire to remove and the challenged actions taken by the insulated actor.’” *Collins v. Lew*, No. 4:16-cv-3113, 2022 WL 17170955, at *4 (S.D. Tex. Nov. 21, 2022) (“*Collins I*”) (quoting *Cnty. Fin. Servs. Ass’n of Am., Ltd. v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022) (citing multiple other cases), *cert. denied* 143 S. Ct. 981 (2023)). In *Collins II*, on remand, the plaintiffs pointed to a number of actual sources (not speculation) that the removal process caused compensable harm, but the district court still found their allegations implausible. *Collins II*, 2022 WL 17170955, at *4–5. Intuit has not come forward with anything whatsoever to suggest that President Biden has any lack of confidence in his own three nominees

to the Commission.⁸ Intuit's idle speculation does not meet its burden in pressing an affirmative defense.

C. Congress Unconstitutionally Delegated Legislative Power To The FTC

175. The power to assign disputes to agency adjudication is “peculiarly within the authority of the legislative department.” *Oceanic Steam Navigation Co v. Stranahan*, 214 U.S. 320, 339 (1909).

Response to Conclusion No. 175:

Same response as RCL-180.

176. The non-delegation doctrine provides that “Congress may not constitutionally delegate its legislative power to another branch of Government.” *Touby v. United States*, 500 U.S. 160, 165 (1991).

Response to Conclusion No. 176:

Same response as RCL-180.

177. Legislation amounts to “a forbidden delegation of legislative power” where Congress fails to provide “an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.” *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (alteration in original).

Response to Conclusion No. 177:

Same response as RCL-180.

178. The FTC Act empowers the Commission to decide whether to enforce its provisions through administrative proceedings or instead in federal court. *See* 15 U.S.C. §§45(b), 53(b). And the statute does not provide the Commission an intelligible principle (or any principle) by which to decide whether to bring proceedings in an administrative or judicial forum. *See* 15 U.S.C. §§45(b), 53(b).

Response to Conclusion No. 178:

Same response as RCL-180.

179. This lack of an intelligible principle violates the non-delegation doctrine. *See generally Gundy v. United States*, 139 S.Ct. 2116, 2123 (2019) (plurality); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

⁸ President Biden nominated, and the Senate confirmed, Chair Khan and Commissioner Bedoya to their first terms; he nominated Commissioner Slaughter to a second term earlier this year.

Response to Conclusion No. 179:

Same response as RCL-180.

180. In fact, the Fifth Circuit recently held that Congress violated the non-delegation doctrine when it gave the SEC authority “to bring securities fraud actions ... within the agency instead of in an Article III court whenever the SEC in its unfettered discretion decides to do so.” *Jarkesy*, 34 F.4th at 461. As with the SEC, “Congress has said nothing at all” about how the FTC should exercise its “exclusive authority and absolute discretion to decide whether to bring ... enforcement actions within the agency instead of in an Article III court.” *Id.* at 462. Such a “total absence of guidance is impermissible under the Constitution.” *Id.*

Response to Conclusion No. 180:

Under the nondelegation doctrine, Congress may not delegate “powers which are strictly and exclusively legislative.” *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality). Intuit, based again on the Fifth Circuit’s recent opinion in *Jarkesy*, argues that the power to choose whether to assign disputes to agency adjudication or to an Article III tribunal is a strictly and exclusively legislative power. To the contrary, in making those choices about whether and how to enforce the laws it enforces, the Commission does not exercise legislative power; instead, it exercises enforcement discretion—a classic executive power. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021) (“[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch.”); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *cf. Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (noting that a federal prosecutor’s decision not to indict a particular defendant “has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed’” (citation omitted)). A Commission decision whether to pursue an enforcement action in federal court or in Part 3 constitutes a “forum choice” that is a classic exercise of prosecutorial discretion, which is not a legislative function. *See Hill v. SEC*, 114 F. Supp. 3d 1297, 1313 (N.D. Ga. 2015), *vacated on other grounds*, 825 F.3d 1236 (11th Cir. 2016). Far from forum shopping, the FTC is correctly adhering to the existing statutory scheme to ensure Intuit’s compliance with the FTC Act while preserving the possibility of consumer redress available under Section 19.

This is precisely what the Supreme Court recently described as a “coherent enforcement scheme.” *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1349 (2021).

Intuit counters that the nondelegation doctrine is nonetheless violated because Congress failed to provide “guidance” on the choice between judicial and administrative enforcement. But the Supreme Court has applied the principle Intuit cites only in cases where Congress has authorized executive agencies to adopt general rules governing private conduct. *See, e.g., Gundy*, 139 S. Ct. at 2129–30 (rules governing registration of sex offenders); *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472–76 (2001) (environmental rules); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 420–33 (1935) (rules governing commerce in petroleum). A decision concerning whether and in what forum to pursue an individual enforcement action, by contrast, involves the execution rather than the making of federal law. The absence of statutory language providing intelligible principles to guide executive officials in exercising enforcement discretion in particular cases therefore does not effect a delegation of any responsibility that Congress itself should have performed.

181. Complaint Counsel’s argument (Pretrial Brief at 51) that the choice of forum is merely an exercise of prosecutorial discretion is unavailing. As *Jarkesy* explained, “[t]hat position reflects a misunderstanding of the nature of the delegated power” because “Congress did not ... merely give the [agency] the power to decide whether to bring enforcement actions in the first place”; rather, Congress “effectively gave the [agency] the power to decide which defendants should receive *certain legal processes* (those accompanying Article III proceedings) and which should not.” 34 F.4th at 462. “Such a decision,” the court explained, “is a power that Congress uniquely possesses.” *Id.*

Response to Conclusion No. 181:

Case-specific Executive Branch enforcement choices often affect the procedural rights that particular defendants may assert. For example, the Executive Branch may choose between bringing criminal prosecutions and bringing civil suits. It may also choose between bringing felony charges (which would entitle the defendant to trial by jury) and bringing petty-misdemeanor charges (which would not). *See Baldwin v. New York*, 399 U.S. 66, 69-70 (1970) (plurality opinion). And executive agencies often choose between regulating parties through

rulemaking and regulating them through adjudication. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290–95 (1974). The Supreme Court has never suggested that, simply because those enforcement choices affect the procedural rights that the defendants may assert, an agency exercises legislative power when making those choices. *Cf. United States v. Batchelder*, 442 U.S. 114, 121, 124 (1979) (Congress did not violate the nondelegation doctrine by enacting two criminal statutes with “different penalties for essentially the same conduct” and leaving federal prosecutors with “discretion to choose between” them).

D. Intuit’s Due-Process Rights Have Been Violated By The Reality Or Appearance Of Prejudgment

182. The Due Process Clause prohibits an agency from “‘adjudg[ing] the facts as well as the law of a particular case in advance of hearing it.’” *Fast Food Workers Committee v. NLRB*, 31 F.4th 807, 815 (D.C. Cir. 2022).

Response to Conclusion No. 182:

Full context for the citation above is helpful, as Intuit omits the note on elaboration that the D.C. Circuit added in a footnote immediately following the end of Intuit’s quotation:

In [*Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970)], we reversed and remanded an entire FTC order because a biased commissioner participated in the decision-making process. It described the “test for disqualification” as “whether a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” [note 4] Reversing and remanding was necessary in *Cinderella* because allowing a biased FTC commissioner to participate in adjudicative proceedings constituted a violation of due process.

[note 4:] We have since elaborated on the *Cinderella* test, stating that “we will set aside a commission member’s decision not to recuse himself from his duties only where he has ‘demonstrably made up [his] mind about important and specific factual questions and [is] impervious to contrary evidence.’” *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164–65 (D.C. Cir. 1995) (quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981)).

Fast Food Workers Comm. v. NLRB, 31 F.4th 807, 815 (D.C. Cir. 2022) (cleaned up).

183. To determine whether due process is violated, courts ask “whether a disinterested observer may conclude that the agency has in some measure” prejudged the case. *Fast Food Workers Committee*, 31 F.4th at 815.

Response to Conclusion No. 183:

Same response as RCL-182.

184. Here, the comments and actions of the FTC Chair would lead a disinterested observer to conclude that the “ultimate determination of the merits” improperly “move[d] in predestined grooves.” *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 589-590 (D.C. Cir. 1970).

Response to Conclusion No. 184:

Same response as RCL-188.

185. If Chair Khan were a judge, her March 29, 2022 tweet of an FTC press release about Intuit’s “deceptive TurboTax ‘free’ filing campaign” and the need for an “immediate halt to Intuit’s deceptive ads,” PFF ¶932, would violate the admonition that “judge[s] should not make public comment on the merits of a matter pending or impending in any court,” Code of Conduct for U.S. Judges Canon 3(A)(6). *See United States v. Cooley*, 1 F.3d 985, 990 (10th Cir. 1993) (judicial recusal required where a judge told the press that abortion protesters who he had enjoined from blocking a clinic, but who intended to disregard his order, were “breaking the law”). The rules for the FTC Chair are no different. *See Intel Corp.*, 149 F.T.C. 1548, 1551 (2010) (reasoning that the standard governing judicial disqualification applies where “Commissioners act[] as judges”).

Response to Conclusion No. 185:

Same response as RCL-188.

186. The same is true of Chair Khan’s public suggestion that Intuit engaged in “law-breaking,” PFF ¶933, in a widely watched public interview that took place before Intuit had an opportunity to defend itself and at a time when FTC rules (and broader due-process principles) required Chair Khan to remain (and appear to remain) neutral. That public statement would have led a reasonable observer to conclude that this case was prejudged.

Response to Conclusion No. 186:

Same response as RCL-188.

187. Courts have invalidated FTC actions tainted by statements less problematic than Chair Khan’s. For instance, in *Cinderella Career & Finishing Schools*, the court vacated an FTC order regarding allegedly deceptive newspaper advertisements because the FTC Chair delivered a speech stating that newspapers’ “advertising acceptance standards could stand more tightening.” 425 F.2d at 589-590. And in *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), the court vacated an FTC order because the FTC Chair had previously investigated “the same facts and issues,” *id.* at 768.

Response to Conclusion No. 187:

Same response as RCL-188.

188. Here, a disinterested observer would reasonably conclude that Chair Khan prejudged this case, having already decided that Intuit's ads were deceptive. Chair Khan's comments also risk "hav[ing] the effect of entrenching [her] in [the] position which [s]he had publicly stated." *Cinderella*, 425 F.2d at 590. As a result, Intuit has been deprived of its right to a hearing "with every element of fairness" and with the "appearance of complete fairness." *American Cyanamid*, 363 F.2d at 767.

Response to Conclusion No. 188:

Here, Intuit seeks to overturn rulings that are already the law of the case, issued by this Court.

First, Intuit complains about a retweet from Chair Khan's FTC Twitter account of an FTC tweet linking to the press release announcing the issuance of the complaint in this case. Br. at 122–23. As this Court has already ruled:

Chair Khan's retweeting of an FTC press release does not reasonably call into question the Chair's impartiality, as claimed by Respondent, and does not indicate any prejudgment of the merits of this case. The Chair merely retweeted, without any commentary, an FTC post linking to a published FTC press release that reported the filing of the suit against Intuit and summarized the allegations and relief requested. As held in *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968), such press releases are not indicative of prejudgment or a violation of due process. *Id.* at 1314–15 (holding that the Commission's issuance of press releases that called attention to the pending proceedings and allegations did not constitute prejudgment or violate respondent's right to due process of law).

In re Intuit, Inc., 2022 WL 16960890, at *5 (F.T.C. Nov. 7, 2022) (Chappell, C.A.L.J.).

Second, Intuit complains about a speech by Chair Khan in which she mentioned this case. Br. at 123. As this Court has already ruled: "Factual statements that the FTC has brought a lawsuit alleging deception are akin to a factual press release describing pending adjudicatory proceedings and allegations, which, as noted above, does not evince prejudgment." *Intuit*, 2022 WL 16960890, at *5 (citing *Cinderella Career & Finishing Schs.*, 404 F.2d at 1314–15).⁹

⁹ The Commission also already determined that "the prejudgment argument asserted is without merit." *Intuit*, 2023 FTC LEXIS 18, at *48–49 (Jan. 31, 2023).

The Court has already distinguished *Cinderella Career & Finishing Schools* and concluded that, on the same factual allegations of prejudgment, “Intuit’s contention is without merit.” *Intuit*, 2022 WL 16960890, at *4–5. Intuit does not mention this inconvenient truth in its Post-Trial Brief. To the extent Intuit has made the argument any differently now than it did late last year, it has not at all explained how that meets the threshold for the Court to reconsider its previous order.¹⁰ Intuit also does not mention that the D.C. Circuit has “since elaborated on the *Cinderella* test, stating that we will set aside a commission member’s decision not to recuse himself from his duties only where [he or she] has demonstrably made up [his or her] mind about important and specific factual questions and is impervious to contrary evidence.” *Fast Food Workers Comm. v. NLRB*, 31 F.4th 807, 815 (D.C. Cir. 2022) (cleaned up) (citing cases). Intuit’s purported evidence—a retweet and a mention in a speech—are nowhere close to Chair Khan “demonstrably” making up her mind and being “impervious to contrary evidence.” *Id.* What is more, Intuit failed to avail itself of the path to relief for parties concerned with prejudgment, choosing inaction that stands in direct contrast with its current outrage.¹¹ Intuit’s affirmative defense of prejudgment rings as hollow now as it did the last time the Court considered it.

189. This proceeding’s constitutional defects require judgment in Intuit’s favor and dismissal of Complaint Counsel’s claim.

¹⁰ *Cf.* D. Ariz. L.R. Civ. 7.2(g)(1) (“The Court will ordinarily deny a motion for reconsideration of an Order absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence. Any such motion shall point out with specificity the matters that the movant believes were overlooked or misapprehended by the Court, any new matters being brought to the Court’s attention for the first time and the reasons they were not presented earlier, and any specific modifications being sought in the Court’s Order. No motion for reconsideration of an Order may repeat any oral or written argument made by the movant in support of or in opposition to the motion that resulted in the Order. Failure to comply with this subsection may be grounds for denial of the motion.”).

¹¹ Despite its repeated complaints about Chair Khan’s retweet and speech, Intuit has never sought her disqualification under Commission Rule 4.17. Such a motion must “be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.” 16 C.F.R. § 4.17(b)(2). At this late hour, Intuit’s allegation that Chair Khan is not impartial should be deemed effectively waived.

Response to Conclusion No. 189:

This is not a conclusion of law; it purports to be an adjudication of the entirety of Intuit's Constitutional affirmative defenses. Without repeating everything on these issues contained in all of Complaint Counsel's Post-Trial Filings, it suffices to say that Part 3 proceedings are constitutional.

If more were needed, there is at least one significant reason to doubt the sincerity of Intuit's constitutional defenses. Despite all of its complaints about the Commission, and an acknowledgement that this Court likely "cannot grant relief on any of these constitutional arguments," Br. at 117, Intuit has failed to pursue two other avenues in which it might actually vindicate its purported rights. First, despite demonstrating awareness of *Axon Enterprise* by citing to it, Intuit has not taken its "claims that the structure, or even existence, of [the FTC] violates the Constitution," 143 S. Ct. at 906, to federal district court, as it has newly been able to do since *Axon* was decided more than two months ago. Second, despite its repeated complaints about Chair Khan's tweet and speech, Intuit has never sought her disqualification under Commission Rule 4.17. As such a motion must "be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification," 16 C.F.R. § 4.17(b)(2), at this late hour, Intuit's allegation that Chair Khan is not impartial should be deemed effectively waived. Intuit has options to pursue recourse from the Commission and/or the courts. It has not availed itself of those options. This calls into question whether Intuit actually believes in its own positions on these constitutional issues.

CONCLUSION

190. Judgment is entered in Intuit's favor.

Response to Conclusion No. 190:

This is not a conclusion of law; it purports to be an adjudication of the entire matter. Without repeating everything contained in all of Complaint Counsel's Post-Trial Filings, it

suffices to say that Intuit is liable for violations of Section 5 of the FTC Act as alleged in Count I of this one-count Complaint, and the Court should enter the proposed order.

Respectfully submitted,

Dated: June 20, 2023

/s/ Roberto Anguizola

Roberto Anguizola, IL Bar No. 6270874
Rebecca Plett, VA Bar No. 90988
James Evans, VA Bar No. 83866
Sara Tonnesen, MD Bar No. 1312190241
Federal Trade Commission
600 Pennsylvania Ave., NW, CC-6316
Washington, DC 20580
(202) 326-3284 / ranguizola@ftc.gov
(202) 326-3664 / rplett@ftc.gov
(202) 326-2026 / james.evans@ftc.gov
(202) 326-2879 / stonnesen@ftc.gov

Counsel Supporting the Complaint
Federal Trade Commission

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

In the matter of:

Intuit Inc.,
a corporation,

Respondent.

Docket No. 9408

**COMPLAINT COUNSEL'S
REPLY FINDINGS OF FACT**

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COMPLAINT COUNSEL'S REPLY FINDINGS OF FACT

Complaint Counsel submits the following Replies to Respondent Intuit Inc.'s Proposed Findings of Fact.¹

I. Procedural History

A. The FTC's Investigation

1. The Federal Trade Commission ("FTC") initiated an investigation into Intuit's allegedly deceptive advertising in May 2019. (RX391 (Intuit) ¶5).

Response to Finding No. 1:

Complaint Counsel has no specific response.

2. During the investigation, the FTC issued three Civil Investigative Demands seeking information, documents, and testimony from Intuit, in addition to several CIDs to individual Intuit employees seeking their testimony. (RX391 (Intuit) ¶5). In response, Intuit produced hundreds of thousands of responsive documents, dozens of written interrogatory responses, and testimony from corporate representatives. (RX391 (Intuit) ¶5). The FTC also took testimony from eight Intuit employees between September 29, 2020, and October 30, 2020. (RX391 (Intuit) ¶5).

Response to Finding No. 2:

As Intuit's cited source reflects, the Commission sent two CIDs to Intuit, not three, though that fact is immaterial. Otherwise, Complaint Counsel has no specific response.

3. On June 29, 2021, Complaint Counsel shared a draft complaint with Intuit. (RX391 (Intuit) ¶9). Allegations regarding Intuit's marketing of its free commercial products made up only a small portion of the draft complaint. (RX391 (Intuit) ¶9).

¹ References to the existing post-trial filings are abbreviated as follows:

FF – Complaint Counsel's Proposed Findings of Fact

IFF – Intuit's Proposed Findings of Fact

RCL – Complaint Counsel's Reply to Intuit's Proposed Conclusions of Law

RFF – Complaint Counsel's Reply to Intuit's Proposed Findings of Fact

Br. – Respondent Intuit Inc.'s Post-Trial Brief

CC Br. – Complaint Counsel's Post-Trial Brief

Response to Finding No. 3:

Complaint Counsel disputes the characterization that “Intuit’s marketing of its free commercial products made up only a small portion of the draft complaint.” Complaint Counsel can offer its June 29, 2021, email transmission to counsel for Intuit for official notice if needed. The draft complaint discussed Intuit’s deceptive marketing at paragraphs 69–90 and 116–19 (Count I) of a 146 paragraph complaint, which is nearly one-fifth of the document. Otherwise, Complaint Counsel has no specific response.

4. At that time, Intuit was instructed by Complaint Counsel not to discuss the substance of the allegations in the draft complaint with them because, in their view, such discussions would be “unproductive.” (RX391 (Intuit) ¶9).

Response to Finding No. 4:

This fact is immaterial and reflects standard agency practice to negotiate settlement orders, not complaint language. Otherwise, Complaint Counsel has no specific response.

5. On January 6, 2022, Intuit entered into a tolling agreement with the FTC at Complaint Counsel’s request that established a tolling date of January 5, 2022.

Response to Finding No. 5:

Complaint Counsel has no specific response.

6. After starting its investigation, the FTC allowed nearly three full tax seasons to pass before suing Intuit in 2022. (RX391 (Intuit) ¶5; RX260 (FTC) at 27; RX799 (FTC) at 31).

Response to Finding No. 6:

Intuit’s comment that the Commission “allowed” time to pass between opening an investigation and bringing suit is little more than derision and distraction from the real issues. Among other things, it ignores extensions that Intuit asked for, Intuit’s petition to quash a CID in part, and Intuit’s delay tactics during compromise negotiations—to say nothing of the depth and thoroughness of the investigation performed by Complaint Counsel along with several state partners. Surely, had the investigation proceeded in less time, or had Intuit *not* been given multiple chances to negotiate a settlement and meet with senior Commission officials, it would be complaining that Complaint Counsel was too hasty and deprived Intuit of due process instead.

Here is brief overview of what Complaint Counsel did during the period in which Intuit suggests it “allowed” time to pass:

From June 2019 through November 2020, Complaint Counsel staff assigned to this matter, among many other things:

- Engaged in privileged and confidential deliberative processes with relevant Commission decision-making authorities to secure the issuance of Civil Investigative Demands (“CIDs”) to Intuit (twice), eleven Intuit employees, and Google;
- Received and reviewed 194 pages of written responses that Intuit submitted pursuant to the CIDs issued to Intuit (plus a 560-page privilege log);
- Received and reviewed 67,017 documents—containing well over half a million pages—of document productions that Intuit submitted pursuant to the CIDs issued to Intuit;
- Took Investigational Hearings of eight Intuit employees—including portions of the Hearings in which the witnesses testified as corporate representatives of Intuit—pursuant to CIDs issued to Intuit and its employees;
- Received and reviewed more than seven gigabytes of data from Google submitted pursuant to the CID to Google, as well as voluntary productions from Free File, Inc. and the Better Business Bureau of Los Angeles and Silicon Valley;
- Worked with one or more experts and/or consultants to design and conduct consumer surveys and/or testing; and
- Undertook an independent investigation of the TurboTax product and Intuit’s marketing practices, as partially described in the Declaration of Diana F. Shiller.

(GX312 (Complaint Counsel) ¶¶ 3, 12–18, 20–26 & App.).

Intuit substantially completed productions under the Commission’s CIDs in November 2020. Between October 27, 2020 and December 28, 2020, Intuit voluntarily submitted an additional 540 pages of whitepapers, analyses, and reports that Complaint Counsel staff reviewed

and considered. (GX312 (Complaint Counsel) ¶ 4). On June 29, 2021, Complaint Counsel sent Intuit a proposed complaint and settlement order on behalf of the Commission and thirty-four state partners. (GX312 (Complaint Counsel) ¶ 5).

From the end of Intuit's substantive productions in December 2020 through June 29, 2021, Complaint Counsel staff assigned to this matter, among many other things:

- Completed the review of materials submitted by Intuit and others, including materials produced pursuant to CID, voluntary productions, whitepapers, expert analyses and reports, and regular correspondence from counsel;
- Continued working with one or more experts and/or consultants to design and conduct consumer surveys and/or testing;
- Continued the independent investigation of the TurboTax product and Intuit's marketing practices;
- Engaged in substantial privileged and confidential deliberative processes at the staff level to consider what actions, if any, were appropriate to address staff's investigative findings;
- Engaged in privileged and confidential deliberative processes with state partners; and
- Engaged in privileged and confidential deliberative processes with relevant Commission decision-making authorities to secure authorization to share a proposed complaint and settlement order, and enter into consent negotiations, with Intuit.

(GX312 (Complaint Counsel) ¶ 6).

From Complaint Counsel's sending the proposed complaint and settlement order on June 29, 2021, through March 28, 2022, when the Commission issued the Complaint in this action, Complaint Counsel staff assigned to this matter, among many other things:

- Engaged in substantial compromise negotiations with Intuit and state partners through the exchange of letters, emails, and draft settlements, as well as at least

seven virtual meetings between Complaint Counsel, counsel for the states, and counsel for Intuit;

- Significantly, were made to **wait 108 days** from sending a revised proposed settlement to Intuit on November 10, 2021 to finally receiving a counterproposal on February 25, 2022, well after the beginning of the Tax Year 2021 filing season;
- Continued working with one or more experts and/or consultants to design and conduct consumer surveys and/or testing;
- Continued the independent investigation of the TurboTax product and Intuit's marketing practices;
- Continued engaging in privileged and confidential deliberative processes with state partners; and
- Engaged in privileged and confidential deliberative processes with relevant Commission decision-making authorities to recommend issuance of the Complaint in this action.

(GX312 (Complaint Counsel) ¶¶ 7, 27–32 & App.).

Before the Commission issued the Complaint this action and the accompanying federal court complaint, the relevant Commission decision-making authorities provided Intuit with opportunities to address them directly. Thus, in addition to numerous meetings at the staff level, Intuit, including through its General Counsel, presented its case to the following:

- Samuel Levine, Director of the Bureau of Consumer Protection, on March 23, 2022 (virtually, with state partner representatives);
- Lina Khan, Chair of the Commission, on March 24, 2022 (virtually);
- Rebecca Kelly Slaughter, Commissioner, on March 25, 2022 (virtually);
- Noah Joshua Phillips, Commissioner, on March 28, 2022 (in person); and
- Christine S. Wilson, Commissioner, on March 28, 2022 (virtually).²

² The fifth FTC Commissioner's seat is currently vacant; the President's nominee is on the Senate Executive Calendar for confirmation. *See* congress.gov/nomination/117th-congress/1541.

(GX312 (Complaint Counsel) ¶ 8 & App.).

On March 28, 2022, after the conclusion of the meetings discussed above, the Commission voted 3 to 1 (Phillips, Comm'r, dissenting) to issue the Complaint in this matter and to authorize staff to seek a Temporary Restraining Order and Preliminary Injunction from the United States District Court for the Northern District of California pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). (GX312 (Complaint Counsel) ¶ 9 & App.).

In addition to the normal rigors of significant investigatory and deliberative processes, during the relevant time period, Complaint Counsel dealt with challenges posed by the Covid-19 Pandemic, especially related to fielding in-person consumer research. (GX312 (Complaint Counsel) ¶ 10).

To summarize: The Commission's investigation of Intuit was among the most significant consumer protection investigations that the Commission has taken on in recent years. A small but dedicated group of Complaint Counsel staff have worked diligently on this matter for several years. Staff received and reviewed copious amounts of material submitted by Intuit and third parties, and undertook its own investigation and worked with one or more experts and/or consultants. Staff coordinated with multiple states on the investigation and possible compromise of this matter. And all involved—Complaint Counsel staff, the states, Intuit, defense counsel—endured a global pandemic throughout most of the pendency of the investigation. In compromise negotiations, Complaint Counsel and the states worked diligently to keep a large group of sovereigns coordinated, while at the same time Intuit, just one company, often took substantial time to engage—on one significant occasion, delaying 108 days to respond to a settlement draft while allowing the TY 2021 filing season to begin. The investigation and initiation of litigation proceeded without undue delay, while affording Intuit every opportunity to be heard in the decision-making process. Complaint Counsel have proceeded as swiftly as possible under the circumstances to take necessary and appropriate actions to protect consumers while affording Intuit due process, consistent with the Commission's statutory mandate and mission. (GX312 (Complaint Counsel) ¶ 11).

7. On March 24, 2022, Intuit informed FTC Chair Lina M. Khan that it was voluntarily retracting its “Free, Free, Free” ads after a meeting with her in which concerns about those ads were expressed. (Ryan (Intuit) Tr. 754-755; GX352 (FTC) at 1; RX73 (Intuit) at 25; GX438 (Intuit) ¶16; Motion to Withdraw Matter from Adjudication at 9, 123 (May 4, 2022)).

Response to Finding No. 7:

Complaint Counsel has no specific response.

8. Intuit voluntarily discontinued its “Free, Free, Free” ads even though doing so “was extremely disruptive,” requiring Intuit to “work[] across multiple agencies and across hundreds of contacts across [Intuit’s] media partners.” (Ryan (Intuit) Tr. 754).

Response to Finding No. 8:

Complaint Counsel has no specific response.

B. FTC Proceedings

9. On March 28, 2022, nearly nine months after sending Intuit the draft complaint, and just three weeks before the April 18, 2022, deadline for filing federal taxes, the FTC filed a pair of complaints: the section 5(a) administrative complaint in this case, and a complaint filed in the United States District Court for the Northern District of California pursuant to section 13(b) of the FTC Act, 15 U.S.C. §53(b). (RX260 (FTC); RX799 (FTC); RX74 (Intuit) at 2).

Response to Finding No. 9:

Same response as RFF-6.

10. Both complaints raised one count of deceptive advertising under section 5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a). (RX260 (FTC) at 24; RX799 (FTC) at 29).

Response to Finding No. 10:

Complaint Counsel has no specific response.

11. The case the Commission authorized contended that consumers were deceived by TurboTax ads into coming to the TurboTax website, and that the website then further duped consumers into spending substantial time and effort before Intuit performed a “bait and switch,” telling consumers at the last minute that their taxes would not be free. (RX260 (FTC); RX799 (FTC)).

Response to Finding No. 11:

The clearest distillation of “[t]he case the Commission authorized” is in Count I of the Complaints: “In numerous instances in connection with the advertising, marketing, promotion, offering for sale, or sale of online tax preparation products or services, [Intuit] represents,

directly or indirectly, expressly or by implication, that consumers can file their taxes for free using TurboTax. 120. [In fact], in numerous instances [Intuit] does not permit consumers to file their taxes for free using TurboTax. [Which is deceptive.]” (RX260 (FTC) ¶¶ 119–21; RX799 (FTC) ¶¶ 129–31) (alterations harmonize the two Complaints).

12. Along with its federal complaint, the FTC filed a motion seeking a temporary restraining order and a preliminary injunction enjoining Intuit from running purportedly unlawfully deceptive advertisements for its free products. (Emergency Motion for Temporary Restraining Order and Preliminary Injunction, *FTC v. Intuit Inc.*, No. 5:22-cv-1973 (N.D. Cal. Mar. 28, 2022)).

Response to Finding No. 12:

Complaint Counsel has no specific response.

13. The federal district court held a hearing on the FTC’s motion on April 21, 2022. (RX73 (Intuit)).

Response to Finding No. 13:

Complaint Counsel has no specific response.

14. During this hearing, U.S. District Judge Charles R. Breyer observed that the FTC’s purported emergency motion was made after extensive delay—as the conduct was “known to the FTC for a considerable period of time”— and that its timing was “entirely disruptive” to Intuit. (RX73 (Intuit) at 6).

Response to Finding No. 14:

In his Order Denying Motion for Emergency Relief, giving the Court’s definitive reasoning on the matter, Judge Breyer “denie[d] the FTC’s motion for emergency relief for three reasons.” (RX74 (Intuit) at 2).

First, Tax Day, which was April 18, 2022, has passed. Most taxpayers have already filed their taxes. Intuit represented in its briefing and at oral argument that its advertising is largely done for this tax season. *See* Opp. (dkt. 45) at vi. Any prospective harm is therefore attenuated. Second, even before Tax Day, Intuit had removed several of the most plausibly deceptive advertisements—that is, three videos that repeated the word “free” a dozen or more times over 30 seconds before a very brief disclaimer. *See* Shiller decl. (dkt. 7-13, GX 301) ¶¶ 16-31 (describing these ads); Ryan decl. (dkt. 45-3) ¶¶ 16-26 (noting their removal). Third, to the extent other advertisements might violate the FTC Act, the Court notes that the FTC has brought an administrative proceeding against Intuit, with a hearing set for September 14, 2022. *See* 15

U.S.C. § 45(b); AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341, 1346 (2021) (detailing the administrative process). An Administrative Law Judge (ALJ) with expertise in these matters will hear (and likely rule) before Intuit resumes its advertising campaign in the lead-up to Tax Day 2023.

(RX74 (Intuit) at 2). Regarding Intuit's suggestion of "extensive delay," see RFF-6.

15. Judge Breyer was unpersuaded by Complaint Counsel's theory of deception. In open court, he recognized that TurboTax Free Edition ads "don't say it is free to everybody and nobody thinks it is free to everybody." (RX73 (Intuit) at 17). He also recognized that Intuit's ads include "a disclaimer." (RX73 (Intuit) at 16-17). In response to Complaint Counsel's argument that Intuit's ads "omitted" disclosures (RX73 (Intuit) at 39), Judge Breyer observed the disclosure "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.'" (RX73 (Intuit) at 40). Similarly, Judge Breyer noted that one exemplary ad "tells me that it is limited to simple tax returns" and "says 'TurboTax free edition, for simple tax returns only*[,] That's what it is.'" (RX73 (Intuit) at 36-37).

Response to Finding No. 15:

Judge Breyer was conducting a hearing on the Commission's Motion for a Temporary Restraining Order and was playing the role of a neutral arbiter in that context, probing attorneys for both sides to test their arguments. His final, official say on the matter is contained in his Order Denying Motion for Emergency Relief. (RX74 (Intuit) at 2); *see* RFF-14. In that order, he recognized that it is *this* Court's job to substantively decide the matter. (RX74 (Intuit) at 2 ("An Administrative Law Judge (ALJ) with expertise in these matters will hear" the case)). With all respect to Judge Breyer, he did not have the whole record that this Court has, and he was considering the case under a different standard—whether to issue a TRO. (*See* RX73 (Intuit) at 6 ("I'm not passing judgment on the merits of whether it is a harm or not"), & 26 ("I'm not passing any judgment on the merits.")). And Intuit acknowledged as much to Judge Breyer at the hearing. (*See* RX73 (Intuit) at 21 (counsel for Intuit: "Now, this lawsuit is a request not that Your Honor decide the merits of whether what we are doing on a going forward basis is -- does or doesn't violate the FTC Act. They have noticed this under Section 5 for a hearing in September. The FTC is going to decide that issue. They filed a complaint with you seeking only the following relief: A temporary restraining order and a preliminary injunction pending the September hearing to prevent us from running the ads which had already stopped.")). The lack of a complete record is

especially important with regard to the understanding that “simple tax returns” is an ineffective disclaimer. *See* Complaint Counsel’s Post-Trial Reply Brief Part II.A.2a. Both Judge Breyer and Intuit recognized that the merits are for *this* Court to decide, and it may now do so based on a fully-developed record.

16. Just a day after the hearing, on April 22, 2022, Judge Breyer denied Complaint Counsel’s motion. (RX74 (Intuit)).

Response to Finding No. 16:

Same response as RFF-14.

17. On May 4, 2022, Intuit filed an unopposed motion to withdraw this matter from adjudication under FTC Rule 3.26(c). (Motion to Withdraw Matter from Adjudication (May 4, 2022)).

Response to Finding No. 17:

Complaint Counsel did not oppose Intuit’s motion because the Rules didn’t allow it. Rule 3.26 provides that Complaint Counsel may only “file an objection asserting that the conditions of paragraph (b) of this section have not been met.” 16 C.F.R. § 3.26(c). The condition referenced that is relevant in this matter is: “A district court has denied the Commission’s request for a preliminary injunction, if the Commission has not filed a motion for relief pending appeal with the court of appeals within 7 days following the district court’s denial of a preliminary injunction.” 16 C.F.R. § 3.26(b)(1). As discussed above, Judge Breyer denied Complaint Counsel’s request for a preliminary injunction, and that decision was not appealed. Intuit’s Motion to Withdraw was timely, and thus there was no allowable reason for Complaint Counsel to object.

18. On May 6, 2022, Complaint Counsel moved for summary decision, before Intuit had any opportunity to conduct discovery. (Motion for Summary Decision (May 6, 2022)).

Response to Finding No. 18:

Complaint Counsel’s Motion for Summary Decision was timely under the Rules. *See* 16 C.F.R. § 3.24(a)(1). And Intuit never availed itself of its right to seek denial of the Motion or a continuance on the basis that discovery was needed. *See* 16 C.F.R. § 3.24(a)(4).

19. Also on May 6, 2022, the Commission withdrew the matter from adjudication pursuant to Rule 3.26(c). (Order Withdrawing Matter from Adjudication Pursuant to Rule 3.26(c) of the Commission Rules of Practice (May 6, 2022)).

Response to Finding No. 19:

Complaint Counsel has no specific response.

20. On August 19, 2022, the Commission returned the matter to adjudication. (Order Returning the Matter to Adjudication and Setting a New Evidentiary Hearing Date (Aug. 19, 2022)).

Response to Finding No. 20:

In doing so, the Commission noted that it had “deliberated and determined that the public interest warrants further litigation.” Order Returning the Matter to Adjudication and Setting a New Evidentiary Hearing Date (Aug. 19, 2022).

21. On August 22, 2022, Complaint Counsel again moved for summary decision, still before Intuit had an opportunity to conduct discovery. (RX600 (FTC); Opposition to Complaint Counsel’s Motion for Summary Decision at 5 (Aug. 30, 2022)).

Response to Finding No. 21:

Complaint Counsel’s renewed Motion for Summary Decision was again timely under the Rules. *See* 16 C.F.R. § 3.24(a)(1). And again, Intuit never availed itself of its right to seek denial of the Motion or a continuance on the basis that discovery was needed. *See* 16 C.F.R. § 3.24(a)(4).

22. On January 31, 2023, following briefing and oral argument, the Commission denied Complaint Counsel’s motion for summary decision, finding that “a decision on the merits would be best made after fuller factual development at trial.” (Opinion and Order Denying Summary Decision at 2 (Jan. 31, 2023)). The Commission reasoned that trial would allow the parties to offer evidence that “might provide insights concerning consumers’ knowledge and expectations concerning ‘free’ claims in Intuit’s ads.” (Opinion and Order Denying Summary Decision at 12 (Jan. 31, 2023)).

Response to Finding No. 22:

The Commission’s Opinion and Order Denying Summary Decision contains numerous reflections that are pertinent to the issues before the Court. Among many other examples:

To summarize, although we find that Complaint Counsel have presented a strong case for summary decision with respect to at least some of the video ads, we are denying summary decision at

this time. Deferring the ruling until after trial will allow the Commission to have the benefit of a full factual record, including any relevant and admissible extrinsic evidence, and will facilitate a cohesive decision that addresses all of the relevant ads at once. Our denial of summary decision, however, should not be taken as an indication that the evidence presented is necessarily insufficient and that liability cannot attach unless Complaint Counsel produce additional evidence of deception at trial. Evidence that may not be sufficient for liability when the Commission must resolve all ambiguities and draw all justifiable inferences in Respondent's favor may nevertheless be sufficient to support a liability finding when Respondent is not entitled to such deference.

Opinion and Order Denying Summary Decision at 16. "Conclusory statements by [Intuit] experts that consumers were not deceived based on ... peripheral evidence are similarly inadequate."

Opinion and Order Denying Summary Decision at 12. "[Intuit's] prejudgment argument ... is without merit." Opinion and Order Denying Summary Decision at 19.

23. In denying summary decision, the Commission acknowledged that Complaint Counsel had "focused heavily on [Intuit's] video ads" and thus called for "the analysis of [the] other, equally important ads [to] be further developed during the course of trial." (Opinion and Order Denying Summary Decision at 8 (Jan. 31, 2023)).

Response to Finding No. 23:

Same response as RFF-22.

C. Trial

24. A trial in this matter was held before the undersigned beginning on March 27, 2023. (Chappell (ALJ) Tr. 5).

Response to Finding No. 24:

Complaint Counsel has no specific response.

25. Complaint Counsel's case-in-chief lasted just three partial trial days, during which they presented only two fact witnesses—both FTC employees—and one expert witness. (Shiller (FTC) Tr. 138; Baburek (FTC) Tr. 291; Novemsky (FTC) Tr. 348).

Response to Finding No. 25:

Despite the derisive "just" and "only," Complaint Counsel has no specific response.

26. Intuit presented in its case-in-chief three current or former Intuit executives as fact witnesses, along with four expert witnesses (one via trial deposition). (Johnson (Intuit) Tr. 546; Ryan (Intuit) Tr. 686; Hauser (Intuit) Tr. 837; Golder (Intuit) Tr. 1041; Deal (Intuit) Tr. 1291; Rubin (Intuit) Tr. 1498; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 1).

Response to Finding No. 26:

Complaint Counsel has no specific response.

27. The trial ended with Complaint Counsel calling two putative expert witnesses in rebuttal. (Yoeli (FTC) Tr. 1657; Novemsky (FTC) Tr. 1763).

Response to Finding No. 27:

Drs. Novemsky and Yoeli were qualified as expert witnesses (FF-472—FF-479; FF-816—FF-820)—they were not “putative expert witnesses.”

II. Intuit Inc.

28. Intuit is a personal finance software company headquartered in Mountain View, California. (JX1 ¶6; GX288 (Intuit) at 5; Johnson (Intuit) Tr. 549-551; GX152 (Johnson (Intuit) IHT) at 125).

Response to Finding No. 28:

Complaint Counsel has no specific response.

29. Intuit was founded in 1984 with the mission of helping customers manage their finances through innovative technology. (Johnson (Intuit) Tr. 551; GX288 (Intuit) at 5-6, 63).

Response to Finding No. 29:

Complaint Counsel has no specific response as this is not a probative fact.

30. For nearly 40 years, Intuit has been a customer-focused company that endeavors to deliver leading financial software products that provide customers with unmatched value and benefit. (Johnson (Intuit) Tr. 547, 549-551, 555; GX152 (Johnson (Intuit) IHT) at 125; RX58-A (Intuit) at 15; RX781 (Intuit) at 15). As Greg Johnson, former Intuit executive and General Manager of the Intuit Consumer Group that oversaw TurboTax, testified, “everything [Intuit] do[es] starts with the customer.” (Johnson (Intuit) Tr. 552, 555; GX288 (Intuit) at 9).

Response to Finding No. 30:

Complaint Counsel has no specific response as this is not a probative fact.

31. Intuit offers a number of widely used financial-software programs, including TurboTax, which assists consumers with preparing and filing their taxes; QuickBooks, which assists small and medium-sized businesses with accounting; and Credit Karma, which provides consumers personalized recommendations for consumer financial services products and services and access to their credit scores and reports. (GX288 (Intuit) at -6010).

Response to Finding No. 31:

Complaint Counsel has no specific response.

32. With TurboTax, Intuit seeks to alleviate consumer stress associated with a financial issue that affects nearly every household in America—filing taxes—by simplifying the tax-preparation process so that consumers can file their taxes with confidence. (Johnson (Intuit) Tr. 549-551; RX814 (Intuit) at -6789).

Response to Finding No. 32:

Complaint Counsel has no specific response as this is not a probative fact.

33. Intuit’s core value is “integrity without compromise.” (Johnson (Intuit) Tr. 553-555; RX58-A (Intuit) at 15; RX781 (Intuit) at 15; RX924-A (Intuit) at 17; RX922 (Intuit) at 12). That phrase embodies Intuit’s commitment to always “speak the truth” and “do the right thing even when no one is looking.” (Johnson (Intuit) Tr. 554; Ryan (Intuit) Tr. 836; RX58A (Intuit) at 15). Intuit’s reputation and its relationship with its customers depend on acting with integrity. (Johnson (Intuit) Tr. 554; Ryan (Intuit) Tr. 836; RX58A (Intuit) at 15).

Response to Finding No. 33:

Complaint Counsel has no specific response as this is not a probative fact. *See also*

Complaint Counsel’s Response to Proposed Conclusion of Law No. 140.

34. Intuit’s mission and values—including its focus on customers and its commitment to integrity without compromise—are integral to the company and drive its customer-focused business and marketing strategies, including the advertising for its free products that is at issue here. (RX920 (Intuit) at -2621; RX921 (Intuit) at -3046; Johnson (Intuit) Tr. 550-551, 554-555; Ryan (Intuit) Tr. 836; RX58-A (Intuit) at 15).

Response to Finding No. 34:

Complaint Counsel has no specific response as this is not a probative fact. *See also*

Complaint Counsel’s Response to Proposed Conclusion of Law No. 140.

35. Intuit’s mission and values are widely known within the company and echoed publicly. (Johnson (Intuit) Tr. 551, 554-555; Ryan (Intuit) Tr. 836; RX58-A (Intuit) at 13-15, 73, 76; RX781 (Intuit) at 14-15, 66, 68; RX804 (Intuit) at 7, 42, 128-129; RX924-A (Intuit) at 16-17).

Response to Finding No. 35:

Complaint Counsel has no specific response as this is not a probative fact. *See also*

Complaint Counsel’s Response to Proposed Conclusion of Law No. 140.

36. Intuit employees are drawn to the company because of its mission and values, and Intuit expects its employees to act according to those values and that mission. (Johnson (Intuit) Tr. 549-551, 553-555; Ryan (Intuit) Tr. 686; Rubin (Intuit) Tr. 1499).

Response to Finding No. 36:

Complaint Counsel has no specific response as this is not a probative fact. *See also* Complaint Counsel’s Response to Proposed Conclusion of Law No. 140.

37. Consistent with its mission and values, Intuit has helped millions of consumers, small businesses, and self-employed workers—many of them returning customers—prosper by providing financial management and compliance software products and services. (GX288 (Intuit) at 5).

Response to Finding No. 37:

Complaint Counsel has no specific response as this is not a probative fact. *See also* Complaint Counsel’s Response to Proposed Conclusion of Law No. 140.

38. The TurboTax advertisements challenged in this case were developed with Intuit’s mission and values—including its focus on customers and commitment to integrity—in mind. (Johnson (Intuit) Tr. 550-551, 554-555; Ryan (Intuit) Tr. 836; RX920 (Intuit) at -2621; RX921 (Intuit) at -3046; RX58-A (Intuit) at 15).

Response to Finding No. 38:

None of the sources Intuit cites here are in any way related to how “[t]he TurboTax advertisements challenged in this case were developed”; they only restate the same information about Intuit’s purported values cited already. In any event, this is not a probative fact. *See also* Complaint Counsel’s Response to Proposed Conclusion of Law No. 140.

III. The Tax-Preparation Industry

39. The tax-preparation industry bears several characteristics that make deception an economically irrational strategy for firms, including Intuit. (RX1027 (Deal Expert Report) ¶¶11-13, 23-58; Yoeli (FTC) Tr. 1740-1742). These characteristics include a “largely fixed set of consumers,” i.e., a stable market size; an “annual requirement to file taxes”; intense competition for customers; differentiated product offerings; and “very low marginal costs” for consumers to switch firms. (RX1027 (Deal Expert Report) ¶¶10-13, 23-58).

Response to Finding No. 39:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s incentives may preclude a finding of deception. Intuit’s economic incentives do not

preclude deception. (Deal (Intuit) Tr. 1388; GX743 (Yoeli Expert Report) ¶ 32). If consumers who were deceived into visiting turbotax.com have some tendency towards using a tax preparation solution that is in front of them, then deception could be in Intuit's economic best interest. (GX743 (Yoeli Expert Report) ¶ 18). If consumers who were deceived into visiting turbotax.com have some tendency towards preparing their taxes using the same service they used in the previous year, then deception could be in Intuit's economic best interest. (GX743 (Yoeli Expert Report) ¶ 18). If consumers who were deceived into visiting turbotax.com prefer not to start afresh in another solution, then deception could be in Intuit's economic best interest. (GX743 (Yoeli Expert Report) ¶ 18). And if consumers who were deceived into visiting turbotax.com tend to discount other firms' advertising claims after encountering Intuit's deception, then deception could be in Intuit's economic best interest. (GX743 (Yoeli Expert Report) ¶ 18).

40. Consumers in the tax-preparation industry also readily communicate about their experiences and understand when they have been deceived. (Deal (Intuit) Tr. 1301-1302, 1319-1320; RX1027 (Deal Expert Report) ¶¶143, 155; Golder (Intuit) Tr. 1189-1191, 1213-1214; Yoeli (FTC) Tr. 1740-1742). While this fact does not preclude deception in all cases, it is important background for understanding Intuit's incentives and business objectives in running the ads at issue, as well as its conduct moving forward.

Response to Finding No. 40:

Same response as RFF-39.

A. The Highly Competitive Tax-Preparation Industry Provides Consumers With A Wide Range Of Tax-Preparation Options

41. The tax-preparation industry is highly competitive, meaning many suppliers—over 130,000, in fact (RX874 (Intuit) at 27)—compete to provide tax-preparation services to consumers through differentiated products. (Deal (Intuit) Tr. 1316; RX1027 (Deal Expert Report) ¶¶37-41 & n.66; RX50 (Intuit) at 7; GX288 (Intuit) at 11; RX436 (Intuit) at -9045; RX874 (Intuit) at 24; RX704 (Intuit) at 5).

Response to Finding No. 41:

Same response as RFF-39. Additionally, Complaint Counsel notes that citations the testimony and report of Mr. Deal violate the Court's instruction to "not cite to expert testimony

to support factual propositions that should be established by fact witnesses or documents.” Order on Post-Trial Filings at 3.

42. The term “Tax Year” is used in the industry to refer to the calendar year preceding the period during which consumers prepare and file their annual individual tax returns. (JX1 ¶7). For example, Tax Year 2021 refers to tax returns filed in calendar year 2022 for income earned in calendar year 2021. (JX1 ¶7).

Response to Finding No. 42:

Complaint Counsel has no specific response.

43. There were approximately 163 million consumers in the tax-preparation industry—i.e., taxpayers who filed an individual tax return—in Tax Year 2021. (RX924-B (Intuit) at 93; RX1510 (Intuit) at 1).

Response to Finding No. 43:

Complaint Counsel has no specific response.

44. The number of consumers in the tax-preparation industry is stable, growing by an average of only 1.1% annually over the last ten years, meaning firms interact with largely the same group of customers each year. (Rubin (Intuit) Tr. 1529; Deal (Intuit) Tr. 1299-1301; RX924-B (Intuit) at 93; RX808 (Intuit) at 10; RX811 (Intuit) at 4; RX1027 (Deal Expert Report) ¶¶14-15, fig. 1). This slow growth creates an economic incentive for Intuit to retain customers who already use its products. (Rubin (Intuit) Tr. 1529; Deal (Intuit) Tr. 1299-1301; RX1027 (Deal Expert Report) ¶26).

Response to Finding No. 44:

Complaint Counsel has no specific response to the first sentence of this Proposed Finding, though Complaint Counsel notes that citations the testimony and report of Mr. Deal violate the Court’s instruction to “not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.” Order on Post-Trial Filings at 3.

Otherwise, Complaint Counsel has the same response as RFF-39.

45. The tax-preparation industry also is characterized by repeat transactions. Consumers are generally required to prepare and file a tax return each year, for their entire income-generating lives. (Deal (Intuit) Tr. 1299-1301). As a result, firms in the tax-preparation industry engage in repeat transactions with a relatively fixed set of customers, year after year. (Rubin (Intuit) Tr. 1529; Deal (Intuit) Tr. 1299-1301).

Response to Finding No. 45:

Complaint Counsel has no specific response to this Proposed Finding, though Complaint Counsel notes that citations the testimony and report of Mr. Deal violate the Court's instruction to "not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents." Order on Post-Trial Filings at 3.

46. Consumers have an array of alternatives when deciding how to prepare and file their tax returns each year. (RX534 (Intuit) at 31). Consumers can do so themselves, by hand; by hiring a tax professional (such as a certified public accountant ("CPA"), attorney, IRS enrolled agent, enrolled actuary, or enrolled retirement plan agent); by visiting a tax store (such as Liberty Tax); by using software available through the IRS Free File program; or by using commercial online tax-preparation software (such as TurboTax). (RX874 (Intuit) at 27; Deal (Intuit) Tr. 1303, 1308-1309; RX1027 (Deal Expert Report) ¶¶14-17, 42-50, C-1-34).

Response to Finding No. 46:

Complaint Counsel has no specific response to this Proposed Finding, though Complaint Counsel notes that citations the testimony and report of Mr. Deal violate the Court's instruction to "not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents." Order on Post-Trial Filings at 3.

47. Within the online tax-preparation software segment of the industry, Intuit competes with other firms that offer such software, including Tax Act, Free Tax USA, TaxSlayer, H&R Block, and Cash App Taxes (formerly known as Credit Karma Tax). (Rubin (Intuit) Tr. 1535; RX874 (Intuit) at 29; GX288 (Intuit) at 11; GX447 (Intuit) at 5).

Response to Finding No. 47:

Complaint Counsel has no specific response.

48. [REDACTED] percent of tax returns filed using online tax-preparation software are filed using TurboTax. (RX814 (Intuit) at -6786). Third-party websites and reviewers recognize that "TurboTax is the best online tax software because of its thorough and intelligent interview process." (RX505 (Intuit) at 3; RX80 (Intuit) at 2; RX1497 (Intuit) at 2).

Response to Finding No. 48:

The figure redacted above does not appear on the cited page, but is on the first page of RX814, which is public. Otherwise, Complaint Counsel has no specific response as this is not a probative fact.

49. In Tax Year 2020, 83.9 million tax returns (approximately 55%) were filed by a tax professional and 67.2 million returns (approximately 44%) were self-prepared using an online tax-preparation software program. (RX84 (Intuit) at tbl. 4).

Response to Finding No. 49:

Table 4 of RX84 indicates that in fiscal year 2021, about 67.2 million out of about 151 million individual income tax returns were filed online. The source does not say that non-online tax returns were necessarily filed by a tax professional.

50. In Tax Year 2021, 87 million tax returns (approximately 53.4%) were filed by a tax professional or tax store, 1 million (approximately 0.6%) were self-prepared on paper, and 74 million (approximately 45.4%) were prepared using online tax-preparation software. (RX327 (Intuit) at -8340; RX924-B (Intuit) at 93; Rubin (Intuit) Tr. 1535).

Response to Finding No. 50:

RX327 is not applicable because it predates TY 2021; additionally, Mr. Rubin's testimony at 1535 does not support these statistics. Otherwise, Complaint Counsel has no specific response.

B. Taxpayers Easily Switch Between Tax-Preparation Methods

51. Consumers can (and do) switch between different tax-preparation products and methods with ease, both within each Tax Year and also from one year to the next. (Deal (Intuit) Tr. 1302, 1310-1311; RX1027 (Deal Expert Report) ¶¶15; 51-54, 129; RX1018 (Golder Expert Report) ¶¶64-65).

Response to Finding No. 51:

Citations the testimony and report of Mr. Deal and Dr. Golder violate the Court's instruction to "not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents." Order on Post-Trial Filings at 3.

52. Every year, in fact, approximately 20% of taxpayers use a different tax-preparation method than they used the year before. (RX704 (Intuit) at 8). Switching between tax-preparation methods happens in no small part because firms in the industry actively encourage customers to switch, and product-review websites discuss the ease of doing so. (Deal (Intuit) Tr. 1309-1311; RX1027 (Deal Expert Report) ¶¶53; RX1018 (Golder Expert Report) ¶¶61-63; RX60 (Intuit); RX814 (Intuit) at -6786 to -6787; RX899 (Intuit); RX859 (Intuit); RX638 (Intuit); RX1048 (Intuit)).

Response to Finding No. 52:

Citations the testimony and report of Mr. Deal and Dr. Golder violate the Court's instruction to "not cite to expert testimony to support factual propositions that should be

established by fact witnesses or documents.” Order on Post-Trial Filings at 3. RX60 is a 118-page document and Intuit did not provide a page number in its citation. RX638, RX899, and RX1048 are screenshots of YouTube videos; the content of the videos is not provided. Otherwise, Complaint Counsel has no specific response.

53. Tax Year 2018 data show that [REDACTED] of consumers who used tax-preparation software the year prior (or [REDACTED] consumers) switched to a different software brand. (RX704 (Intuit) at 8). [REDACTED] of consumers who used a paid tax preparer the year prior (or [REDACTED] consumers) switched to a different one. (RX704 (Intuit) at 8). And [REDACTED] of all consumers who switched (or [REDACTED] consumers) changed their *method* of preparation (online DIY product to CPA, for example, or tax store to online product). (RX704 (Intuit) at 8; RX1027 (Deal Expert Report) ¶54).

Response to Finding No. 53:

Intuit does not clearly indicate which figures on page 8 of RX704 should be used to arrive at the numbers it puts forward here, and it is unclear what the source of the data in RX704 is. Citation the report of Mr. Deal violates the Court’s instruction to “not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.” Order on Post-Trial Filings at 3. Otherwise, Complaint Counsel has no specific response.

54. Intuit’s customer data further illustrate that [REDACTED] million TurboTax customers in Tax Year 2020 switched to TurboTax from a different tax-preparation method used the prior year. (RX1027 (Deal Expert Report) ¶129). These [REDACTED] million new TurboTax customers constituted over [REDACTED] of TurboTax’s customer base that year of [REDACTED] (RX1027 (Deal Expert Report) ¶129).

Response to Finding No. 54:

Citation the report of Mr. Deal violates the Court’s instruction to “not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.” Order on Post-Trial Filings at 3. Otherwise, Complaint Counsel has no specific response.

55. The online software segment of the tax-preparation industry—the segment in which TurboTax competes—has several features that allow customers to switch firms and products with particular ease. (RX90 (Intuit); RX498 (Intuit)). To start, consumers can simultaneously browse competitors’ product websites. (Rubin (Intuit) Tr. 1586, 1610; Yoeli (FTC) Tr. 1718-1719). TurboTax also allows consumers to electronically import and export their tax documents to and from competitors’ products, thereby reducing the burden on consumers of

switching. (Ryan (Intuit) Tr. 694-695, 799-800; Deal (Intuit) Tr. 1310-1311, 1346; RX1027 (Deal Expert Report) ¶¶12, 51, 53). Further, tax-preparation software typically does not require a financial commitment until the end of the tax-filing process, unlike a tax store or CPA, which may require upfront payment. (RX1027 (Deal Expert Report) ¶52).

Response to Finding No. 55:

Citations the testimony and report of Mr. Deal violate the Court’s instruction to “not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.” Order on Post-Trial Filings at 3. Otherwise, Complaint Counsel has no specific response.

C. Tax-Preparation Firms Offer Free Software To Facilitate Long-Term Customer Relationships, While Establishing Eligibility Criteria To Use It

56. Intuit and its competitors all offer consumers free versions of their tax-preparation software. (RX1027 (Deal Expert Report) ¶20, App’x C (“Digital DIY Tax Preparation Products Overview”) at C-3, fig. C.1 (“Free Products Among Intuit’s and Competitors’ Digital DIY Offerings in TY21”), C-7, fig. C.2 (“Comparison of Tax Situation Coverage Across Free Digital DIY Tax Product Offerings”)).

Response to Finding No. 56:

Citation the report of Mr. Deal violates the Court’s instruction to “not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.” Order on Post-Trial Filings at 3. Otherwise, Complaint Counsel has no specific response.

57. Companies offer free versions of their tax-preparation software to encourage consumers to try their products, with the goal of retaining customers who use free products over the long term, so that those customers will stay with a particular firm if they eventually need paid tax-preparation assistance. (RX1027 (Deal Expert Report) ¶61).

Response to Finding No. 57:

Citation the report of Mr. Deal violates the Court’s instruction to “not cite to expert testimony to support factual propositions that should be established by fact witnesses or documents.” Order on Post-Trial Filings at 3. Also, the cited paragraph in Mr. Deal’s report speaks only about TurboTax, not tax prep “[c]ompanies” in general. Otherwise, Complaint Counsel has no specific response.

58. Like Intuit’s TurboTax Free Edition, Intuit’s competitors’ free software also include qualifications on eligibility, almost always tied to the complexity of taxpayers’ returns, meaning not all consumers are eligible to file for free using their software. (Rubin (Intuit) Tr. 1535-1536; *infra* ¶¶141, 454, 458-459).

Response to Finding No. 58:

Complaint Counsel has no specific response.

59. The IRS also offers free tax-preparation services through the IRS Free File program, a private-public partnership with tax-preparation companies. (Rubin (Intuit) Tr. 1507-1509). Like the free software offered by Intuit’s competitors, the software offered through the IRS Free File program is only available for certain consumers who qualify. (Rubin (Intuit) Tr. 1519; RX301 (Intuit) at 3, 6). Unlike most commercial offers, however, eligibility for the IRS program is based on adjusted gross income (“AGI”). (Rubin (Intuit) Tr. 1519; RX301 (Intuit) at 3, 6; Shiller (FTC) Tr. 261). Moreover, the IRS’s rules dictate that participating companies impose additional eligibility requirements to ensure the companies’ Free File offerings serve at least 10 percent but not more than 50 percent of the eligible population. (RX1259-A (Intuit); Rubin (Intuit) Tr. 1516-1518). As a result, eligibility for the IRS Free File program is a “patchwork.” (RX1259-A (Intuit); Rubin (Intuit) Tr. 1518).

Response to Finding No. 59:

“[P]atchwork” is Intuit’s characterization. Otherwise, Complaint Counsel has no specific response.

IV. TurboTax’s Products

A. Product Lineup

60. Intuit offers several products under the “TurboTax” brand name that help consumers prepare and file their federal and state tax returns. (Ryan (Intuit) Tr. 690; Johnson (Intuit) Tr. 571-573, 642; JX1 ¶8; RX439-A (Intuit); RX449 (Intuit); GX144 (Soukas (Intuit) Dep.) at 15).

Response to Finding No. 60:

Complaint Counsel has no specific response.

61. Intuit refers to these TurboTax products as “stock keeping units” or “SKUs.” (Johnson (Intuit) Tr. 572; Rubin (Intuit) Tr. 1575; Deal (Intuit) Tr. 1410).

Response to Finding No. 61:

Complaint Counsel has no specific response.

62. TurboTax SKUs (free and paid) are differentiated by the complexity of a consumer’s tax situation they can handle and the level of expert assistance provided. (Ryan (Intuit) Tr. 690; Johnson (Intuit) Tr. 568, 570-571; RX439-A (Intuit); RX449 (Intuit)). This

approach makes TurboTax's SKUs easier for consumers to understand and choose among. (Johnson (Intuit) Tr. 571).

Response to Finding No. 62:

Regarding the last point, Mr. Johnson testified: "The purpose of [Intuit's complexity-based model] is to remove ambiguity, and the complexity reflects and then mirrors the IRS requirements for filing returns based on the schedules required for you to comply with the tax code. And so our lineup complexity-based reflects the complexity in terms of the types of forms and number of forms that are reflected in the tax code and how we mirror that within our product lineup." (Johnson (Intuit) Tr. 571). Testimony about the "purpose" of the model does not definitely show that "[t]his approach makes TurboTax's SKUs easier for consumers to understand and choose among." Otherwise, Complaint Counsel has no specific response.

63. The complexity of a customer's tax return is determined by the IRS forms and schedules that the individual must file. (Ryan (Intuit) Tr. 690; Johnson (Intuit) Tr. 571; GX145 (Berger (Intuit) Dep.) at 121; GX4 (Intuit) at 9-10).

Response to Finding No. 63:

Complaint Counsel has no specific response.

64. TurboTax's SKUs fall into three categories: Do-It-Yourself ("DIY"), Live Assisted, and Live Full Service; each offers varying levels of expert assistance. (Johnson (Intuit) Tr. 572; Ryan (Intuit) Tr. 690-691; RX439-A (Intuit); RX449 (Intuit); RX1223 (Intuit); RX1224-A (Intuit)).

Response to Finding No. 64:

Complaint Counsel has no specific response.

65. TurboTax DIY SKUs allow consumers to prepare and file their tax returns on their own. (Johnson (Intuit) Tr. 563; GX150 (Goode (Intuit) IHT) at 44-45; GX157 (Smith (Intuit) IHT) at 31). TurboTax Live Assisted SKUs allow consumers to prepare and file their returns themselves after receiving expert tax assistance, including a final expert review before filing. (Ryan (Intuit) Tr. 690). TurboTax Live Full Service SKUs provide consumers with a tax expert—similar to a CPA—who prepares and files a customer's return entirely on her behalf. (Ryan (Intuit) Tr. 691).

Response to Finding No. 65:

Complaint Counsel has no specific response.

66. Each of the three product categories includes four separate SKUs. (Johnson (Intuit) Tr. 572-573; Ryan (Intuit) Tr. 690-691). The four TurboTax DIY SKUs are TurboTax Free Edition, TurboTax Deluxe, TurboTax Premier, and TurboTax Self-Employed. (Ryan (Intuit) Tr. 690; RX439-A). The four TurboTax Live Assisted SKUs are TurboTax Live Basic, TurboTax Live Deluxe, TurboTax Live Premier, and TurboTax Live Self-Employed. (GX144 (Soukas (Intuit) Dep.) at 15; RX1224-A (Intuit)). The four TurboTax Live Full Service SKUs are TurboTax Live Basic Full Service, TurboTax Live Deluxe Full Service, TurboTax Live Premier Full Service, and TurboTax Live Self-Employed Full Service. (GX144 (Soukas (Intuit) Dep.) at 15; RX1224-A (Intuit)).

Response to Finding No. 66:

Complaint Counsel has no specific response.

67. The three free TurboTax products—Free Edition, Live Basic, and Live Basic Full Service—may be used by consumers with “simple tax returns,” as defined by the IRS, regardless of income level. (Ryan (Intuit) Tr. 702-703; GX146 (Ryan (Intuit) Dep.) at 122; GX156 (Ryan (Intuit) IHT) at 92; RX3 (Intuit); *see also* RX371 (Intuit) at -0295).

Response to Finding No. 67:

The three free TurboTax products may be used by consumers with “simple tax returns,” as defined by *Intuit*. (FF-11—FF-20; RFF-119).

68. Prior to Tax Year 2018, simple tax returns were those that could be filed with an IRS Form 1040EZ or Form 1040A. (Ryan (Intuit) Tr. 707, 718-719; RX1280 (Intuit)). Beginning in Tax Year 2018, simple tax returns were those that could be filed on a Form 1040, without any attached schedules or forms. (Ryan (Intuit) Tr. 702-703; RX3 (Intuit)).

Response to Finding No. 68:

Intuit has also extended eligibility for its free offerings beyond what is listed here. (FF-17—FF-18, FF-20).

69. TurboTax Free Edition is “truly free.” (Rubin (Intuit) Tr. 1524, 1528; Johnson (Intuit) Tr. 573, 614, 617, 622; GX161 (Maxson (FTC) Dep.) at 279; *see also* Ryan (Intuit) Tr. 702-703, 742; GX146 (Ryan (Intuit) Dep.) at 122; GX156 (Ryan (Intuit) IHT) at 92; RX3 (Intuit); RX371 (Intuit) at 8; RX439-A (Intuit); RX449 (Intuit)). Consumers cannot pay to use TurboTax Free Edition under any circumstances. (Rubin (Intuit) Tr. 1528, 1539; *see also* Johnson (Intuit) Tr. 573, 617, 622; Ryan (Intuit) Tr. 702-703, 742).

Response to Finding No. 69:

TurboTax Free Edition is only free for those eligible to use it. (FF-11—FF-20).

70. TurboTax Deluxe, TurboTax Live Deluxe, and TurboTax Live Deluxe Full Service are paid SKUs that can be used by consumers with more complex tax situations, including mortgage deductions, rental property income, charitable donations over \$300, itemized

deductions, unemployment income, or education expenses. (Rubin (Intuit) Tr. 1614; RX439-A (Intuit); RX449 (Intuit)).

Response to Finding No. 70:

Complaint Counsel has no specific response.

71. TurboTax Premier, TurboTax Live Premier, and TurboTax Live Premier Full Service are paid SKUs that can be used by consumers with IRS forms or schedules beyond those covered by the TurboTax Deluxe SKUs, such as investment income, rental property income, or refinancing deductions. (RX439-A (Intuit); RX449 (Intuit)).

Response to Finding No. 71:

Complaint Counsel has no specific response.

72. TurboTax Self-Employed, TurboTax Live Self-Employed, and TurboTax Live Self-Employed Full Service are paid SKUs that can be used by taxpayers who file forms 1099-NEC, 1099-K, and Schedule C. (RX439-A (Intuit); RX950 (Intuit) at 1-3; RX1539 (Intuit) at 1).

Response to Finding No. 72:

Complaint Counsel has no specific response.

B. Intuit Aims To Start Customers In The Right SKU

73. Because it wants its customers to have a positive experience, Intuit is incentivized to get them started in the TurboTax SKU that best suits their individual tax needs, including by accurately informing customers about Free Edition's qualifications. (Johnson (Intuit) Tr. 567-568, 570; Ryan (Intuit) Tr. 705, 747-748; Rubin (Intuit) Tr. 1580-1581, 1583-1584; RX40 (Intuit) at 12; RX810 (Intuit) at -6751, -6772; RX42 (Intuit) at 11; RX54 (Intuit) at -2523; RX1027 (Deal Expert Report) ¶¶67; RX1018 (Golder Expert Report) ¶¶28-29, 205; GX152 (Johnson (Intuit) IHT) at 66-67, 128-129, 136-137; GX150 (Goode (Intuit) Dep.) at 128; GX146 (Ryan (Intuit) Dep.) at 125-126). As Intuit's Senior Vice President of Marketing Cathleen Ryan testified, Intuit's "business depends on ... [TurboTax customers] start[ing] in the right product for them." (Ryan (Intuit) Tr. 747).

Response to Finding No. 73:

Most of the cited sources concern SKU selection on the TurboTax website; they do not speak to Intuit's advertising for TurboTax that brings consumers to the TurboTax website.

74. Intuit defines the "right" product for the consumer as the lowest-priced (or free) TurboTax SKU for which the consumer's tax situation qualifies. (Johnson (Intuit) Tr. 567-568, 570).

Response to Finding No. 74:

The cited testimony does not support this Proposed Finding. Mr. Johnson testified:

Q. And, Mr. Johnson, who sees what you call the products and pricing page?

A. Every customer sees the products and pricing page.

Q. And what is the reason TurboTax makes the products and pricing page available to consumers?

A. The whole purpose of the product and pricing page is to ensure the customer does two things. We want to make sure that they get in the right product, as defined by their complexity, and we also want to deliver confidence that the customer actually qualifies and understands why they are in the product that they are in.

Q. And why does Intuit want to make sure consumers get in the right product as defined by their complexity?

A. Oh, it's essential that our customers go into the product with confidence so that when they do file and they understand what is the price, if there is a price for the offering that they filed in, that they have an understanding of why. If they were in the wrong product, that would lead to a lot of friction and a negative experience, and in many cases, leads to what we call abandonment. This is a customer that starts the product but never finishes and they leave and go to a competitor or some other method of filing. And so that's what happens, people abandon the product if they are filing their return and they end up being in the wrong SKU that fits their situation.

Q. And I should back up here a minute. When you say "right product," what do you mean by that?

A. The products we have are aligned to the IRS tax code. And they are -- the products are arranged based on the complexity, and that complexity is defined based upon the core form or schedules you would need to file your taxes. And so when I say the right product, it means the product that aligns with their complexity of their tax situation in how that aligns with the IRS definition of forms and schedules required to file a return accurately.

Q. Now -- JUDGE CHAPPELL: I have a question. You said earlier that there are people that input their information and their data and they get to a point where they see they have to pay or for whatever reason they choose not to use the program and they leave the program, correct?

THE WITNESS: Yes, Your Honor. [...]

Q. Thank you, Mr. Johnson. And back to the screen here in RX 439-A, doesn't -- let's say a taxpayer comes to the TurboTax website and has a simple tax return. Wouldn't Intuit prefer that they used one of the paid products anyway?

A. No. No. The goal is to make sure the customer files in the return that they need to based on their complexity and have confidence in doing so. And therefore, they -- one, not only are they satisfied, they recommend to a friend, they become a loyal customer, they file in future years. And so the whole product selection process is very objectively getting customers into the product that represents their tax situation. And so filing in those -- that -- filing their taxes is in a sense complying with the IRS code as it relates to their forms complexity.

Q. And so three of the products -- of the four products listed here have prices associated with them. Is that right?

A. Yes.

Q. And for those three products, do you have to pay up front?

A. No.

(Johnson (Intuit) Tr. 567-568, 570). Mr. Johnson discussed the “right” product being the one that matches the complexity of consumers’ taxes, not “the lowest-priced (or free) TurboTax SKU for which the consumer’s tax situation qualifies.”

75. When consumers begin in the right TurboTax SKU for their tax needs, and thereby avoid having to switch to a more expensive SKU during their tax-preparation process, they have a more positive experience. (Ryan (Intuit) Tr. 747-748; Rubin (Intuit) Tr. 1560, 1583-1584; RX54 (Intuit) at -2523; GX152 (Johnson (Intuit) IHT) at 128-129). They also tend to leave more positive feedback about TurboTax. (Rubin (Intuit) Tr. 1559-1560, 1583-1584; GX152 (Johnson (Intuit) IHT) at 66-67, 128-129; GX411 (Intuit) at 1, 10; RX809 (Intuit) at 5). And they are more likely to return to TurboTax the following year. (Ryan (Intuit) Tr. 747-748; GX152 (Johnson (Intuit) IHT) at 128-129).

Response to Finding No. 75:

Complaint Counsel has no specific response.

76. Conversely, consumers generally report having a more negative experience when they are prompted to change SKUs. (Johnson (Intuit) Tr. 567-568; Rubin (Intuit) Tr. 1525-1526; GX636 (Intuit) at -4423; GX411 (Intuit) at 1, 10).

Response to Finding No. 76:

Such negative experiences include, according to the cited GX411 “customers still want more price transparency (e.g. ‘Free isn’t Free,’ required upgrades, State and RT).” (GX411 (Intuit) at 1).

77. Not surprisingly, then, Intuit has invested substantial time, effort, and other resources in tools that help consumers identify the TurboTax SKU best for their tax situation. (Johnson (Intuit) Tr. 570; GX152 (Johnson (Intuit) IHT) at 161-162).

Response to Finding No. 77:

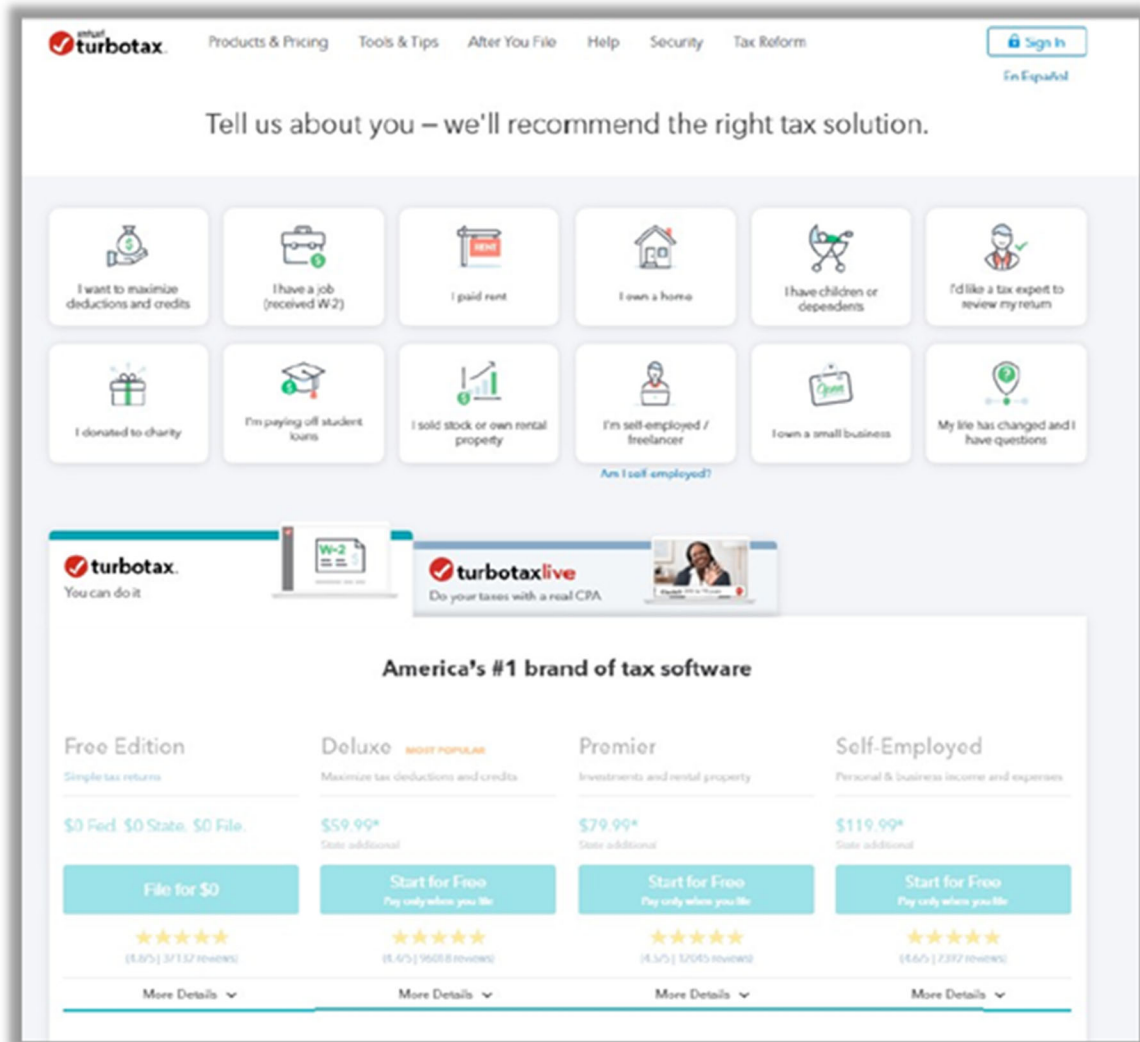
The cited testimony concerns SKU selection on the TurboTax website; it does not speak to Intuit’s advertising for TurboTax that brings consumers to the TurboTax website. (E.g. GX152 (Johnson (Intuit) IHT) at 161–62 (“We want our consumers to [1] come to our website, [2] understand what their alternatives are, [3] get them in the right SKU, which is a SKU that best aligns with what we think they will file with, or file in, and then make sure that we continuously innovate to make that experience as good as possible, as frictionless as possible, and ideally we want to have every single customer that visits us to ultimately file with us because they’re so delighted. And so it’s not about a advertising is not our goal. Our goal is around building the product experience that delights customers and that they want to tell their friends about.”)).

78. Since Tax Year 2015, Intuit’s “Products & Pricing” webpage has included a straightforward tool (the “SKU Selector”) that can recommend the right TurboTax SKU for a consumer, with the goal of making it easy for consumers to choose the right SKU for their individual tax needs. (Johnson (Intuit) Tr. 565-566; Rubin (Intuit) Tr. 1575-1577; RX295 (Intuit)).

Response to Finding No. 78:

“[S]traightforward,” “right,” and “easy” are Intuit’s characterizations. In fact, the SKU selector steers consumers towards a paid product for such common reasons and indicating that they want to “maximize deductions and credits.” (Johnson (Intuit) Tr. 662–63; Rubin (Intuit) Tr. 1579–81). And the SKU selector may steer consumers to the free product when they are not, in fact, eligible to use free TurboTax. (FF-718—FF-720).

79. RX716-A, shown in part below, is a screenshot of the Products & Pricing webpage from Tax Year 2018 that shows the SKU Selector at the top of the page. (RX716-A (Intuit)).



Response to Finding No. 79:

Complaint Counsel has no specific response.

80. More generally, Intuit endeavors to be transparent—in its advertisements and on the TurboTax website—about the qualifications for TurboTax Free Edition and its other free products, so that consumers get started in the right product. (Ryan (Intuit) Tr. 747; Johnson (Intuit) Tr. 608-610; GX651 (Intuit) at -0265; GX150 (Goode (Intuit) IHT) at 217).

Response to Finding No. 80:

Despite Intuit’s purported endeavors, its advertising is deceptive. Ms. Ryan testified about an exhibit that claims: “within our spot [an ad] and by landing on our website, people should be able to quickly understand whether they qualify for this free offer.” (GX651 (Intuit), at -0265). She later testified that the only way Intuit ensured that “within our spot” people would

understand whether they qualified for the free offer was “the use of simple – ‘simple tax returns’ and ‘see details at turbotax.com.’” (Ryan (Intuit) Tr. 826). But Intuit’s purported disclaimers—especially “simple tax returns”—were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). The cited testimony from Mr. Johnson discusses the “‘See Why It’s Free’ modal” on the TurboTax website, which consumers would see *after* being exposed to deceptive TurboTax advertising. Intuit created GX651 in October 2021, more than two years into the FTC’s and states’ investigation into Intuit’s deceptive free claims. Intuit’s endeavors at transparency were simply too little, too late.

81. Intuit’s efforts to get consumers to begin their tax returns in the right TurboTax SKU for them have been successful. Between Tax Years 2014 and 2021, [REDACTED] of customers that started in a DIY TurboTax SKU ultimately completed and filed their returns using the same SKU. (RX820 (Intuit); RX821 (Intuit); *see also* RX1018 (Golder Expert Report) ¶206 & fig. 37).

Response to Finding No. 81:

That consumers started and finished their taxes in the same SKU does not indicate it was the right SKU for them; Intuit does not provide information on how many people started and finished in a paid SKU who could have qualified to use Free Edition, or TurboTax’s IRS Free File Program offering, when it existed.

82. Intuit’s efforts to get consumers with simple tax returns to begin in Free Edition have been similarly successful. Between Tax Years 2014 and 2021, [REDACTED] of the [REDACTED] consumers ([REDACTED] who began their tax returns in Free Edition completed and filed their returns in Free Edition. (RX820 (Intuit); RX821 (Intuit); *see also* RX1018 (Golder Expert Report) ¶207 & fig. 37).

Response to Finding No. 82:

Same response as RFF-81.

V. TurboTax Free Tax-Preparation Services

A. TurboTax's "Free-Tax Growth Strategy"

1. Intuit Offers Free Products As Part Of Its Long-Term Growth Strategy

83. Intuit offers free TurboTax SKUs, including TurboTax Free Edition, as part of a long-term growth strategy to attract and retain customers with simple tax returns. (Ryan (Intuit) Tr. 702-703; GX152 (Johnson (Intuit) IHT) at 124). By delivering an exceptional experience in its free TurboTax SKUs, Intuit aims to develop a long-term relationship with simple filers so that they will continue to use TurboTax as their tax situations become more complex—and hence require the use of paid TurboTax SKUs—over time. (Johnson (Intuit) Tr. 626, 642-643; Ryan (Intuit) 702-703; Rubin (Intuit) Tr. 1522-1523; RX50 (Intuit) at 2; RX1018 (Golder Expert Report) ¶28; GX156 (Ryan (Intuit) IHT) at 89-90, 118; GX152 (Johnson (Intuit) IHT) at 124-125; GX148 (Somers (Intuit) Dep.) at 88-89).

Response to Finding No. 83:

Complaint Counsel has no specific response.

84. In addition to driving acquisition and retention of simple filers, offering a genuinely free tax-preparation solution supports other aspects of Intuit's broader strategy. Customers who have a positive experience filing their own taxes for free are more likely to recommend TurboTax to their friends, family, and neighbors (Rubin (Intuit) Tr. 1584-1585; GX155 (Rubin (Intuit) IHT) at 175, 208-209, 213; GX152 (Johnson (Intuit) IHT) at 162), and offering free TurboTax SKUs leads customers to consider other DIY solutions (RX54 (Intuit) at -2511; RX1027 (Deal Expert Report) ¶¶60-61).

Response to Finding No. 84:

Complaint Counsel has no specific response.

85. Customers with simple tax returns offer significant potential long-term value to Intuit because they tend to be younger and less set in their ways, have lower acquisition costs, and likely will have more complex taxes over time. (Ryan (Intuit) Tr. 702-703; Rubin (Intuit) Tr. 1522-1523, 1596-1598; Yoeli (FTC) Tr. 1745; GX152 (Johnson (Intuit) IHT) at 122-125). For instance, TurboTax Free Edition filers have an average age of 33 years, significantly lower than the average age of all taxpayers (which is 45-50 years). (Rubin (Intuit) Tr. 1597-1598).

Response to Finding No. 85:

Complaint Counsel has no specific response.

86. Intuit does not set any short-term revenue goals for simple filers who use its free TurboTax SKUs. (Johnson (Intuit) Tr. 556-557, 642).

Response to Finding No. 86:

Complaint Counsel has no specific response.

87. For Intuit to realize the potential long-term value of acquiring simple filers, it must retain those customers year-over-year. (Johnson (Intuit) Tr. 626-627, 643; Rubin (Intuit) Tr. 1522-1523; RX1018 (Golder Expert Report) ¶28). Therefore, to ensure it receives a return on its investments in developing, supporting, and marketing TurboTax—including its offering of free TurboTax SKUs to simple filers—Intuit relies on repeat customers returning to TurboTax every year. (Johnson (Intuit) Tr. 626-627; RX1018 (Golder Expert Report) ¶28). Repeat customers are the foundation of Intuit’s business and business model. (Johnson (Intuit) Tr. 626; Rubin (Intuit) Tr. 1529; Ryan (Intuit) Tr. 747).

Response to Finding No. 87:

Complaint Counsel has no specific response.

88. Intuit’s focus on retaining customers is also consistent with its economic incentives in the tax-preparation industry. Because there are, as discussed earlier, relatively few new customers entering the tax-preparation market each year, many consumers will have prepared their taxes before and may be resistant to trying online tax-preparation generally or TurboTax specifically. (Rubin (Intuit) Tr. 1529-1530; Deal (Intuit) Tr. 1299-1301; RX924-C at -0862; RX1027 (Deal Expert Report) ¶¶14-15, fig. 1). Intuit also faces high customer-acquisition costs, providing yet additional incentive for Intuit to value repeat customers, as it can take several years to recoup the investment required to acquire each new customer. (Johnson (Intuit) Tr. 626-627; RX50 (Intuit) at -6547; RX1027 (Deal Expert Report) ¶65).

Response to Finding No. 88:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s incentives may preclude a finding of deception. Intuit’s economic incentives do not preclude deception. (Deal (Intuit) Tr. 1388; GX743 (Yoeli Expert Report) ¶ 32). If consumers who were deceived into visiting turbotax.com have some tendency towards using a tax preparation solution that is in front of them, then deception could be in Intuit’s economic best interest. (GX743 (Yoeli Expert Report) ¶ 18). If consumers who were deceived into visiting turbotax.com have some tendency towards preparing their taxes using the same service they used in the previous year, then deception could be in Intuit’s economic best interest. (GX743 (Yoeli Expert Report) ¶ 18). If consumers who were deceived into visiting turbotax.com prefer not to start afresh in another solution, then deception could be in Intuit’s economic best interest. (GX743 (Yoeli Expert Report) ¶ 18). And if consumers who were deceived into visiting turbotax.com tend to discount other firms’ advertising claims after encountering Intuit’s

deception, then deception could be in Intuit's economic best interest. (GX743 (Yoeli Expert Report) ¶ 18).

89. In short, because the tax-preparation industry has a "largely fixed set of consumers," and because of the "very low marginal costs and [the] annual requirement to file taxes," Intuit (like its competitors) derives far greater value from exceeding customer expectations and earning repeat business than it does from one-off transactions. (RX1027 (Deal Expert Report) ¶10); *see also* RX1027 (Deal Expert Report) ¶11 ("Having millions of short-term, dissatisfied customers who became victims of a 'bait and switch' program ... would eliminate future revenue streams from the deceived customers, would spread negative perceptions of Intuit, and would not be economically rational.")).

Response to Finding No. 89:

Same response as RFF-88.

90. Intuit seeks to maximize customer retention by delivering exceptional products that result in a positive consumer experience. (Ryan (Intuit) Tr. 834; GX150 (Goode (Intuit) IHT) at 121). Intuit's "guiding approach" to retaining customers is to have products that delight customers so that they return year after year and tell others about their positive experience. (Johnson (Intuit) Tr. 626-627; Ryan (Intuit) Tr. 703; RX1018 (Golder Expert Report) ¶¶28, 33; GX152 (Johnson (Intuit) IHT) at 124; GX155 (Rubin (Intuit) IHT) at 175).

Response to Finding No. 90:

Same response as RFF-88.

91. Intuit's focus on customer retention has been successful. TurboTax maintains an industry-leading customer-retention rate of approximately 80%, meaning 8 out of 10 TurboTax customers return the following year. (Johnson (Intuit) Tr. 627-628; RX50 (Intuit) at -6548 to -6550; RX53 (Intuit) at 271; RX58 (Intuit) at 81; RX924-C (Intuit) at 96; GX144 (Soukas (Intuit) Dep.) at 135-136, 139; GX150 (Goode (Intuit) IHT) at 131). In Tax Year 2018, Intuit's 80% retention rate was [REDACTED]

(RX704 (Intuit) at 8; RX59 (Intuit)).

Response to Finding No. 91:

It is well established that evidence of customer satisfaction is not relevant to determining whether challenged advertising claims are deceptive. Because proof of actual deception is not necessary for purposes of Section 5 liability, evidence that some consumers were not injured or were satisfied with services received is not a defense to liability. Accordingly, evidence of such satisfaction may be excluded as irrelevant. Moreover, evidence of general consumer satisfaction does not rebut evidence of deception. Although evidence of actual deception is not required to prove liability under Section 5, such proof is highly probative to show that a practice is likely to mislead consumers acting reasonably under the

circumstances. However, consumer satisfaction does not necessarily indicate the absence of deception. As stated in the Commission's recent opinion denying Complaint Counsel's Motion for Summary Decision, "the fact that most customers who chose to use a TurboTax product were generally happy with that product does not render non-deceptive a particular ad that drove people to the TurboTax website."

In re Intuit, Inc., 2023 WL 2609450, at *8–9 (F.T.C. Mar. 7, 2023) (order granting Complaint Counsel's Motion to Preclude Admission of Evidence of Customer Satisfaction) (Chappell, C.A.L.J.) (citations omitted) (quoting *In re Intuit Inc.*, 2023 WL 1778377, at *12 (F.T.C. Jan. 31, 2023) (Commission order denying summary decision)).

92. Intuit's retention rate is even higher with its paying customers than with its customers who file for free, which is inconsistent with consumers who have to pay expecting that they could file for free. (Johnson (Intuit) Tr. 628-629; GX152 (Intuit) at 133; GX155 (Rubin (Intuit) IHT) at 213; RX36 (Intuit); RX59 (Intuit) at 3; RX765-A (Intuit); RX1018 (Golder Expert Report) ¶47; RX1017 (Hauser Expert Report) ¶131).

Response to Finding No. 92:

Same response as RFF-91.

93. Nearly [REDACTED] of all TurboTax returns each year are filed by returning TurboTax customers. (RX54 (Intuit) at -2512; RX57-A (Intuit) at 2; RX765-A (Intuit) at 5).

Response to Finding No. 93:

Same response as RFF-91.

94. Intuit's witnesses provided credible testimony that Intuit's strategy is *not* to deceive consumers into believing that they can file taxes for free with TurboTax when they cannot. (Johnson (Intuit) Tr. 603-604, 615, 622, 683; Ryan (Intuit) Tr. 702-704; Rubin (Intuit) Tr. 1529-1531; GX146 (Ryan (Intuit) Dep.) at 125-126).

Response to Finding No. 94:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers. Complaint Counsel also disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: "consumers can file their taxes for free using TurboTax." Compl. ¶ 119.

The evidence shows that many TurboTax advertisements include a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

95. Such a strategy, these witnesses explained, would be catastrophic for TurboTax’s business. (Johnson (Intuit) Tr. 561-562; Ryan (Intuit) Tr. 704; Rubin (Intuit) Tr. 1525-1526). Intuit presented evidence that it has an incentive *not* to deceive customers both because such deception is easy for consumers to detect and because consumers can readily punish deception, including by switching to a competitor and sharing their negative experiences. (Johnson (Intuit) Tr. 561-562, 575-576; Ryan (Intuit) Tr. 704; Rubin (Intuit) Tr. 1525-1526; Deal (Intuit) Tr. 1319-1320).

Response to Finding No. 95:

Same response as RFF-88.

96. Intuit's executives confirmed the negative repercussions that would result from a business strategy to mislead customers. (Rubin (Intuit) Tr. 1648). It would "erode trust" in the TurboTax brand, result in negative word-of-mouth among consumers, and undercut Intuit's ability to retain customers, thereby preventing it from establishing the long-term relationships necessary to the success of its free-tax growth strategy. (Johnson (Intuit) Tr. 561-562, 575-576, 629; Rubin (Intuit) Tr. 1529-1530, 1648; RX577 (Intuit) at 8). As Mr. Johnson testified, "if when Intuit was marketing TurboTax Free Edition, it was creating an expectation among consumers who did not qualify to file for free that they could, in fact, do so," then consumers would have been "incredibly disappoint[ed]," and "would leave" TurboTax to find "another way of filing." (Johnson (Intuit) Tr. 575).

Response to Finding No. 96:

Same response as RFF-88.

97. Unlike in a typical deception case, Complaint Counsel did not offer any evidence that the alleged theory of deception benefitted the defendant. Indeed, the record demonstrates that the deception alleged would have harmed the TurboTax business.

Response to Finding No. 97:

Complaint Counsel disputes the asserted fact. As an initial matter, the fact asserted does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record."). Otherwise, Complaint Counsel has the same response as RFF-88.

2. Intuit's Free-Tax Strategy Requires Intuit To Continuously Innovate And Improve Its Free Offerings

98. Intuit invests a significant amount of time, effort, and other resources in making its free tax-preparation software superior to any other in the market. (Johnson (Intuit) Tr. 564-565, 576, 586-588; Rubin (Intuit) Tr. 1539-1541; Ryan (Intuit) Tr. 799-800; RX702-A (Intuit) at 3; RX49 (Intuit) at 21-22; RX581 (Intuit) at 10; RX594 (Intuit) at -1390, -1392, -1396; RX597 (Intuit) at 9; RX804 (Intuit) at 15; RX803 (Intuit) at 2).

Response to Finding No. 98:

Complaint Counsel has no specific response.

99. Intuit has improved TurboTax Free Edition by expanding both the scope of the free offer and the product's functionality over the years. (Johnson (Intuit) Tr. 610-611; Rubin (Intuit) Tr. 1539-1541; GX640 (Intuit) at 1; GX155 (Rubin (Intuit) IHT) at 64-65). Doing so cost Intuit millions of dollars in short-term revenue. (Rubin (Intuit) Tr. 1540; Johnson (Intuit) Tr. 586-588, 604; RX702-A at 17).

Response to Finding No. 99:

Complaint Counsel has no specific response.

b. Expanded Free-State-Return Offer

100. Intuit has offered a free DIY tax-filing product to consumers since Tax Year 2006. (RX591 (Intuit) at 9). From Tax Year 2013 to 2016, TurboTax Free Edition was known as “Federal Free Edition.” (JX1 ¶9).

Response to Finding No. 100:

Complaint Counsel has no specific response.

101. Before 2013, consumers with simple tax returns could use TurboTax Free Edition to file their federal income taxes for free; filing state returns required a fee. (Ryan (Intuit) Tr. 707; RX591 (Intuit) at 9; RX260 (FTC) at 3).

Response to Finding No. 101:

Complaint Counsel has no specific response.

102. In Tax Year 2013, Intuit offered a discount to TurboTax Free Edition customers to prepare and file their state tax return(s) for free during a three-week promotional period. (GX640 at -3644). Intuit expanded this offer in Tax Year 2014 when it introduced Absolute Zero, which enabled TurboTax Free Edition customers to prepare and file their state tax returns for free during the first five weeks of the tax-filing season (later expanded to the first fifteen weeks of the tax filing season), and in Tax Year 2018 began offering free state returns to Free Edition customers for the entire year. (Ryan (Intuit) Tr. 711-712, 721; Johnson (Intuit) 557, 602- 606; RX581 (Intuit) at 15-16; RX577 (Intuit) at 18, 39; RX578 (Intuit) at 7; RX300-A (Intuit) at 3).

Response to Finding No. 102:

Complaint Counsel has no specific response.

103. Because “the name of [Intuit’s free] offer [was] Absolute Zero” from Tax Year 2014 to Tax Year 2017 (Johnson (Intuit) Tr. 606), Intuit used the “Absolute Zero” name in its advertising during that period.

Response to Finding No. 103:

Complaint Counsel has no specific response.

104. Intuit was the first tax-preparation company to offer a free federal and state tax-filing option. (Johnson (Intuit) Tr. 602; GX640 (Intuit) at 1; GX402 (Intuit) at -7468). Following the introduction of Absolute Zero, many of Intuit’s competitors began offering similar free programs. (Johnson (Intuit) Tr. 602; GX581 (Intuit) at 15-16; GX640 (Intuit) at 1; RX577 (Intuit) at 18). Intuit’s leadership has therefore driven an expansion in free tax offerings across the industry. (GX640 (Intuit) at 1; RX1018 (Golder Expert Report) ¶¶235, 239).

Response to Finding No. 104:

The citation to GX581 appears to be a miscite, as GX581 is a video; the likely correct cite is RX581. Otherwise, Complaint Counsel has no specific response.

c. Expanded Features In Free Edition

105. Intuit has consistently sought to improve TurboTax Free Edition by adding additional features, services, and functionality. (Johnson (Intuit) Tr. 564; Rubin (Intuit) Tr. 1539).

Response to Finding No. 105:

Complaint Counsel has no specific response.

106. In Tax Year 2018, for example, Intuit provided TurboTax Free Edition customers the ability to import information from their prior year's tax return ("YOY Data Transfer") for free. (Rubin (Intuit) Tr. 1540). Before that, Free Edition customers could only access YOY Data Transfer if they purchased a separate add-on product. (Rubin (Intuit) Tr. 1540).

Response to Finding No. 106:

Complaint Counsel has no specific response.

107. In Tax Year 2019, Intuit further enhanced TurboTax Free Edition by offering "Tax Return Access"—which allows customers to review their prior year(s)' tax returns—for free. (GX640 (Intuit) at 1; Rubin (Intuit) Tr. 1540). Before that, Free Edition customers could only use Tax Return Access if they purchased a separate add-on product. (Rubin (Intuit) Tr. 1540; RX54 (Intuit) at -2511).

Response to Finding No. 107:

Complaint Counsel has no specific response.

108. Intuit also has used artificial intelligence and machine learning to "simplify and streamline TurboTax Free Edition ... removing as many screens as we can and reducing the amount of time and effort that people put into using Free Edition." (Rubin (Intuit) Tr. 1540-1541).

Response to Finding No. 108:

Complaint Counsel has no specific response.

d. Free-Assisted And Full-Service Products

109. In Tax Year 2020, Intuit—having recognized that consumers with simple returns often paid for a small amount of live assistance—began offering TurboTax Live Basic for free for individuals with simple tax returns who filed from the start of the tax-filing season through the end of March. (Ryan (Intuit) Tr. 742; Rubin (Intuit) Tr. 1542-1543). It did so as an extension of its free customer acquisition and retention strategy. (Ryan (Intuit) Tr. 742; Rubin (Intuit) Tr.

1503). The first year this free offer was available, over [REDACTED] taxpayers filed their taxes for free using Live Assisted Basic, a more than [REDACTED] increase over the number that paid to file with that SKU the prior year. (RX820 (Intuit)).

Response to Finding No. 109:

Complaint Counsel has no specific response.

110. In Tax Year 2021, Intuit—through what it called its “\$0 Any Way” campaign—expanded its free assisted offer to include both Live Basic and Live Basic Full Service, allowing consumers with simple tax returns to file with a tax professional for free. (GX650 (Intuit) at 1; Ryan (Intuit) Tr. 749-750).

Response to Finding No. 110:

Complaint Counsel has no specific response.

111. The “\$0 Any Way” offer was for a limited time; the advertisements for it always specified the end date. (Ryan (Intuit) Tr. 788, 796-798; GX650 (Intuit) at 1).

Response to Finding No. 111:

Complaint Counsel has no specific response.

112. In Tax Years 2020 and 2021, more than [REDACTED] taxpayers ([REDACTED]) filed their federal and state tax returns for free using Live Basic or Basic Full Service. (RX820 (Intuit); RX821 (Intuit)).

Response to Finding No. 112:

Complaint Counsel has no specific response.

3. Intuit’s Free-Tax Strategy Has Led To Over A Hundred Million Americans Filing For Free Using TurboTax Free Edition

113. Between Tax Years 2014 and 2021, [REDACTED] customers filed their federal tax returns for free using TurboTax Free Edition. The vast majority of those ([REDACTED]) also filed their state return(s) for free using TurboTax Free Edition. (RX820 (Intuit); RX821 (Intuit)). In each year during that period, between 11 and 14 million consumers used TurboTax Free Edition to prepare and file their taxes for free. (RX820 (Intuit); RX821 (Intuit)).

Response to Finding No. 113:

Complaint Counsel has no specific response.

114. In 2022 alone, more than “13 million customers filed for absolutely zero dollars” using Free Edition. (Ryan (Intuit) Tr. 703; Johnson (Intuit) Tr. 576-577).

Response to Finding No. 114:

Complaint Counsel has no specific response.

115. Between Tax Years 2014 and 2021, more TurboTax users filed with Free Edition (██████████) than with any other TurboTax SKU. (RX820 (Intuit); RX821 (Intuit)).

Response to Finding No. 115:

Complaint Counsel has no specific response.

116. Between Tax Years 2014 and 2021, moreover, approximately ██████████ who filed using any online service (not just TurboTax) filed their federal taxes for free with TurboTax Free Edition. (RX820 (Intuit); RX821 (Intuit); RX1513 (Intuit) at 8; RX1514 (Intuit) at 9; RX1515 (Intuit) at 8; RX1516 (Intuit) at 8; RX327 (Intuit) at 2; RX694 (Intuit) at 8; RX518 (Intuit) at 8-9).

Response to Finding No. 116:

Complaint Counsel has no specific response.

117. TurboTax Free Edition is not the only way a consumer can file their taxes for free using TurboTax. As discussed, *supra* ¶¶109-112, Intuit offered customers with simple returns the opportunity to file their taxes for free using TurboTax Live Basic and TurboTax Live Basic Full Service during certain promotional periods. Between Tax Years 2019 and 2021, ██████████ customers filed their federal and state taxes for free using Live Basic or Live Basic Full Service. (RX820 (Intuit); RX821 (Intuit)).

Response to Finding No. 117:

Complaint Counsel has no specific response.

118. Intuit also offers a variety of coupons or discount codes that allow taxpayers without simple returns to prepare and file their federal and state taxes for free using a paid TurboTax SKU. For example, Intuit offered customers who drive for certain rideshare companies, including Uber and Lyft, to use TurboTax Self-Employed for free. (GX146 (Ryan (Intuit) Dep.) at 91; GX439 (Ryan (Intuit) Decl.) ¶13; GX428 (Intuit) at 45). And, as discussed below, Intuit has long allowed certain military personnel to file for free with TurboTax. (*Infra* ¶¶151-154). Between Tax Years 2014 and 2021, ██████████ customers filed their federal and state tax returns for free using a paid TurboTax DIY SKU, including TurboTax Deluxe, TurboTax Premier, and TurboTax Self-Employed. (RX820 (Intuit); RX821 (Intuit)).

Response to Finding No. 118:

Complaint Counsel has no specific response.

B. Simple Tax Return Qualification

1. Intuit Uses The IRS’s Definition Of “Simple Tax Returns”

119. The IRS classifies tax returns into three levels of complexity, based on a return’s “accompanying schedules or additional forms associated with specific tax credits.” (RX78 (Intuit) at 10; Ryan (Intuit) Tr. 728-729). “[S]imple returns” are those filed using the most basic

form for an individual income-tax return, without any schedules. (Johnson (Intuit) Tr. 581; Ryan (Intuit) Tr. 719-720; RX77 (Intuit) at 19; RX18 (Intuit) at 10; RX49 (Intuit) at 19-20).

Response to Finding No. 119:

Complaint Counsel disputes this Proposed Finding.

Intuit has not provided any reliable evidence that “the IRS classifies tax returns into three levels of complexity,” including “simple returns.” IRS laws and regulations are notoriously lengthy and technical, and yet the *only* evidence Intuit can muster from an IRS source is a single slide show presentation given at a conference in 2008, the last page of which contains definitions for simple, intermediate, and complex filers. *See* JX-2 (identifying RX77 (Intuit) as “IRS, Cico and Olson, Lessons Learned from IRS Free Filers: Capturing Young Taxpayers for a Lifetime of Electronic Filing, <https://www.irs.gov/pub/irs-soi/08resconefile.pdf>”). Not only is this document using definitions that are nearly 20 years old, but on its face unclear the source, reach or context of those definitions, rendering them near meaningless. (*See* RX77 (Intuit) at 19 (slide titled “ETA IMP Marketing Database Tax Year 2005 Definitions Continued”).

RX78, a 2022 GOA report to Congress, is no more useful. *See* JX-2 (identifying RX77 (Intuit) as “U.S. Government Accountability Office Report to Congressional Requesters, IRS Free File Program”). Albeit more recent, RX078 is further removed from the source, does not have any relevant citation, and, again, may pertain to the limited context of the Free File Program. (*See* RX078 at 12, 14).

Next, neither Ms. Ryan nor Mr. Johnson work for the IRS or possess an expertise in the tax industry, and as fact witnesses proffered by Intuit, their self-serving testimony is not credible. Additionally, on cross examination, when asked the basis for her understanding of the IRS’s definition of a simple tax return, the only support that Ms. Ryan could identify was the GAO report discussed above (RX78), and a 2018 IRS report describing the new Form 1040 “as a simple form.” (Ryan (Intuit) Tr. at 805-806).

Finally, the remaining documents are Intuit marketing materials that cannot support a finding regarding IRS classifications. RX18 is a screenshot of a TurboTax television ad featuring

Sir Anthony Hopkins. JX-2 (identifying RX18 as “Screenshot of TY15 Disclosure in Video Advertisement re: Never a Sellout”). RX18 does not support IPFF-119. [REDACTED]

[REDACTED]. JX-2 (identifying RX49 as [REDACTED] [REDACTED]). Again, [REDACTED] and cannot support IPFF-119 with respect to how the IRS classifies tax filers. (RX49 (Intuit) 19-20 (stating, for example, “[REDACTED]

[REDACTED] [REDACTED] [REDACTED]”).

120. Before Tax Year 2018, the most basic IRS forms available were Forms 1040EZ and 1040A. (RX49 (Intuit) at 20; RX23 (Intuit); Ryan (Intuit) Tr. 718-719; RX77 (Intuit) at 19; RX587 (Intuit) at -1279; RX1522 (Intuit) at 1). A return filed using either form was thus a “simple tax return.”

Response to Finding No. 120:

With regard to the portion of the Proposed Finding, “Before Tax Year 2018, the most basic IRS forms available were Forms 1040EZ and 1040A,” Complaint Counsel has no specific response.

Complaint Counsel disputes that “A return filed using either form was thus a ‘simple tax return.’” As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Because Intuit fails to cite to the record to support, the Proposed Finding is ambiguous, leaving unclear whether Intuit contends that such a tax return is considered a “simple tax return” by the IRS or by Intuit. Intuit has not established that the IRS uses the phrase “simple tax return.” *See* RFF-119. Complaint Counsel does not dispute, however, that Intuit defined a “simple” tax return as a return that can be filed using a 1040A or 1040EZ tax form. *See* FF-15.

121. In response to the Tax Cuts and Jobs Act of 2017, the IRS discontinued Forms 1040EZ and 1040A and launched in their place a new Form 1040. (RX81 (Intuit); RX811 (Intuit) at 1; RX1522 (Intuit) at 1; JX1 ¶12). Form 1040—which previously had been for more

complex returns—became the most basic individual tax form. (JX1 ¶12; *see also* Ryan (Intuit) Tr. 718-719).

Response to Finding No. 121:

Complaint Counsel has no specific response.

122. In order to “easily communicate to customers which TurboTax product is right for their tax situations” and minimize consumer confusion, Intuit aligns the qualifications for TurboTax Free Edition to the IRS’s definition of a “simple tax return.” (Johnson (Intuit) Tr. 581, 584-587; Ryan (Intuit) Tr. 707-708, 720; 727, 744, 750; Rubin (Intuit) Tr. 1542-1547; RX804 (Intuit) at 20; GX298 (Intuit) at -6446, -6457; RX298 (Intuit) at -5088; RX81 (Intuit) at 1; RX78 (Intuit) at 14; RX49 (Intuit) at 19-20; GX155 (Rubin (Intuit) IHT) at 48-49, 55).

Response to Finding No. 122:

Complaint Counsel disputes this Proposed Finding.

As an initial matter, as set forth RFF-119, there is no evidence in the record that the IRS defines “simple tax returns,” much less that those definitions match the qualifications for TurboTax Free Edition. Intuit’s definition of “simple tax return,” which establishes the qualification criteria for TurboTax Free Edition, has changed over time. FF-11—FF-13. In 2017 and 2018, Intuit defined a “simple” tax return as a return that can be filed using a 1040A or 1040EZ tax form. FF-15. In 2019 and 2020, Intuit defined a “simple” tax return as a return that can be filed on a Form 1040, with no attached schedules. FF-16. In 2021, Intuit defined a “simple” tax return as one that can be filed on a Form 1040, with no attached schedules, except to claim unemployment income. FF-17. In 2022, Intuit defined a “simple” tax return as one that can be filed on a Form 1040, with certain attached schedules to cover distinct tax situations, including student loan interest. FF-18. There is no evidence in the record that the IRS had a definition of a simple return, that it had a definition of simple tax return that changed from year to year, or that it had a definition of simple tax return that changed from year to year to include things like unemployment income or student loan interest. None of the documents cited by Intuit would establish this. For example, RX804, [REDACTED] [REDACTED] hardly definitive proof of IRS policy or practice. RX78 is a 2022 GOA report to Congress. *See* JX-2 (identifying RX77 (Intuit) as “U.S.

Government Accountability Office Report to Congressional Requesters, IRS Free File Program”). RX078 is not an IRS document, does not contain any relevant citation back to any IRS document, and, on its face, is from a document created in the limited context of the Free File Program. (See RX078 (Intuit) at 12, 14).

More importantly, however, the documents cited by Intuit demonstrate that [REDACTED]

[REDACTED]

[REDACTED]

For example, in the cited page

of RX298 (Intuit) the document reads in part:

[REDACTED]

(RX298 (Intuit) at -5088 (emphasis added)). Similarly, RX49, “FY’19 GTM (“Go to Market”)

White Paper, reads:

[REDACTED]

(RX49 (Intuit) at 12 (emphasis added)).

123. As Mr. Johnson testified, Intuit uses the term “simple tax return” “for comprehension, and just alignment and understanding ... to reflect the fact that this is the simplest way to file using the IRS tax code.” (Johnson (Intuit) Tr. 581-582). As Ms. Ryan testified, “[REDACTED]” “[REDACTED]” and it [REDACTED].” (Ryan (Intuit) Tr. 777).

Response to Finding No. 123:

Complaint Counsel disputes this Proposed Finding. The testimony of Intuit’s executives, whose conduct is directly implicated by the charges, is not credible when it contradicts the documents in evidence. *See, e.g.*, RFF-119, RFF-122.

124. Thus, before Tax Year 2018, taxpayers who filed on Forms 1040A or 1040EZ could file for free using TurboTax Free Edition. (Johnson (Intuit) Tr. 584; Ryan (Intuit) Tr. 707-708; RX77 (Intuit) at 19). Starting that year, taxpayers who filed using Form 1040 with no attached schedules could file for free using Free Edition. (JX1 ¶13).

Response to Finding No. 124:

Complaint Counsel has no specific response.

125. Intuit had no control over the changes to the tax code, and if it had not aligned its definition of simple tax returns to the IRS’s definition after tax reform, no one would have qualified for TurboTax Free Edition. (Johnson (Intuit) Tr. 584-585).

Response to Finding No. 125:

Complaint Counsel has no specific response.

126. Intuit truthfully describes TurboTax Free Edition in its advertisements and on its website as being for taxpayers with “simple tax returns only,” or similar language, as part of a comprehensive set of disclosures where space permits. (Johnson (Intuit) Tr. 582-584, 594-598, 620-621; Ryan (Intuit) Tr. 712, 716, 720, 721-722, 726-727, 734-735, 776-777; *infra* ¶¶215-217, 222, 226-227, 232-233, 248, 252, 257, 267-268, 272, 281-282, 294, 296, 306-308, 335, 337-347, 350, 359-362, 374, 376, 378-379, 381-382, 389-391, 400-401, 413-414, 416, 427, 435, 437).

Response to Finding No. 126:

Complaint Counsel disputes this Proposed Finding. The question of whether Intuit “truthfully” describes its TurboTax product in its advertisements, including whether the “simple tax returns only” language is an effective disclosure, is a central question of law at issue in this case not properly disposed of in a Finding of Fact. To the extent Intuit’s Proposed Finding suggests or implies that the “simple tax returns only” language was an effective disclosure, the evidence is clear it was not. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead

consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

To the extent Intuit cites to its Proposed Findings at paragraphs 215-217, 222, 226-227, 232-233, 248, 252, 257, 267-268, 272, 281-282, 294, 296, 306-308, 335, 337-347, 350, 359-362, 374, 376, 378-379, 381-382, 389-391, 400-401, 413-414, 416, 427, 435, and 437, Complaint Counsel responds with specificity to each of those paragraphs below.

127. Each year, more than 60 million taxpayers have simple returns and qualify to file for free with TurboTax Free Edition. (Rubin (Intuit) Tr. 1594-1596; RX814 (Intuit) at -6784). Of those, 38 million are online filers. (Rubin (Intuit) Tr. 1594-1596; RX814 (Intuit) at -6784).

Response to Finding No. 127:

Complaint Counsel disputes this Proposed Finding.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. In fact, Intuit’s internal documents show that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

128. In addition to the 60 million simple tax returns filed in Tax Year 2020 using the IRS’s most basic tax forms, millions of taxpayers with simple tax situations chose to file using non-simple forms or schedules. (Rubin (Intuit) Tr. 1594-1595; RX49 (Intuit) at 20; Ryan (Intuit) Tr. 718-719; RX77 (Intuit) at 19; RX587 (Intuit) at -1279; RX1522 (Intuit) at 1; JX1 ¶12; *see also* Ryan (Intuit) Tr. 718-719). For example, Jack Rubin, Vice President of Marketing Strategy for Intuit’s Consumer Group, credibly testified that there are individuals who may file a return as married filing jointly, who, if they filed separately, could have filed a simple tax return. (Rubin (Intuit) Tr. 1594-1595).

Response to Finding No. 128:

Complaint Counsel has no specific response.

129. A majority of tax returns filed using online tax software are simple tax returns. (Johnson (Intuit) Tr. 592-593; Rubin (Intuit) Tr. 1596; RX814 at -6784). Approximately 75 million taxpayers use online tax-preparation software each year, and 38 million of those consumers—50.7%—have simple tax returns. (Johnson (Intuit) Tr. 592-593; Rubin (Intuit) Tr. 1596; RX814 at -6784).

Response to Finding No. 129:

Complaint Counsel disputes this Proposed Finding. [REDACTED]

[REDACTED]

2. Reasonable Consumers Understand (Or Can Easily Learn) The Meaning of Simple Tax Returns

130. At trial, Complaint Counsel argued that reasonable consumers did not necessarily understand the meaning of “simple tax returns.” (Evans (FTC) Tr. 22, 45-46). Complaint Counsel failed to adequately support this theory: Their evidence rested primarily on the unreliable survey of Professor Nathan Novemsky, which as discussed below does not support the argument. (Novemsky (FTC) Tr. 372-73; *infra* ¶¶530-613).

Response to Finding No. 130:

With respect to the sentence: “At trial, Complaint Counsel argued that reasonable consumers did not necessarily understand the meaning of ‘simple tax returns,’” Complaint Counsel has no specific response.

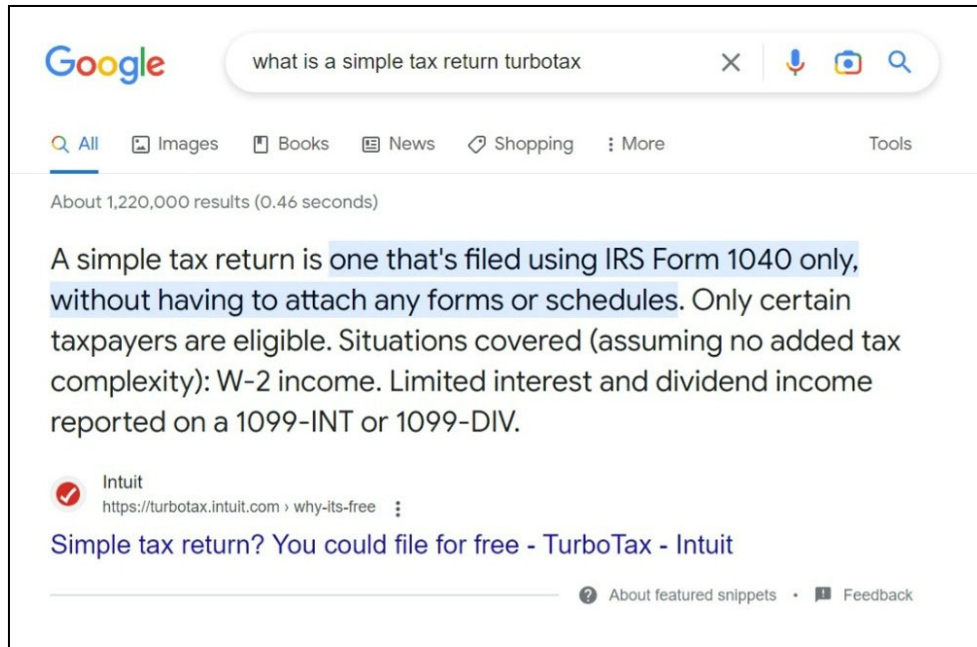
With regard to the next sentence, “Complaint Counsel failed to adequately support this theory: Their evidence rested primarily on the unreliable survey of Professor Nathan Novemsky, which as discussed below does not support the argument,” Complaint Counsel disputes the Proposed Finding. Under the guise of a “fact,” Intuit is making what amounts to a legal conclusion and one that is not “supported by specific reference to the evidentiary record,” as required. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

“simple return” is and are under a preexisting misimpression that they have one. (FF-502 (*citing* GX749 (Novemsky Rebuttal Expert Report) ¶¶ 223 & 227)).

The cited consumer testimony does not support (or even directly relate) to this Proposed Finding. For example, during Mr. Katz’s deposition he is shown the TurboTax website and testified that, “having looked at this page,” he did not “have an understanding of who would be eligible to use the Free Edition.” (GX137 (DuKatz (Consumer) Dep.) at 63). Intuit’s counsel then, in the portion of the transcript to which it now cites, points out the hyperlink on the website; Mr. Katz acknowledges, in response to being shown the hyperlink, that the hyperlink would provide additional information on who qualifies for Free Edition. (*See* GX137 (DuKatz (Consumer) Dep.) at 63-67). Similarly, in the deposition of Mr. Benbrook, Intuit’s counsel again points out the disclaimers and hyperlink on the TurboTax website and then asks the consumer: “If you didn’t have an understanding [of what the term simple meant], and were looking at this page, you could click on that link to find out more information; is that right?” to which Mr. Benbrook testified, “apparently, yes.” (GX128 (Benbrook (Consumer) Dep.) at 28-29). At best, this testimony demonstrates that some consumers, in a deposition under the instruction of Intuit’s counsel, understand what hyperlink is—hardly proof that consumers in the wild “would research whether their tax situation met” Intuit’s free eligibility.

Complaint Counsel further disputes this Proposed Finding to the extent it suggest that the IRS defines “simple tax return.” *See* RFF-119.

132. A screenshot of the first result from a Google search for “what is a simple tax return turbotax” is shown below. (RX1524 (Intuit)).



Response to Finding No. 132:

Complaint Counsel has no specific response.

133. Furthermore, as Intuit’s fact witnesses credibly explained, the TurboTax website disclosed, repeatedly, that TurboTax Free Edition was for simple tax returns only, with detailed descriptions of what this meant that appeared so many times that it was difficult to keep track of the precise number. (Johnson (Intuit) Tr. 594-595; Ryan (Intuit) Tr. 776-777; Rubin (Intuit) Tr. 1564-1568).

Response to Finding No. 133:

Complaint Counsel disputes this Proposed Finding.

As an initial matter, the TurboTax website (which itself contains prominent free claims), itself plays a role in forming a misimpression that consumers can file for free. (*See* GX303 (Novemsky Expert Report) ¶¶ 9, 79 & Figure 2; Novemsky (Complaint Counsel) Tr. 361-362).

And once on the website, website disclaimers appearing behind hyperlinks are wholly inadequate to correct the express false claim and deceptive net impression made by Intuit’s ads and the prominent “Free, free free free” claims. Specifically, the disclaimers are usually hidden behind a hyperlink, (*see e.g.*, FF-458, FF-462; FF-462), are dramatically less prominent than the free claims, (RX1017 (Hauser Expert Report) C-1-38, C-1-41; GX749 (Novemsky Rebuttal Expert Report) ¶ 131, Figures 10 & 11; Novemsky (Complaint Counsel) Tr. 1787; Hauser (Intuit)

Tr. 993-994, 1005), and often use the same confusing phrase “simple tax returns.” (*See e.g.*, FF-459, FF-461; FF-463).

134. There is still more evidence that consumers understood the meaning of “simple tax returns.” Intuit was motivated to ensure that consumers understood the term “simple tax return” because it would be damaging to the TurboTax business if consumers came to expect that they could file for free on TurboTax only to later find out while preparing their taxes that they could not. (RX1018 (Golder Expert Report) ¶¶36-37, 50; Golder (Intuit) Tr. 1189-1191; Johnson (Intuit) Tr. 574-576, 582-583; Ryan (Intuit) Tr. 747-748; Rubin (Intuit) Tr. 1524-1526). Thus, Intuit tested consumer comprehension of “simple tax return” and found through a qualitative study that consumers found the phrase very “easy to understand.” (Rubin (Intuit) Tr. 1544-1546; RX304 (Intuit)). None of the participants in that study indicated that they were confused by the phrase or did not understand it. (RX304 (Intuit)). Further, Intuit does not receive customer feedback that “simple tax return” is confusing. (Ryan (Intuit) Tr. 812).

Response to Finding No. 134:

Complaint Counsel disputes this Proposed Finding. The evidence shows that consumers did not understand the meaning of “simple tax returns,” as Intuit used it. For example, Professor Novemsky’s survey shows that a substantial portion of the respondents have the misimpression that their returns meet TurboTax’s definition of a “simple U.S. return,” (FF-491), and that the use of the “simple returns” language as Intuit’s purported disclaimer is ineffective and fails to convey to consumers that they may not qualify for free TurboTax in a manner that is consistent with TurboTax’s qualification criteria. (FF-492—FF-495 & FF-498—FF-500). The perception survey showed that 55% of consumers ineligible for Free Edition who had not used TurboTax in the previous three years had the misimpression that they had a “simple U.S. return.” (FF-496). Of survey respondents who recently paid to use TurboTax, 28.6% thought they had a “simple return” even though they did not. (FF-497).

What is more, consumer testimony (FF-664) and consumer complaints (FF-619; FF-620; FF-623; FF-635—FF-662) also show that consumers did not understand the meaning of “simple tax return” as defined by Intuit. (*See, e.g.*, FF-642 (“Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”)).

The only document Intuit cites to is RX304. On its face, this document reflects the results of testing TurboTax's YOY Data Transfer—not whether consumers understood the meaning of a “simple tax return.” (See JX-2 identifying RX304 (Intuit) as “Spreadsheet entitled “Data Transfer - YOY Data - UserTesting”). Intuit's reliance on this document is therefore baffling (and made more confusing since Intuit provides no pin cite or explanation of how the document supports the proposition).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit's executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit's knowledge and intent to deceive includes:

- Intuit's own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit's TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my taxe s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit's internal complaint

tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED]

[REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).

- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

135. Consumers understand that “simple returns only” conveys that eligibility for free TurboTax SKUs or offers is qualified, as the words “simple” and “only” both communicate that a product or offer is not for “all.” (Golder (Intuit) Tr. 1119, 1122; RX1018 (Golder Expert Report) ¶105).

Response to Finding No. 135:

Complaint Counsel disputes this Proposed Finding, *see* RFF-134. Complaint Counsel disputes this Proposed Finding for the additional reason that, while Intuit’s only support is Professor Golder, the asserted fact is not contained in Professor Golder’s report. (*See* RX1018 (Golder Expert Report) ¶105). The Proposed Finding should therefore be disregarded. (*See* Chappell (ALJ) Tr. 889 (admonishing the parties that “anything that’s in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.”)).

136. Consumers also understand that “simple returns only” in TurboTax ads conveys that the ability to use the free TurboTax SKU or offer depends on the complexity of the taxpayer’s return. (Golder (Intuit) Tr. 1115, 1119; Novemsky (FTC) Tr. 451 (testifying that “people took away a complexity or simplicity message” from TurboTax ads); RX1018 (Golder Expert Report) ¶105).

Response to Finding No. 136:

Complaint Counsel disputes this Proposed Finding, *see* RFF-134. Complaint Counsel disputes this Proposed Finding for the additional reason that, while Intuit relies in part on the expert report and trial testimony of Professor Golder, the asserted fact is not contained in Professor Golder’s report. (*See* RX1018 (Golder Expert Report) ¶105). The Proposed Finding should therefore be disregarded. (*See* Chappell (ALJ) Tr. 889 (admonishing the parties that “anything that’s in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.”)). Finally, Professor Novemsky’s testimony (which Intuit begins to quote immediately after he uses the qualifier “some”) does not support the proposition. Professor Novemsky, interpreting the results of his survey (which, notably, Intuit impliedly seems to credit here), testifies that consumers’ answers to his open-ended survey questions indicated that “some people took away a complexity or simplicity message”—not that all consumers did, or that consumers as a general matter do. (Novemsky (FTC) Tr. 451).

137. Complaint Counsel also argued both that more detail about what “simple tax return” meant was required in the advertisements themselves and that detailed disclosures behind a hyperlink needed to come out from behind the hyperlink. (Evans (FTC) Tr. 22, 37-38; Complaint Counsel’s Pretrial Brief at 38-44 (Feb. 17, 2023)). But Complaint Counsel presented no evidence to suggest that either step would improve consumer comprehension of the challenged ads.

Response to Finding No. 137:

Complaint Counsel disputes the Proposed Finding, which misstates the position of Complaint Counsel. Complaint Counsel has never sought to prescribe how Intuit cure the deception caused by its advertising, and the citation to Complaint Counsel’s opening statement and Complaint Counsel’s Pretrial Brief are misguided. For example, Intuit cites a passage of Mr. Evan’s opening statement in which he states, in part, “As the Commission advised the industry in the dot-com disclosure guidelines, disclosures that are an integral part of the meaning of the claim should not be hidden behind hyperlinks, which are likely to be missed.” (Evans (FTC) Tr. 37-38). As Complaint Counsel’s Proposed Order in this case demonstrates, Complaint Counsel asks that Intuit offers a good or service for Free to all consumers, “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.” Complaint Counsel Proposed Cease and Desist Order at 5. *See also* RFF-829—RFF-831, RFF-837, RFF-839, RFF-843, RFF-844.

138. To the contrary, providing more detailed information in ads about what a “simple tax return” is would be counter-productive to consumer understanding. (Johnson (Intuit) Tr. 583-584; Ryan (Intuit) Tr. 776-777; RX1018 (Golder Expert Report) ¶120). Complaint Counsel’s own expert, Professor Novemsky, conceded that this was true because of the phenomenon of “information overload.” (Novemsky (FTC) Tr. 1819-1820).

Response to Finding No. 138:

Complaint Counsel disputes this Proposed Finding, which is not supported by the record. Intuit has not established that either Mr. Johnson nor Mr. Rubin is a credible witness with regard to “consumer understanding” of the term “simple tax return,” nor did Intuit test or survey consumers to learn if they understood the term “Simple tax return.” Instead, the evidence is clear that consumers did not understand. See FF-491—FF-492) (describing the results of Professor

Novemsky's survey showing that a substantial portion of respondents have a misimpression that their returns qualify as simple tax returns, as Intuit uses the phrase). The evidentiary record also includes consumer depositions (FF-670) and customer feedback demonstrating that consumers did not understand "simple tax returns only." (*See, e.g.*, FF-636 ("[REDACTED]"; FF-655 ("Such false advertising. You state free for simple returns, but over \$100 later, that is not the case at all. Every year it is the same crap. False advertising. I will not use you again moving forward.")).

To the extent Intuit cites to Professor Novemsky's trial testimony, it likewise does not support the Proposed Finding. Though Professor Novemsky opined that providing complicated details in hypothetical 6- or 30-second ads could possibly overload consumers with information, he opined that whether disclaiming an advertisement accurately is difficult "doesn't say anything about whether that ad is deceptive;" "how complicated the criteria that TurboTax has chosen happened to be, is not really at issue here. To me my understanding is, are consumers taking away the wrong idea and to me that's not really relevant to what a disclosure you can get across in a TV ad or some other channel." (Novemsky (Complaint Counsel) Tr. 1780-1781; *see also* GX749 (Novemsky Rebuttal Expert Report) ¶ 231).

139. Indeed, consumers testified that "simple tax returns" is more comprehensible than describing specific IRS forms in understanding qualifications. (GX138 (Adamson (Consumer) Dep.) at 72-73; RX369 (Goldstein (Consumer) Dep.) at 90). During trial, Complaint Counsel characterized references to individual tax forms as "inscrutable." (Evans (FTC) Tr. 38).

Response to Finding No. 139:

Complaint Counsel disputes this Proposed Finding, as the cited testimony does not support this Proposed Finding.

Intuit grossly misstates the testimony of one consumer in this case, Mr. Adamson, and a consumer in the California action. The relevant testimony reads as follows:

Q. And so can you read for me -- could you read for me what's in white letters below the orange button?

A. The TurboTax Free Edition, for simple tax returns.

Q. So do you understand that the Free Edition is for people with simple tax returns?

A. Yes.

MS. SILOS: And then Ms. Plett, if we could go to the next one.

Q. And Mr. Adamson, what's the date on this e-mail?

A. December the 9th, 2016.

Q. And just, sorry, for the sake of clarity, this is GX-388 that we're referring to. And did this advertisement at all affect your decision to purchase TurboTax?

A. No.

MS. SILOS: And then Ms. Plett, if we could scroll down a little bit.

Q. Mr. Adamson, in between those horizontal white lines, what does it say?

A. 1040EZ/A.

Q. And what do you understand that to mean?

A. I'm not sure.

(GX138 (Adamson (Consumer) Dep.) at 72-73).

Q And what do you understand -- what did you understand -- well, let's start with 1040EZ and 1040A. You were aware those were tax forms; right?

A Yes.

Q And, Mr. Goldstein, does this refresh your recollection about what the -- the eligibility criteria were for TurboTax Free Edition?

MR. SHERMAN: Objection; form.

11 THE WITNESS: I don't -- I don't recall. I didn't think of it in terms of which tax form would be eligible. I mean, I am not a tax professional, so I couldn't tell you the difference between a 1040EZ and a 1040A, other than to say the 1040A is slightly more complex because I've done 1040EZ myself in the past. I couldn't

tell you how many tax forms there are available. I don't know if there's two, five, twenty.

RX369 (Goldstein (Consumer) Dep.) at 90).

As demonstrated when the actual language of the consumers is reviewed, neither consumer testimony cited by Intuit supported the Proposed Finding that “‘simple tax returns’ is more comprehensible than describing specific IRS forms in understanding qualifications.” Intuit also ignores that at least ten consumer deponents, including Mr. Adamson, testified that they did not understand Intuit’s eligibility criteria for Free Edition. FF-669. The Proposed Finding should therefore be rejected.

140. Intuit has found that “simplicity works” when communicating information about qualifications and recommendations for TurboTax SKUs that are most likely to meet taxpayers’ needs. (RX42 (Intuit) at 12). For example, user testing performed on the SKU Selector showed that the “wordiness of the tiles” used in that tool lowered interactions with the selector by consumers. (RX42 (Intuit) at 12). And a qualitative analysis of consumer feedback related to the SKU Selector also confirmed that consumers appreciate TurboTax disclosures that do not contain “complicated tax terminology” and are worded in “laymen’s terms.” (RX47 (Intuit) at 17).

Response to Finding No. 140:

Complaint Counsel disputes the Proposed Finding to the extent it suggests “simplicity works” when communication, for example, “simple tax returns” as a qualification for its free offering. Intuit has never tested whether “simple tax returns only” or other similar language is an effective disclosure, and the cited documents are of no moment to the case at hand. RX42 is an internal presentation from 2015 that, at the cited page, is a slide summarizing learnings from the “SKU Selector Test Learnings”, the objective of the test which was to “optimize mix without impacting conversion” and which includes the concluding notes: “The recipes [of SKU tiles] are shifting the mix, but are flat on revenue because of lower or flat conversion. We do not have any clear winners over baseline.” (RX42 (Intuit) at 12). RX47 (Intuit) is a slide presentation from 2018 titled “PLU/Monetization Overview;” the cited page is a slide: “Blue Box Qualitative Feedback” that appears to be testing the color and design of the products and pricing page, with comments like “Blue is seen as soothing, from soft to more prominent” and “blue catches their

eye.” (RX47 (Intuit) at 17). Intuit’s parsing of these documents is not credible and not relevant to this case.

141. Intuit also is not alone in using the “simple tax returns” description for its free product. Each of Intuit’s major competitors also offers a free tax-preparation product—and each describes that product as being for taxpayers with simple tax returns. (Johnson (Intuit) Tr. 581-582; Ryan (Intuit) Tr. 708, 777; Golder (Intuit) Tr. 1121-1122; RX1018 (Golder Expert Report) ¶¶108-112; RX79 (Intuit) at 1; RX97 (Intuit) at 1; RX98 (Intuit) at 1; GX789 (Intuit) at 1). H&R Block’s DIY “Free Online” product is limited to taxpayers with “simple returns” (RX97 (Intuit); RX1339 (Intuit); RX1341 (Intuit); Golder (Intuit) Tr. 1089). TaxSlayer’s “Simply Free” is limited to qualifying “simple tax situations.” (RX427 (Intuit); RX697 (Intuit); GX824 (Intuit); RX1338 (Intuit)). And TaxAct’s “Free” online tax-preparation product is described as “perfect for simple federal filers.” (RX422 (Intuit); GX789 (Intuit)). Use of the term “simple tax returns” is thus “industry convention.” (Johnson (Intuit) Tr. 582).

Response to Finding No. 141:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s major competitors use the term “simple tax return” in the same way, or that the use of the term by other competitors in the industry reduces confusion. Other tax preparation companies use the term “simple returns” differently than Intuit does. (See RX1018 (Golder Expert Report) Figure 17 & 27; RX1017 (Hauser Expert Report) ¶ 48 Fn. 87). FF-697. 698. The fact that Intuit’s competitors use the term differently than Intuit does may contribute to consumer confusion about its meaning. (GX749 (Novemsky Rebuttal Expert Report) ¶ 223 Fn. 393).

142. California’s Franchise Tax Board similarly stated that its ReadyReturn pre-filled tax forms were available to “taxpayers who file simple returns,” explaining that the program (now discontinued) would cover individuals with “[i]ncome only from wages” and taking the “[s]tandard deduction.” (RX79 (Intuit)).

Response to Finding No. 142:

Complaint Counsel disputes the Proposed Finding. The cited document, on its face, does not explain[] that the program (now discontinued) would cover individuals with ‘[i]ncome only from wages’ and taking the ‘[s]tandard deduction.’” (See RX79 (Intuit)). Complaint Counsel further disputes this Proposed Finding, which discusses eligibility for a program being offered in 2014 (TY2013), before the time period that the challenged ads ran. (See FF-66—FF-466) (describing ads beginning in 2015)).

143. The ubiquity in the industry, common usage, and clear meaning of “simple tax returns” are facts the Court appropriately weighs in evaluating whether reasonable consumers were likely to be misled by the challenged advertisements. (RX1018 (Golder Expert Report) ¶¶106, 113).

Response to Finding No. 143:

Complaint Counsel disputes this Proposed Finding. As an initial matter, IPFF-143 is nothing more than a thinly veiled legal conclusion. Professor Golder is a marketing expert who has no legal training or law degree, (RX1018 (Golder Expert Report) ¶¶ 1-5) and thus his unsupported legal conclusion about what factors the court should weigh should be rejected.

More fundamentally, however, Dr. Golder’s expert report does not support the (incorrect) finding that there is an “industry, common usage, and clear meaning of ‘simple tax returns.’” At the paragraphs cited by Intuit, Dr. Golder repeats uncritically the Intuit party line, for example saying (without support) that the IRS uses the phrase “simple return,” (RX1018 (Golder Expert Report) ¶¶ 113; *see* (RX1018 (Golder Expert Report) ¶¶ 106). Intuit has never demonstrated that the IRS classifies some filers as having simple tax filings, nor, more importantly, that any use by the IRS of this language would have trickled down to consumers. *See* RFF-119.

Dr. Golder’s own report and testimony at trial directly challenge the Proposed Finding. Because the “simple tax returns” disclaimer cannot be effective at mitigating deception if consumers do not understand whether their tax return is simple, (*see* FF-695), the fact that Dr. Golder did test whether consumers understood “simple returns” (*see* FF-694; FF-704) is fatal.

Professor Golder opined that use by other tax preparation services of “simple returns” disclaimers means that consumers are familiar with the term, but the use of the term by some of Intuit’s competitors does not make the term more effective. FF-696. Other tax preparation companies use the term “simple returns” differently than Intuit does. (See RX1018 (Golder Expert Report) Figure 17 & 27; RX1017 (Hauser Expert Report) ¶ 48 Fn. 87). FF-697. 698. The fact that Intuit’s competitors use the term differently than Intuit does may contribute to consumer confusion about its meaning. (GX749 (Novemsky Rebuttal Expert Report) ¶ 223 Fn. 393).

144. As Professor Golder explained, competitors' widespread use of "simple tax returns" is "critically important" for showing consumers understood the term. (Golder (Intuit) Tr. 1063-1064, 1090-1091, 1121-1122).

Response to Finding No. 144:

Complaint Counsel disputes the Proposed Finding, which is not contained in Professor Golder's report and should therefore be disregarded. (*See* Chappell (ALJ) Tr. 889 (admonishing the parties that "anything that's in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.")).

145. It is unlikely that government and industry actors alike would, over many years, rely on a term that taxpayers do not understand. (GX156 (Ryan (Intuit) IHT) at 40, 55). Thus, Intuit's consistent use of the phrase "simple tax returns only" (Johnson (Intuit) Tr. 566, 582-584, 594-598, 614-615; Ryan (Intuit) Tr. 707-708, 720), is strong evidence that consumers would not believe that TurboTax was "free for them" unless they in fact had a simple tax return.

Response to Finding No. 145:

Complaint Counsel disputes this Proposed Finding.

Intuit's speculation about how "government and industry actors" are likely to act is unsupported.

Intuit has not "consistently" used the phrase "simple tax returns only," as qualifications for TurboTax Free Edition have changed from year to year. (*See* FF-11—FF-20).

Assuming, arguendo, that these facts were accepted, the conclusion that they are "strong evidence that consumers would not believe that TurboTax was "free for them" unless they in fact had a simple tax return" is not supported by any citation to the record, and should therefore be disregarded. Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record."). Intuit has not shown that consumers understand the meaning of simple tax returns. RFF-130—RFF-145. In fact, the only survey to test whether consumers understand the term simple tax returns shows that consumers are misled. (*See* FF-480—FF-487).

3. **Intuit’s Expansion of Free Eligibility Beyond Simple Tax Returns Does Not Impact Consumer Comprehension**

146. Intuit has occasionally expanded eligibility for free TurboTax offerings beyond “simple tax returns.” (Ryan (Intuit) Tr. 705-706, 800-801). It has forgone substantial near-term revenue on each such occasion (Ryan (Intuit) Tr. 800-801; Rubin (Intuit) Tr. 1540), because doing so was “the right thing” for its customers. (Ryan (Intuit) Tr. 706).

Response to Finding No. 146:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding is vague and ambiguous, as to what is “substantial” revenue and what are the “such occasions” Intuit refers to. Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit set its eligibility for Free TurboTax in order to do “the right thing” for consumer, rather than for Intuit’s bottom line. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *see also* FF-24—FF-30

(discussing Intuit’s “freemium” strategy).

147. In expanding eligibility for free TurboTax offerings, Intuit did not alter the definition of “simple tax returns.” (Ryan (Intuit) Tr. 720; Johnson (Intuit) Tr. 584-585; GX155 (Rubin (Intuit) IHT) at 50-51; RX3 (Intuit)).

Response to Finding No. 147:

Complaint Counsel disputes this Proposed Finding. The pop-up screen from TY20 shows defines a simple tax return as “Form 1040 only OR Form 1040 + Unemployment Income,” while the same screen the next year defines a simple tax return as “Form 1040 only.” (*Compare* GX184 (Complaint Counsel) (TY20 ‘simple return’ popup) to GX484 (Complaint Counsel) (TY21 ‘simple return’ popup)).

148. For instance, in Tax Year 2020, Intuit, recognizing the severe impact of the COVID-19 pandemic, allowed taxpayers who had to file a Schedule 1 in order to report unemployment benefits to prepare and file their taxes for free with TurboTax. (Ryan (Intuit) Tr. 705-706, 800-801 (testifying that [REDACTED]))

[REDACTED]; RX1293 (Intuit)). As a result, a taxpayer with an “[REDACTED]” would not [REDACTED]” (Ryan (Intuit) Tr. 800-801).

Response to Finding No. 148:

Complaint Counsel has no specific response.

149. Similarly, in Tax Year 2021, during “the height of student loan defaults,” Intuit allowed taxpayers claiming the student-loan-interest deduction to file their taxes for free. (Ryan (Intuit) Tr. 706; RX435 (Intuit)).

Response to Finding No. 149:

Complaint Counsel has no specific response.

150. Intuit has never expanded eligibility for Free Edition or other free offers “in an effort to mislead consumers” (Ryan (Intuit) Tr. 706), and Complaint Counsel presented no evidence that Intuit’s expansion of eligibility for its free products was intended to deceive, or that any expansion did deceive (or was likely to have deceived) any significant number of reasonable consumers (whether considered in isolation or in conjunction with Intuit’s other conduct).

Response to Finding No. 150:

Complaint Counsel disputes the Proposed Finding.

To the extent the asserted fact does not cite to any portion of the record, it should be disregarded. (*See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”)).

To the extent Intuit does provide a citation (here, a single page of one deposition), the cited testimony does not support this Proposed Finding. (*See* Ryan (Intuit) Tr. 706 (testifying that in expanding free eligibility for a period of time to those on unemployment or with student loan interest, Intuit did not do in an effort to mislead consumers, but not testifying that Intuit “never” did such)).

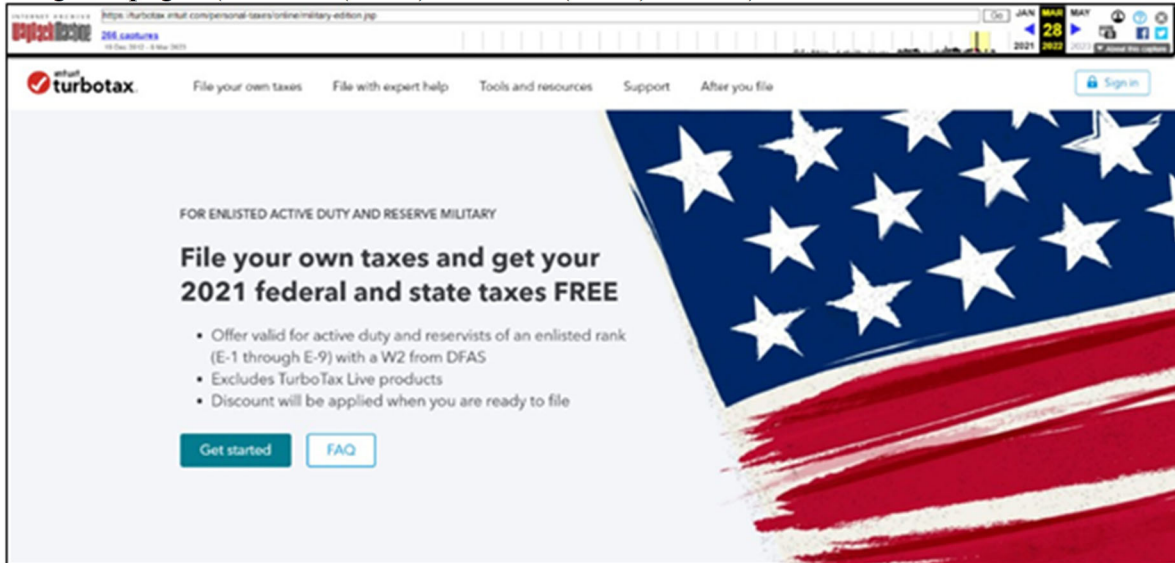
C. Free Tax-Preparation Services For Enlisted Servicemembers

151. Intuit has long allowed certain military personnel to file for free with TurboTax. (Johnson (Intuit) Tr. 578-579; Ryan (Intuit) Tr. 705; GX155 (Rubin (Intuit) IHT) at 61, 63). Intuit does so “because it is the right thing to do.” (Ryan (Intuit) Tr. 705).

Response to Finding No. 151:

Complaint Counsel has no specific response.

152. In recognition of their service to the county, all enlisted military members (E-1 to E-9) can use any DIY TurboTax SKU for free, regardless of the complexity of their tax situation. (Johnson (Intuit) Tr. 578-579, 653; Rubin (Intuit) Tr. 1522; GX155 (Rubin (Intuit) IHT) at 63-64). RX1550 (Intuit), shown in part below, is a screenshot of the TurboTax military discount landing webpage. (RX1550 (Intuit); Johnson (Intuit) Tr. 579).



Response to Finding No. 152:

The screenshot above is not from RX1550. This screenshot is dated March 28, 2022; RX1550 is dated July 12, 2022. Nonetheless, Complaint Counsel does not dispute that the screenshot represents the TurboTax military discount landing webpage, and that its contents are similar to RX1550. Otherwise, Complaint Counsel has no specific response.

153. TurboTax automatically applies the discount when qualifying servicemembers enter “[their] military W-2.” (Johnson (Intuit) Tr. 580; RX329 (Intuit) at -0005; RX948 (Intuit) at 2; RX1550 (Intuit) at 2).

Response to Finding No. 153:

This process may be defective. A consumer who Intuit deposed, who was in the military, testified about having to seek refunds for fees paid to use TurboTax. (Lee (Consumer) Dep. 12–13).

154. In 2022, of the estimated 1.7 million military servicemembers who qualified to file for free using the TurboTax military discount, 627,000 (over one third) did so. (Rubin (Intuit) Tr. 1522).

Response to Finding No. 154:

Complaint Counsel has no specific response.

VI. TurboTax Advertising

155. Companies use a variety of advertising strategies to attract and retain customers, often depending on where each customer is in their purchase decision-making process. (RX560 at 141; RX1018 (Golder Expert Report) ¶152).

Response to Finding No. 155:

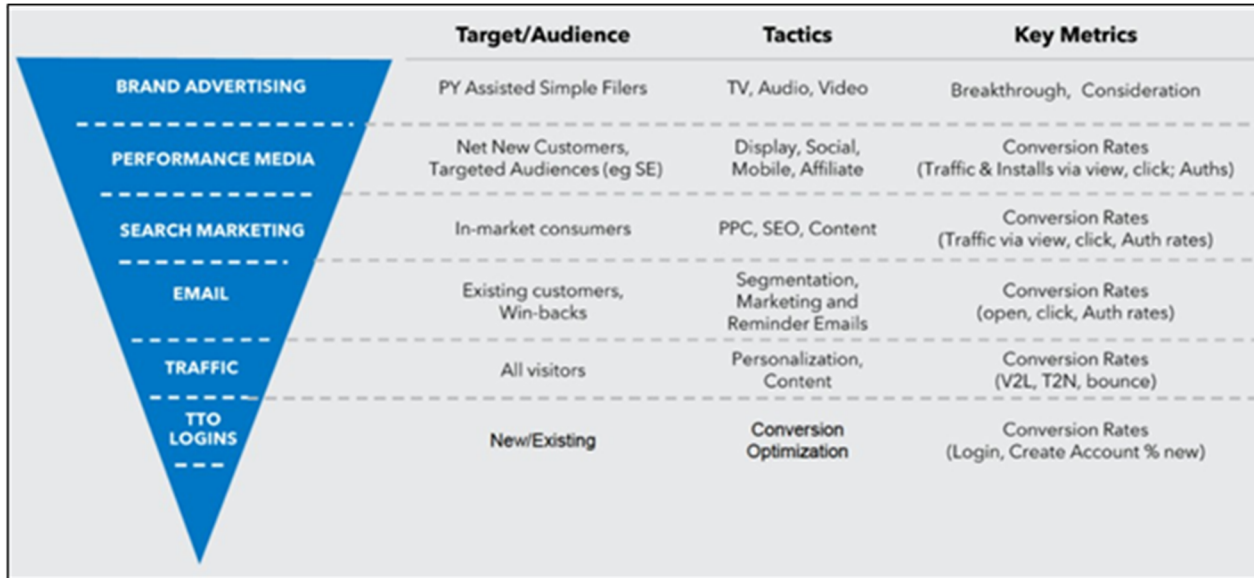
Complaint Counsel has no specific response.

156. The widely recognized “marketing funnel” concept reflects how companies use different advertising strategies and channels to reach different audiences at the various stages of a consumer’s process in making a purchasing decision. (RX560 (Intuit) at 141; RX1018 (Golder Expert Report) ¶¶153-154; *see also* Golder (Intuit) Tr. 1065-1069). At the top of the marketing funnel, for example, there may be more consumers who are targeted for general brand awareness or sentiment, whereas at the bottom of the funnel a company is often targeting a smaller number of consumers who may be nearing their purchase decision to select a product. (RX1018 (Golder Expert Report) ¶153; *see also* RX560 (Intuit) at 141). Companies align their advertising and consumer outreach to the marketing funnel, including through advertising designed to “build brand awareness, build brand equity, enhance consideration, educate consumers, direct consumers to the website, or to engage with prior customers.” (RX1018 (Golder Expert Report) ¶¶153-154). In furtherance of these specific strategies, companies target their advertising to reach consumers at specific steps in the marketing funnel. (RX1018 (Golder Expert Report) ¶152; *see also* RX560 (Intuit) at 141).

Response to Finding No. 156:

Complaint Counsel has no specific response.

157. Intuit aligns its TurboTax marketing strategies to its own marketing funnel. (RX582 (Intuit) at -1293). A version of the TurboTax marketing funnel is shown below.



(RX1018 (Golder Expert Report) fig. 23).

Response to Finding No. 157:

Complaint Counsel has no specific response.

158. Intuit tailors its marketing strategies to the TurboTax online marketing funnel by targeting specific audiences at different points in the tax-preparation purchase process through specific marketing channels. (RX582 (Intuit) at -1293).

Response to Finding No. 158:

Complaint Counsel has no specific response.

159. At the top of the TurboTax marketing funnel, for example, Intuit targets larger numbers of consumers for general awareness of the TurboTax brand and its products. (RX582 (Intuit) at -1291, -1293; GX146 (Ryan (Intuit) Dep.) at 22; RX1018 (Golder Expert Report) ¶153). Moving down the funnel, Intuit targets its advertising to reach a smaller number of consumers, many of whom who have already engaged with TurboTax marketing or products, who are nearing their purchase decision. (RX582 (Intuit) at -1291, -1293; RX1018 (Golder Expert Report) ¶¶152-154).

Response to Finding No. 159:

Complaint Counsel has no specific response.

160. Intuit also presents increasingly detailed information to consumers as they near their purchase decision and move through the marketing funnel. (RX1018 (Golder Expert Report) ¶153; *see also* RX560 (Intuit) at 141). Intuit provides shorter disclosures in TV or social media ads, for example, when consumers are likely to be in earlier stages of the buying process (such as information search, *infra* ¶¶503-513), compared to more detailed disclosures available

on the TurboTax website, when consumers are likely nearing their purchase decision. (Golder (Intuit) Tr. 1105-1107, 1120, 1129-1130).

Response to Finding No. 160:

Complaint Counsel has no specific response.

A. Development Of TurboTax Advertisements

161. Intuit advertises free TurboTax SKUs to encourage consumers with simple tax returns to file their taxes for free using TurboTax. (GX144 (Soukas (Intuit) Dep.) at 52, 135, 137; GX145 (Berger (Intuit) Dep.) at 156; GX146 (Ryan (Intuit) Dep.) at 123; GX150 (Goode (Intuit) IHT) at 120; RX56 (Intuit) at 6; RX588 (Intuit) at 40; RX1018 (Golder Expert Report ¶236).

Response to Finding No. 161:

Complaint Counsel disputes this Proposed Finding. This Proposed Finding is misleading by omission and directly contradicted by evidence which shows that Intuit also advertises free TurboTax as part of a business strategy that involves persuading consumers to upgrade from free to paid versions of TurboTax and that involves growing Intuit's customer base by offering free services to consumers [REDACTED]. (FF-25—FF-29).

162. The goal of Intuit's free TurboTax advertising campaigns is not to attract customers who do not qualify for the free SKU, but instead to attract those who do. (Johnson (Intuit) Tr. 574-575, 618; Ryan (Intuit) Tr. 726, 746-747; Rubin (Intuit) Tr. 1524-1525).

Response to Finding No. 162:

Complaint Counsel disputes this Proposed Finding. This Proposed Finding is directly contradicted by evidence which shows that Intuit advertises free TurboTax as part of a business strategy that involves persuading consumers to upgrade from free to paid versions of TurboTax and that involves growing Intuit's customer base by offering free services to consumers [REDACTED]. (FF-25—FF-29).

163. Intuit develops TurboTax advertisements through a months-long iterative process that involves several rounds of review from multiple stakeholders. (Ryan (Intuit) Tr. 699-701; GX159 (Ryan (Intuit) Dep.) at 46-49). During this process, ads are carefully reviewed—by Intuit's marketing team, outside ad agencies, and legal team—to ensure they are not deceptive or misleading. (Ryan (Intuit) Tr. 700-701).

Response to Finding No. 163:

Complaint Counsel agrees that Intuit develops TurboTax advertisements through a months-long iterative process that involves several rounds of review from multiple stakeholders. Complaint Counsel further agrees that during this process, ads are carefully reviewed—by Intuit’s marketing team, outside ad agencies, and legal team.

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C.

174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

164. The development of TurboTax advertisements begins with the marketing team’s drafting of a creative brief that describes the objectives for the advertising campaign, which then is provided to an outside advertising agency. (Ryan (Intuit) Tr. 699; GX159 (Ryan (Intuit) Dep. at 7; RX365 (Intuit); RX368 (Intuit)). Intuit works with advertising agencies because they have expertise in creating compelling advertising concepts. (Ryan (Intuit) Tr. 698-699).

Response to Finding No. 164:

Complaint Counsel has no specific response.

165. After receiving the creative brief, the advertising agency brainstorms how to accomplish Intuit’s stated objectives and generates creative concepts for the advertisements. (Ryan (Intuit) Tr. 699-700). The agency revises the concepts based on Intuit’s feedback and sends the revised advertisements to Intuit for further review, with the iterative back-and-forth process often taking five to nine months. (Ryan (Intuit) Tr. 699-700).

Response to Finding No. 165:

Complaint Counsel has no specific response.

166. TurboTax advertising concepts are reviewed by the TurboTax advertising team, Intuit’s advertising partners, and the Intuit legal team. (Ryan (Intuit) Tr. 700). In addition, advertising agencies review TurboTax advertising concepts to ensure that their disclosures are clear and legible. (GX159 (Ryan (Intuit) Dep.) at 45-49). In some cases, concepts are also tested on consumers. (Ryan (Intuit) Tr. 700).

Response to Finding No. 166:

Complaint Counsel agrees that TurboTax advertising concepts are reviewed by the TurboTax advertising team, Intuit’s advertising partners, and the Intuit legal team. (Ryan (Intuit) Tr. 700). Complaint Counsel further agrees that advertising agencies review TurboTax advertising concepts and their disclosures. (GX159 (Ryan (Intuit) Dep.) at 45-49). Complaint Counsel further agrees that, in some cases, concepts are also tested on consumers. (Ryan (Intuit) Tr. 700).

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by

Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

167. Intuit seeks to communicate “in a believable way” with consumers in its advertisements because it is “critical” that Intuit “actually say what [it’s] going to do”—i.e., have a high “say:do ratio”—in order to “build future growth and have a healthy franchise.” (Johnson (Intuit) Tr. 623-624). Mr. Rubin similarly testified that Intuit does “a lot of work to be clear with [its] customers” in its ads. (Rubin (Intuit) Tr. 1599).

Response to Finding No. 167:

Complaint Counsel agrees that Intuit’s executives testified as set forth in this Proposed Finding but disputes the substance of the testimony.

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-

179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit)); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit)); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of

respondents associated “That i can file my tax s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))

- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (*e.g.* ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).
- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. For example, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not

require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)).

“Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).

- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, instead of immediately addressing its deception, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

169. Ms. Ryan and Mr. Rubin testified credibly that Intuit would never run ads that stakeholders consider deceptive or misleading. (Ryan (Intuit) Tr. 702; Rubin (Intuit) Tr. 1599). As Ms. Ryan testified, if there is any concern that an ad could be deceptive or misleading, that ad would “absolutely not” ever make it on air. (Ryan (Intuit) Tr. 702). Mr. Rubin similarly testified that Intuit “wouldn’t run” any ad it had reason to believe was deceptive. (Rubin (Intuit) Tr. 1599).

Response to Finding No. 169:

Complaint Counsel disputes that Ms. Ryan and Mr. Rubin testified credibly in that their testimony is directly contradicted by copious evidence in the hearing record as set forth below.

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a

pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C.

359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)).

“Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).
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‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)

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- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
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For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

170. Intuit never intended to deceive consumers by conveying in any TurboTax advertisement (or otherwise) that all TurboTax SKUs are free or that TurboTax is free for everyone. (Ryan (Intuit) Tr. 700-702, 704, 712, 716, 718, 722, 727, 734, 741, 743, 749, 753, 758, 760; GX156 (Ryan (Intuit) IHT) at 110; Johnson (Intuit) Tr. 582, 618, 623-624; GX146 (Ryan Dep.) at 125-126; RX298 (Intuit)).

Response to Finding No. 170:

Complaint Counsel disputes this Proposed Finding. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of

Intuit's executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit's knowledge and intent to deceive includes:

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- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its "free" TurboTax advertising. Intuit's internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] (FF-619). That same year, Intuit found that "customers still want more price transparency (e.g. 'Free isn't Free,' ...)", and that a number of consumers complained about Intuit's pricing. (FF-619).
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For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

171. Rather, Intuit’s intent in running advertisements about free TurboTax SKUs has always been to convey that specific TurboTax SKUs are free for consumers who qualify, and that consumers can see if they qualify on the TurboTax website. (Johnson (Intuit) Tr. 574-575, 617-618; Ryan (Intuit) Tr. 726, 747; Rubin (Intuit) Tr. 1524-1525).

Response to Finding No. 171:

Complaint Counsel disputes this Proposed Finding. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

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respondents associated “That i can file my tax s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))

- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (*e.g.* ‘Free isn’t Free,’ ...”), and that a number of consumers complained about Intuit’s pricing. (FF-619).
- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting

with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

172. Intuit conveys its intent to outside agencies who develop TurboTax advertisements. (Johnson (Intuit) Tr. 620-621; Ryan (Intuit) Tr. 797; GX654 (Intuit) at 2; RX365 (Intuit) at -7442; RX368 (Intuit) at -7750). As Mr. Johnson testified, Intuit gives the agencies “mandatory” instructions that the ads should “drive absolute clarity around who ... TurboTax Free Edition was meant for.” (Johnson (Intuit) Tr. 620-621).

Response to Finding No. 172:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))

- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).
- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

173. For example, Intuit directs agencies to include on television ads the language “TurboTax Free Edition is for simple U.S. returns only” and “See if you qualify at turbotax.com,” as well as include a “blue end card with [the] TurboTax Free Edition logo ... as a way of being clear on what product we were advertising, versus other products that we offer.” (Johnson (Intuit) Tr. 620-621; GX654 (Intuit) at 1). A similar mandate governed TurboTax Live Basic video ads. (GX309 (Intuit); GX614 (Intuit); Ryan (Intuit) Tr. 797). Intuit instructs agencies to [REDACTED] in email ads, and on the TurboTax website. [REDACTED] (RX365 (Intuit); RX368 (Intuit); GX654 (Intuit)).

Response to Finding No. 173:

Complaint Counsel agrees that in some instances Intuit directs agencies to include on television ads the language “TurboTax Free Edition is for simple U.S. returns only” and “See if you qualify at turbotax.com,” as well as include a “blue end card with [the] TurboTax Free Edition logo.” Complaint Counsel further agrees that a similar mandate governed TurboTax Live Basic video ads. (GX309 (Intuit); GX614 (Intuit); Ryan (Intuit) Tr. 797). Complaint Counsel also agrees that in some instances Intuit instructed agencies to [REDACTED] in email ads, and on the TurboTax website, [REDACTED]. (RX365 (Intuit); RX368 (Intuit); GX654 (Intuit)).

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the

self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (*e.g.* ‘Free isn’t Free,’ ...”), and that a number of consumers complained about Intuit’s pricing. (FF-619).
- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)

- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

174. If Intuit at any point believed that a TurboTax advertisement was deceptive or misleading, Intuit immediately “would have stopped [running] the ad,” (Johnson (Intuit) Tr. 615, 622-624, 683; Ryan (Intuit) Tr. 701-702; Rubin (Intuit) Tr. 1599; GX146 (Ryan (Intuit) Dep.) at 124-125), and never would have run an ad that it believed to be deceptive in the first place. (Ryan (Intuit) Tr. 702; Rubin (Intuit) Tr. 1599).

Response to Finding No. 174:

Complaint Counsel disputes this Proposed Finding. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts

citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit)); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))

- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).
- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

175. Complaint Counsel have not offered any evidence that Intuit intended to convey the claims they allege or to mislead or deceive consumers with the challenged ads. Indeed, the FTC's designee testified that there is no evidence Intuit intentionally tried to deceive consumers. (RX161 (Maxson (FTC) Dep.) at 173-174).

Response to Finding No. 175:

Complaint Counsel disputes this Proposed Finding. First, “[i]t is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)).

Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED]

[REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).

- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

Complaint Counsel further notes that Intuit miscites and misstates the deposition testimony of Bureau of Consumer Protection designee William T. Maxson. First, the transcript of Mr. Maxson’s deposition is marked GX161 (not RX161). More importantly, Mr. Maxson does not testify there is no evidence of intent as Intuit claims. Instead, Mr. Maxson testified as follows in relevant part: “I don’t have a photographic memory of the entire record or all evidence produced in this case. I cannot recall whether there is evidence that would support the proposition that Intuit intended for consumers to take away the impression that TurboTax was free. I am fairly confident

that there is evidence that that was the impression that consumers had. There may be evidence that they intended to do that. I am not certain, and I do not remember a piece of evidence.” (GX161 (Maxson (Bureau of Consumer Protection) Dep. at 175).

176. Intuit’s intent and effort to be clear with consumers in its free TurboTax advertising, and its intent not to deceive consumers by conveying in any TurboTax advertisement (or otherwise) that all TurboTax SKUs are free or that TurboTax is free for everyone, demonstrates that Intuit acted in good faith in developing and distributing the challenged ads. (*Supra* ¶¶33-38, 162-175).

Response to Finding No. 176:

Complaint Counsel disputes this Proposed Finding. First, “[i]t is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)).

Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This is the opposite of good faith. The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s

internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED]

[REDACTED]” (FF-

619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).

- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

177. Complaint Counsel have not offered any evidence that Intuit acted in bad faith in developing or distributing the challenged ads.

Response to Finding No. 177:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Whether Intuit acted in good faith is irrelevant to liability. “[i]t is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)).

Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. Deceiving consumers knowingly is dishonest and the opposite of good faith. The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED]

[REDACTED] FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).

- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
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For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

B. TurboTax Advertising Channels

178. Intuit advertises all its TurboTax SKUs, as well as the TurboTax brand generally, through four primary advertising channels: (1) “brand” advertising; (2) display advertising; (3) direct marketing (or CRM); and (4) holistic search marketing. (Ryan (Intuit) Tr. 691-696). Each of these channels focuses on consumers at different places in the marketing funnel. (RX582 (Intuit) at -1293; RX1018 (Golder Expert Report) ¶153 & fig. 23; *supra* ¶¶155-160).

Response to Finding No. 178:

Complaint Counsel has no specific response.

179. Brand advertising encompasses advertising for the TurboTax SKUs and brand “at broadcast scale,” such as television, radio, and streaming services like Hulu and Spotify. (GX156 (Ryan (Intuit) IHT) at 41-42; Ryan (Intuit) Tr. 691-692).

Response to Finding No. 179:

Complaint Counsel has no specific response.

180. Intuit’s objective with TurboTax brand advertising is to break through with top-of-funnel consumers to “[d]rive awareness and consideration” of the TurboTax brand and products. (RX582 (Intuit) at -1291, -1304; GX146 (Ryan (Intuit) Dep.) at 22-23). To accomplish this, Intuit designs its brand advertising to ensure consumers remember the advertisement, the message, and the brand, and that the advertisement increases a consumer’s consideration of the TurboTax brand in general. (RX582 (Intuit) at -1306). As Professor Golder explained, such top-of-funnel advertising is meant to “move [consumers] from being unaware to being aware” of their different tax filing options. (Golder (Intuit) Tr. 1106; *see also* Golder (Intuit) Tr. 1065-1069).

Response to Finding No. 180:

Complaint Counsel has no specific response.

181. Display advertising includes traditional online ads, such as banners displayed on websites, and social media advertisements like TikTok, Facebook, or Snapchat. (Ryan (Intuit) Tr. 693; GX156 (Ryan (Intuit) IHT) at 27). TurboTax display advertising aligns to the “Performance Media” stage of the TurboTax marketing funnel in order to convert viewers into customers, as well as to increase awareness and consideration of the TurboTax brand. (RX582 (Intuit) at -1291, -1293, -1318). Intuit also uses TurboTax display advertising to re-engage customers and move them down the marketing funnel toward a completed tax return. (RX582 (Intuit) at -1320).

Response to Finding No. 181:

Complaint Counsel has no specific response.

182. Holistic search marketing refers to marketing strategies for search-engine results. (Ryan (Intuit) Tr. 696). Intuit markets TurboTax through two categories of holistic search marketing: paid-search advertising, often referred to as pay-per-click (“paid-search”) advertising, and organic search marketing, also known as search engine optimization (“SEO”). (Ryan (Intuit) Tr. 696; GX156 (Ryan (Intuit) IHT) at 29-30).

Response to Finding No. 182:

Complaint Counsel has no specific response.

183. Intuit aligns TurboTax holistic search marketing to the next level down in its marketing funnel and uses search marketing to increase conversion among consumers who are already in the market for online tax-preparation products generally, or who may be searching for information about TurboTax specifically. (RX582 (Intuit) at -1291, -1293; RX1018 (Golder Expert Report) ¶159).

Response to Finding No. 183:

Complaint Counsel has no specific response.

184. For paid-search advertising, Intuit does not control when or how those ads appear on the search engine's results page. (Ryan (Intuit) Tr. 697; GX439 (Ryan (Intuit) Decl.) ¶23). Instead, Intuit bids on a variety of keywords in an auction marketplace, and if Intuit is the highest bidder, a TurboTax advertisement would appear at the top of the search results page when consumers search for those keywords. (Ryan (Intuit) Tr. 696-697; GX151 (Ison (Intuit) IHT) at 61-63; GX156 (Ryan (Intuit) IHT) at 31; Hauser (Intuit) Tr. 973-974). Intuit submits components of the advertising copy that should appear when a paid-search ad is shown, but ultimately the search engine (e.g., Google or Bing) compiles and presents the advertisement based on the search performed and the information the search engine has about the particular consumer who performed the search. (Ryan (Intuit) Tr. 697).

Response to Finding No. 184:

Complaint Counsel has no specific response.

185. As for SEO, Intuit uses different techniques, such as modifying the content on webpages, to get the TurboTax website to rank highly in organic search results and help consumers find the TurboTax SKU that best fits their tax needs. (Rubin (Intuit) Tr. 1548-1549, 1551-1552; Ryan (Intuit) Tr. 697-698, 805).

Response to Finding No. 185:

Complaint Counsel has no specific response.

186. Direct marketing (also referred to as CRM marketing) encompasses advertisements sent directly to individual consumers, such as email, mobile push notifications, SMS notifications, and direct mail. (Ryan (Intuit) Tr. 695-696; GX146 (Ryan (Intuit) Dep.) at 14).

Response to Finding No. 186:

Complaint Counsel has no specific response.

187. In the context of the TurboTax marketing funnel, direct marketing aims to “drive business through direct-to-customer messaging” and increase conversion, retention, and ongoing engagement of existing and prior customers. (RX582 (Intuit) at -1291, -1293, -1325; RX1018 (Golder Expert Report) ¶160). By leveraging customer data and predictive models, Intuit delivers targeted advertisements and offers that are “are personalized to the individual consumer.” (Ryan (Intuit) Tr. 695-696; RX582 (Intuit) at -1325).

Response to Finding No. 187:

Complaint Counsel has no specific response.

C. Targeting Of TurboTax Advertisements

188. Intuit presents increasingly targeted information to consumers as they near their purchase decision and descend through the marketing funnel. ((RX582 (Intuit) at -1291, -1293; RX1018 (Golder Expert Report) ¶153; RX560 (Intuit) at 141).

Response to Finding No. 188:

Complaint Counsel has no specific response.

189. At the top of the funnel, for example, Intuit targets larger numbers of consumers for general awareness of the TurboTax brand and its products. (RX582 (Intuit) at -1291; GX146 (Ryan (Intuit) Dep.) at 22; RX1018 (Golder Expert Report) ¶153). Moving down the funnel, Intuit makes use of demographic and exclusionary targeting to reach a smaller number of more relevant audiences who are likely to engage with TurboTax advertising to find the product most appropriate for their tax filing situation. (Ryan (Intuit) Tr. 704-705; Rubin (Intuit) Tr. 1597-1598; RX1018 (Golder Expert Report) ¶¶152-153).

Response to Finding No. 189:

Complaint Counsel has no specific response.

190. At every point in the TurboTax marketing funnel, to the extent it is able, Intuit targets ads for individual TurboTax SKUs toward the audiences most likely to qualify use those products. (Ryan (Intuit) Tr. 704-705, 732, 785-786, 797; GX146 (Ryan (Intuit) Dep.) at 124-125). As Ms. Ryan testified, Intuit wants TurboTax ads to “be relevant” to their audience so that “people ... get started in the product that’s right for them.” (Ryan (Intuit) Tr. 705).

Response to Finding No. 190:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion.

(See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

191. Intuit targets advertisements for free TurboTax SKUs, for instance, to individuals likely to have simple tax returns and therefore qualify to use those free products. (Ryan (Intuit) Tr. 702, 704, 732; Rubin (Intuit) Tr. 1597; RX287 (Intuit) at -8826). Intuit does so to increase consumer awareness that Intuit offers a free tax-preparation product, to inform filers with simple returns that it is “completely free to file” using TurboTax Free Edition, and to increase the number of returns filed using TurboTax Free Edition. (Johnson (Intuit) Tr. 574, 605-606; Ryan (Intuit) Tr. 702-703; Rubin (Intuit) Tr. 1525).

Response to Finding No. 191:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

192. Intuit targets ads for free TurboTax SKUs to customers likely to have simple tax returns both by targeting specific demographics of taxpayers more likely to have simple tax returns and developing creative content that appeals to such consumers. (Ryan (Intuit) Tr. 704, 783, 785-786, GX146 (Ryan (Intuit) Dep.) at 124).

Response to Finding No. 192:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

193. For example, Intuit targets ads for free TurboTax SKUs toward individuals ages 18 to 35 because those people are relatively likely to have simple tax returns. (Ryan (Intuit) Tr. at 702, 704, 783; Rubin (Intuit) Tr. 1597; GX654 (Intuit); GX688 (Wieden+Kennedy (WK)) at -4848, -4851, -4854; GX689 (WK); RX804 (Intuit) at -6481). That fact is borne out by Intuit’s customer data, which show that consumers with simple tax returns who file using TurboTax Free Edition tend to be younger than the average taxpayer. (Rubin (Intuit) Tr. 1597-1598; *supra* ¶85).

Response to Finding No. 193:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was

not limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

194. Intuit targets the 18- to 35-year-old demographic by advertising its free SKUs through “media channels and platforms that skew heavily towards that population [18 to 35 year-olds] ... like Snapchat and TikTok.” (Ryan (Intuit) Tr. 732-733). It also targets them by using creative concepts that “would resonate” with those individuals. (Ryan (Intuit) Tr. 732-733). For example, Intuit’s “Young Love” and “Echo” ads for TurboTax Free Edition were developed and aired due to their perceived appeal to younger audiences. (GX690 (WK) at -4965, -4970); GX688 (WK) at -4848, -4874).

Response to Finding No. 194:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

195. Intuit also targets advertising for free TurboTax SKUs to 18-to-35-year-olds by using young people “as the creative inspiration for the campaign idea” (Ryan (Intuit) Tr. 704), for example, by partnering “with a broad range of YouTube and Instagram influencers” in its social media advertising, (GX688 (WK) at -4892); GX689 (WK) at -4943 to -4946)).

Response to Finding No. 195:

Complaint Counsel has no specific response.

196. Intuit runs ads for free TurboTax SKUs at the beginning of each tax season (during what it terms “First Peak”), such as Super Bowl ads, as that is “when the majority of

Simple Filers prepare and file their taxes.” (RX804 at -6482; Rubin (Intuit) Tr. 1597-1598; Johnson (Intuit) Tr. 655).

Response to Finding No. 196:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and otheeverr channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

197. Intuit also uses a marketing strategy called “exclusionary targeting” to avoid showing ads to consumers for whom they are irrelevant. (Ryan (Intuit) Tr. 704-705; GX146 (Ryan (Intuit) Dep.) at 124-125); GX149 (Crosby (Intuit) Dep.) at 118-120. For example, if Intuit has an indication that a consumer bought or sold cryptocurrency, Intuit will not show that consumer an advertisement for a free TurboTax SKU. (GX149 (Crosby (Intuit) Dep.) at 118-119). Similarly, Intuit will not show someone an advertisement for a free TurboTax SKU if it knows that the consumer has self-employment income from a job at Uber. (Ryan (Intuit) Tr. 704-705). Conversely, Intuit will target consumers with self-employment income for advertisements for TurboTax Self-Employed, highlighting the benefits of that SKU for those consumers. (Ryan (Intuit) Tr. 705).

Response to Finding No. 197:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in

mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

198. Intuit similarly uses direct marketing (e.g., email marketing) to send advertisements for free TurboTax SKUs only to consumers who are relatively likely to have simple tax returns, such as consumers who filed with TurboTax Free Edition the previous year, or those who have entered information into TurboTax Free Edition in the current year. (Ryan (Intuit) Tr. 769; *see also* RX582 (Intuit) at -1293, -1325).

Response to Finding No. 198:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

199. Finally, through SEO, Intuit attempts to direct its marketing for specific TurboTax SKUs to consumers who have indicated that the promoted SKU would be right for their tax situation. (Rubin (Intuit) Tr. 1549, 1550-1551). Intuit optimizes content on the TurboTax website so that search engines list specific pages on the TurboTax website “based on relevancy of that page to a user’s query.” (Ryan (Intuit) Tr. 697-698; GX156 (Ryan (Intuit) IHT) at 31-32).

Response to Finding No. 199:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

200. For instance, if a consumer searches “TurboTax Free” on the internet, Intuit’s SEO strategy will result in her being served with more prominent results related to TurboTax Free Edition, including the Free Edition landing page (where qualifications are discussed in detail), TurboTax blog posts about Free Edition and its qualifications, press releases about Free Edition, and other webpages discussing what qualifies as a simple tax return. (Rubin (Intuit) Tr. 1548-1549, 1551, 1591).

Response to Finding No. 200:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was

not limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

201. If a consumer searches phrases such as “TurboTax sold new investments” or “TurboTax rental property” on the internet, Intuit’s SEO strategy will result in her not being served with high-ranking results for TurboTax Free Edition because the sale of investments “doesn’t fit on a simple tax return”; instead, that consumer would “see content for TurboTaxPremier appearing in those search results,” because that product covers investments and rental properties. (Rubin (Intuit) Tr. 1549-1551).

Response to Finding No. 201:

Complaint Counsel has no specific response.

202. Similarly, if a consumer searches “TurboTax Form 1099,” Intuit’s SEO efforts mean that he will not be served with prominent results for TurboTax Free Edition, but will instead be provided high-ranking results for TurboTax Deluxe, Premier, or Self-Employed, which all cover IRS Form 1099 income. (Rubin (Intuit) Tr. 1549-1550). And if a consumer searches “TurboTax, itemize my deductions,” he will not be served prominent results for TurboTax Free Edition but will see high-ranking results for TurboTax Deluxe, which covers itemized deductions. (Rubin (Intuit) Tr. 1550).

Response to Finding No. 202:

Complaint Counsel has no specific response.

203. Intuit’s efforts to target its ads for free TurboTax SKUs toward consumers who qualify for those products helps ensure that consumers who do not qualify for free SKUs are not seeing those ads, making it unlikely that a significant minority of consumers would be deceived by those ads. (Ryan (Intuit) Tr. 704-705; GX146 (Ryan (Intuit) Dep.) at 124-125).

Response to Finding No. 203:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including

millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

204. Intuit’s efforts to target its advertising also reinforce that its intent in marketing free TurboTax SKUs was to communicate that there was a legitimate free offer for those consumers who qualified. (Johnson (Intuit) Tr. 606, 618; Ryan (Intuit) Tr. 704-705). If Intuit had intended to deceive consumers into believing TurboTax was free for them when it was not, it would not have gone to such lengths to ensure (as best it could) that consumers seeing advertising for free TurboTax SKUs were likely to qualify for those products. (Johnson (Intuit) Tr. 606, 618; Ryan (Intuit) Tr. 727, 735, 754).

Response to Finding No. 204:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–

65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)).

“Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my taxe s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).
- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).

- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

D. The Challenged Advertisements

205. Complaint Counsel contend that certain advertisements for free TurboTax SKUs (the “challenged ads”) are deceptive because they conveyed either that all TurboTax SKUs were free or that TurboTax was free for the viewer when it was not. (Evans (FTC) Tr. 17, 19, 33; Complaint Counsel’s Pretrial Brief at 30, 48 (Feb. 17, 2023); RX600 (FTC) at 36).

Response to Finding No. 205:

Complaint Counsel objects to this Proposed Finding in that it does not set forth a factual assertion supported by the evidentiary record. Instead, this Proposed Finding is argumentative and mischaracterizes contentions or arguments made by Complaint Counsel.

Complaint Counsel disputes this Proposed Finding. Complaint Counsel contends what Count I of the Complaint alleges: Intuit “represents, directly or indirectly, expressly or by implication, that consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. This is precisely what the hearing record shows (FF-47 & FF-49—FF-454). The Complaint does not, as Intuit seems to believe, allege that Intuit represented that TurboTax was free for *everyone*.

Complaint Counsel makes no such contention. Moreover, Complaint Counsel does not focus on TurboTax SKUs because specific SKUs don't resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit's ads "communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live)." (FF-609). According to its own copy testing "[m]ost viewers can recall TurboTax, but only a handful mention the specific product name" when asked "Which brand do you think this ad was for?" (FF-610). In other words, consumers remember and think of the product as "TurboTax" and don't distinguish between SKUs.

206. Complaint Counsel maintain that this "is an express claim case." (Anguizola (FTC) Tr. 1837). But Complaint Counsel cannot even agree on the claim or claims they believe the ads conveyed, shifting their allegations throughout this litigation. Sometimes they said the ads conveyed that "TurboTax is free." (Complaint Counsel's Motion for Summary Decision at 36 (May 6, 2022); Complaint Counsel's Pretrial Brief at 48 (Feb. 17, 2023). Other times they said the ads conveyed to consumers that "TurboTax is free *for them*." (Complaint Counsel's Reply in Support of Motion for Summary Decision at 3). At trial, they again shifted course, arguing at some points that the ads conveyed that "TurboTax will be free for the consumer watching the ad" (Evans (FTC) Tr. 17), and at other points that the ads claimed that TurboTax is "free for the consumer watching the ad" (Evans (FTC) Tr. 6-8). Then on the last day of trial, Professor Novemsky offered another, new, alleged claim supposedly made in the challenged ads: that consumers "could not just file, but file and get [their] full refund" for free. (Novemsky (FTC) Tr. 1790-1791). When pressed to clarify their position, Complaint Counsel said they "don't see a lot of daylight between" these various claims allegedly made by the challenged ads. (Anguizola (FTC) Tr. 1837-1838).

Response to Finding No. 206:

Complaint Counsel objects to this Proposed Finding in that it does not set forth a factual assertion supported by the evidentiary record. Instead, this Proposed Finding is argumentative and mischaracterizes contentions or arguments made by Complaint Counsel.

Complaint Counsel agrees that it maintains that this "is an express claim case."

Complaint Counsel disputes this Proposed Finding in that Complaint Counsel has consistently contended what Count I of the Complaint alleges: Intuit "represents, directly or indirectly, expressly or by implication, that consumers can file their taxes for free using

TurboTax.” Compl. ¶ 119. This is precisely what the evidentiary hearing record shows (FF-47 & FF-49—FF-454).

207. Complaint Counsel have also largely focused on claims allegedly conveyed by challenged video ads (i.e., the 131 brand video ads at issue), while failing to explain how challenged non-video ads (108 display ads (including video display ads), 17 paid-search ads, 24 email ads, and 4 radio ads)—which constitute the majority of the ads at issue in this case—are deceptive. (Evans (FTC) Tr. 18-19; Complaint Counsel’s Pretrial Brief at 30 & App’x B (Feb. 17, 2023)).

Response to Finding No. 207:

Complaint Counsel objects to this Proposed Finding in that it does not set forth a factual assertion supported by the evidentiary record. Instead, this Proposed Finding is argumentative and mischaracterizes contentions or arguments made by Complaint Counsel.

Complaint Counsel disputes this Proposed Finding in that Complaint Counsel has explained how the challenged ads, including the challenged non-video ads, are deceptive. (*See e.g.* CC Br. at 48-65).

208. And Complaint Counsel and their witnesses at times have ignored various elements of the challenged ads. During their opening statement, for instance, Complaint Counsel repeatedly skipped over the “simple returns only” qualification included in the ads (Evans (FTC) Tr. 44-45), prompting the Court to interject and point out that the ads included that text (Chappell (ALJ) Tr. 45). And when asked to confirm that the phrase ““see if you qualify at turbotax.com’ was included” in one ad, Complaint Counsel’s expert replied, “If you say so” and “I don’t recall.” (Novemsky (FTC) Tr. 1814; *see also* RX1396 (Yoeli (FTC) Dep.) at 180 (responding “That language sounds familiar, but I’m not sure”)).

Response to Finding No. 208:

Complaint Counsel objects to this Proposed Finding in that it does not set forth a factual assertion supported by the evidentiary record. Instead, this Proposed Finding is argumentative and mischaracterizes contentions and arguments made by Complaint Counsel. It also misstates and mischaracterizes expert testimony.

Complaint Counsel further disputes this Proposed Finding. Complaint Counsel and the experts it called did not ignore qualifying language contained in the challenged ads. Instead, Complaint Counsel and Professor Novemsky put forward evidence, including a consumer

perception survey, showing that Intuit’s disclaimers were inadequate and failed to correct the misimpression the challenged ads left with at least a significant minority of consumers that “TurboTax is free” when those consumers were not eligible for the free offer. (FF-481, FF-491—FF-495 & FF-498—FF-500).

During opening argument, Complaint Counsel acknowledged the “simple returns only” qualification in Intuit’s ads while correctly arguing “Simple returns,” to the extent it’s even readable, is meaningless to consumers.” (Evans (Complaint Counsel) Tr. 22). And in responding to one of the Court’s questions on this topic, Complaint Counsel explained: “So, basically, in no format could ‘simple tax return’ effectively disclaim the free claim for a -- at least a substantial minority of taxpayers, and, Your Honor, I don't mean to overlook it. I'm not mentioning it every time just to speed through things, but, yes, there is a simple ‘tax returns only’ disclaimer on most, if not all, ads after a certain point, and I think we've passed that point, so we will continue to see it.” (Evans (Complaint Counsel) Tr. 46).

Complaint Counsel also notes that Intuit omitted a significant part of Professor Novemsky’s testimony where he addresses the “see if you qualify at turbotax.com” disclaimer. When defense counsel asked “And ‘see if you qualify at turbotax.com’ was included in the written disclosure that appeared in the tax year 2021 Dance Class Ad, right?,” Professor Novemsky testified: “If you say so. I don’t recall, but it sounds like it could be right.” (Novemsky (Expert) Tr. 1814). On redirect, Professor Novemsky returned to this topic when he was asked: “Mr. Paikin asked you a question about whether your survey measured anything about "see if you qualify" language. Can you explain in what way your survey may have taken that language into account?” (Novemsky (Expert) Tr. 1826). In response, Professor Novemsky testified as follows: “A. Sure. So my understanding is that some ads that were on the air when my -- when and before my survey was run, did include that language. And so to the extent that language was curing any misperception, that would have been picked up in my survey. So my survey included all information in the marketplace in mid to late March 2022, so to the extent

that language was in the marketplace, it would be part of consumer understanding that's measured in my survey.” (Novemsky (Expert) Tr. 1826).

209. When considering all constituent elements of the challenged ads, and the specific components of the different kinds of ads at issue (including the display, paid-search, email, and radio ads at issue), it is plain that the ads did not convey—expressly or impliedly—any of the claims asserted by Complaint Counsel.

Response to Finding No. 209:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit)));

FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

210. None of the challenged ads expressly conveyed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel.

Response to Finding No. 210:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these

advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Moreover, specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs.

211. Nor did any of the challenged ads impliedly convey that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel.

Response to Finding No. 211:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial

Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Furthermore, the Complaint does not, as Intuit seems to believe, allege that Intuit represented that TurboTax was free for *everyone*. And Complaint Counsel makes no such contention. Instead, Complaint Counsel contends what Count I of the Complaint alleges: Intuit “represents, directly or indirectly, expressly or by implication, that consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. This is precisely what the hearing record shows (FF-47 & FF-49—FF-454).

212. Instead, the challenged ads conveyed that the TurboTax SKU being advertised was free for consumers who qualify.

Response to Finding No. 212:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-

169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Complaint Counsel further disputes the Proposed Finding in that specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

213. Moreover, Intuit no longer runs TurboTax ads that repeat the term “free”—which comprise less than one quarter of the challenged ads—and has agreed “not [to] publish, or cause to be published, in any medium (1) its ‘free, free, free’ Video Advertisements ... and (2) Video Advertisements that are substantially similar in their repetition of the word free.” (Ryan (Intuit)

Tr. 754-755; Rubin (Intuit) Tr. 1555; RX261 (Intuit) at 8; GX352 (FTC) at 2; RX73 (Intuit) at 25; GX438 (Intuit) ¶16).

Response to Finding No. 213:

Complaint Counsel disputes the Proposed Finding. While Intuit’s current TurboTax ads repeat the word “free” fewer times than the ads that aired in March 2022 when this case commenced, Intuit’s current TurboTax ads include multiple “free” claims. For example, the TY22 “Lasso” 15 second TurboTax video ad (RX1444 (Intuit)) includes two free claims: (1) a voiceover that states: “Filing a simple return for free with the help of a TurboTax expert. See if you qualify at turbotax.com” (RX1444 (Intuit) at 00:05); and (2) a prominent written claim that appears on the screen in bright yellow cursive and states: “File Free with Expert Help.” (RX1444 (Intuit) at 00:11). The TY22 “Roller Boogie” 15 second TurboTax video ad (RX1449 (Intuit)) and the TY22 “Taxbourine” 15 second TurboTax video ad (RX1470 (Intuit)) contain the same repeated free claims. Similarly, the TY22 TurboTax website (RX1500 (Intuit)) includes multiple free claims including: (1) a large \$0 behind Tax expert Claudell in the middle of the page; (2) the claim “Fill 100% FREE with expert help” in the middle of the page next to Claudell; (3) and the claim: “Get live help from tax experts, plus a final review before you file – all free” also in the middle of the page next to Claudell. So, a consumer that watched the TY22 Lasso video ad and then went to the TY22 TurboTax homepage would have been exposed to at least five free claims. (RX1444 (Intuit); RX1500 (Intuit)).

1. Brand Video Advertisements

214. Complaint Counsel contend that 131 TurboTax brand video ads that ran between Tax Years 2014 and 2021 (and one exhibit containing brand video scripts) were deceptive to reasonable consumers. (Complaint Counsel’s Pretrial Brief at App’x B (Feb. 17, 2023)).

Response to Finding No. 214:

Complaint Counsel has no specific response.

215. Every one of the 131 challenged brand video ads stated that the free offer being advertised applied to a specific TurboTax SKU, either TurboTax Free Edition or TurboTax Live Basic. Every challenged brand video ad also stated in writing that the free offer being advertised was available only to taxpayers with “simple returns only,” or similar language indicating that the offer was qualified. All the challenged brand video ads also included language—like “see if

you qualify” or “see details at TurboTax.com”—that invited consumers to visit the TurboTax website to learn more about the free offer and whether they qualified for that offer. (GX59 (FTC); GX200 (FTC); GX202 (FTC); GX204 (FTC); GX206 (FTC); GX208 (FTC); GX299 (Intuit); GX300 (Intuit); GX307 (FTC); GX309 (FTC); GX321 (FTC); GX323 (FTC); GX324 (Intuit); GX325 (Intuit); GX326 (FTC); GX327 (FTC); GX328 (Intuit); GX329 (Intuit); GX330 (Intuit); GX331 (Intuit); GX332 (FTC); GX344 (Intuit); GX345 (Intuit); GX346 (Intuit); GX347 (Intuit); GX348 (Intuit); GX349 (Intuit); GX350 (Intuit); GX351 (Intuit); GX356 (Intuit); GX601 (Intuit); GX602 (Intuit); GX603 (Intuit); GX604 (Intuit); GX605 (Intuit); GX606 (Intuit); GX607 (Intuit); GX608 (Intuit); GX609 (Intuit); GX610 (Intuit); GX611 (Intuit); GX612 (Intuit); GX613 (Intuit); GX614 (Intuit); GX615 (Intuit); GX616 (Intuit); GX619 (Intuit); GX620 (Intuit); GX621 (Intuit); GX622 (Intuit); GX623 (Intuit); GX624 (Intuit); GX625 (Intuit); GX626 (Intuit); GX628 (Intuit); GX629 (Intuit); GX668 (Intuit); GX669 (Intuit); GX670 (Intuit); GX671 (Intuit); GX672 (Intuit); GX691 (FTC); GX692 (FTC); GX693 (FTC); GX694 (FTC); GX695 (FTC); GX696 (FTC); GX697 (FTC); GX698 (FTC); GX699 (FTC); GX700 (FTC); GX701 (FTC); GX702 (FTC); GX703 (FTC); GX704 (FTC); GX705 (FTC); GX706 (FTC); GX707 (FTC); GX708 (FTC); GX709 (FTC); GX710 (FTC); GX711 (FTC); GX712 (FTC); GX713 (FTC); GX714 (FTC); GX715 (FTC); GX716 (FTC); GX717 (FTC); GX718 (FTC); GX719 (FTC); GX720 (FTC); GX721 (FTC); GX722 (FTC); GX774 (FTC); GX775 (FTC); GX776 (FTC); GX777 (FTC); GX778 (FTC); GX779 (FTC); GX785 (FTC); GX786 (FTC); GX800 (FTC); GX802 (FTC); GX803 (FTC); GX804 (FTC); GX805 (FTC); GX806 (FTC); GX807 (FTC); GX811 (FTC); GX815 (FTC); GX816 (FTC); GX820 (FTC); GX821 (FTC); GX822 (FTC); GX825 (FTC); GX826 (FTC); GX827 (FTC); GX828 (FTC); GX829 (FTC); GX835 (FTC); GX836 (FTC); GX837 (FTC); GX838 (FTC); GX844 (FTC); GX848 (FTC); GX849 (FTC); GX855 (FTC); GX856 (FTC); RX32 (Intuit); RX200 (Intuit); RX201 (Intuit); RX202 (Intuit); Johnson (Intuit) Tr. 606; Ryan (Intuit) Tr. 753-754).

Response to Finding No. 215:

Complaint Counsel agrees that the challenged brand video ads contained “simple returns only” and “see if you qualify” disclaimers. Complaint Counsel also agrees that the challenged brand video ads referenced TurboTax sub brands or SKUs such as “Free Edition” or “TurboTax Live.” Complaint Counsel otherwise disputes Intuit’s characterization of the challenged ads in this Proposed Finding. The best evidence of the challenged ads are the ads themselves.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the

circumstances, to the consumers' detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter "Deception Policy Statement").

Complaint Counsel further disputes the Proposed Finding in that specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don't resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit's ads "communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live)." (FF-609). According to its own copy testing "[m]ost viewers can recall TurboTax, but only a handful mention the specific product name" when asked "Which brand do you think this ad was for?" (FF-610). In other words, consumers remember and think of the product as "TurboTax" and don't distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to "TurboTax" as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating "I have been using TurboTax for years..." without specifying a SKU and third consumer testimonial stating: "TurboTax is way better than HR Block" without specifying a SKU; GX183A (two out of three customer testimonials featured refer to "TurboTax" without specifying a SKU or version).

216. A screenshot of the title card from a challenged Tax Year 2021 brand video ad, showing the TurboTax Free Edition logo and the qualifications "TurboTax Free Edition is for simple U.S. returns only" and "See if you qualify at turobtax.com," is provided below. (RX202 (Intuit)).



Response to Finding No. 216:

Complaint Counsel has no specific response.

217. Beginning in Tax Year 2020 and 2021, certain video ads also stated verbally that the advertised free offer was for “simple returns.” (GX307 (Intuit); GX309 (Intuit); GX601 (Intuit); GX602 (Intuit); GX603 (Intuit); GX607 (Intuit); GX614 (Intuit); GX616 (Intuit); GX619 (Intuit); GX622 (Intuit); GX828 (Intuit); GX838 (Intuit); GX844 (Intuit); GX856 (Intuit)).

Response to Finding No. 217:

Complaint Counsel has no specific response.

218. In Tax Year 2021, the challenged brand video ads also encouraged consumers to visit the TurboTax website through a spoken voiceover that stated “see details at turbotax.com.” (GX200 (Intuit); GX202 (Intuit); GX204 (Intuit); GX206 (Intuit); GX208 (Intuit); GX620 (Intuit); GX621 (Intuit); GX623 (Intuit); GX625 (Intuit); GX711 (Intuit); GX712 (Intuit); GX713 (Intuit); GX714 (Intuit); GX715 (Intuit); GX722 (Intuit); RX202 (Intuit)).

Response to Finding No. 218:

Complaint Counsel agrees that in Tax Year 2021, the challenged brand video ads contained a spoken voiceover that stated, “see details at turbotax.com.” Complaint Counsel

otherwise disputes Intuit's characterization of the challenged ads in this Proposed Finding. The best evidence of the challenged ads are the ads themselves.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit's false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers' detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter "Deception Policy Statement").

219. The only "evidence" Complaint Counsel offer for their express-claim theory is the repetition of the word "free" in some of the challenged video ads, which Complaint Counsel say constitutes an express claim that *all* consumers viewing those ads can necessarily file their taxes for free using TurboTax. (Evans (FTC) Tr. 19; Complaint Counsel's Pretrial Brief at 30 (Feb. 17, 2023)). But the repetition of the word free does not establish that the challenged brand video ads, let alone all challenged ads, expressly conveyed that all TurboTax SKUs are free.

Response to Finding No. 219:

Complaint Counsel disputes this Proposed Finding. "Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way." *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 n.4 (7th Cir. 1992). Even advertisements that do not use the specific terms alleged in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., "that consumers can file their taxes for free using TurboTax," Compl. ¶ 119), or the functional equivalent, in numerous TurboTax ads. (*See, e.g.*, FF-66—FF-466).

There is nothing oblique or indirect about Intuit's ads. They directly represent that TurboTax is free. For example, in 2015, Intuit told the television audience of Super Bowl XLIX:

“[Y]ou can file on TurboTax for absolutely nothing.” (FF-66—FF-67). Intuit repeated this messaging in its 2016 Super Bowl Ad featuring Sir Anthony Hopkins (as himself) and claiming, “I would never tarnish my name by selling you something. Now, if I were to tell you to go to turbotax.com, it’s because TurboTax Absolute Zero lets you file your taxes for free.” (FF-70—FF-71). In 2018, Intuit told consumers: “At least your taxes are free.” (*E.g.*, FF-74—FF-75 & FF-80). In 2019, Intuit’s message to consumers was: “Free free, free free, free free! ... That’s right, TurboTax Free is free. Free, free free free.” (FF-99—FF-100 & FF-104). In 2020, Intuit told consumers Googling “free file taxes ONLINE” that the “TurboTax® Official Site” offered “100% Free Online Tax Filing.” (FF-445). And in 2021, Intuit told TikTok users that the energetic dance of its “Dance Workout” ad was: “What it feels like to file your taxes for free, aka the TurboTax #FreeFileDance.” (FF-214). These are a few among many similar ads containing express free claims or the functional equivalent. (*See, e.g.*, FF-66—FF-466). The representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax.

220. To start, the repetition of the word “free” is missing from many of the challenged video ads, and the vast majority (more than two-thirds) of all challenged ads, including most challenged display ads and all paid-search and email ads. (*Cf.* Complaint Counsel’s Pretrial Brief at App’x B (Feb. 17, 2023); *infra* ¶223).

Response to Finding No. 220:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding fails to cite to specific challenged ads where the word “free” is not repeated and should be disregarded on that basis alone. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding in that the word “free” is repeated more than once in the vast majority of the challenged video ads. (*See* FF-66—FF-194). The word “free” or synonymous language such as “\$0” or “Guaranteed Zero” is repeated more than once in many of the challenged display ads (*see e.g.*, FF-212 (describing a Facebook ad (GX173) that contains multiple iterations of \$0 and Free)), paid search (*see e.g.* FF-445

(describing a paid search ad that repeats \$0 and Free)), and email ads (*see e.g.* FF-441 (describing an email ad (GX477) that repeats \$0 and Free multiple times)). “Free” is also used repeatedly in the TurboTax Radio Ads. (FF-195—FF-211).

Moreover, each of the challenged ads made the free claim alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, at least once. (*See, e.g.*, FF-66—FF-466). The making of a deceptive claim once in a challenged ad is sufficient under the FTC Act in that repetition of the claim within an ad is not an element necessary for establishing deception. *See generally*, 15 U.S.C. § 45(a); Deception Policy Statement, 103 F.T.C. 174.

221. Moreover, the word “free” by itself is not a claim about TurboTax at all. The FTC’s designee testified that the word “free” in ads is not an express claim because its meaning “depends [on] whether there is any other context for the person that is hearing [it].” (GX161 (Maxson (FTC) Dep.) at 239).

Response to Finding No. 221:

Complaint Counsel disputes this Proposed Finding in that it takes the testimony of Bureau of Consumer Protection designee William T. Maxson out of context and presents it in a misleading manner. Complaint Counsel agrees that a hypothetical advertisement that only uses the word “free” without any reference to TurboTax is not an express claim about TurboTax. During his deposition, Bureau of Consumer Protection designee William T. Maxson was asked: “If I say the words: ‘And free and free and free and free and free and free,’ is that an express claim that TurboTax is free?.” (GX161 (Maxson (BCP) Dep. at 239). In response, Mr. Maxson testified as follows: “If you simply say that, it depends whether there is any context for the person that is hearing that statement. If you walk up to someone on the street and say that sentence, no, I’m not sure they would know what you’re talking about.” (GX161 (Maxson (BCP) Dep. at 239). However, all the challenged ads make clear that “free” pertains to the price of TurboTax. (*See, e.g.*, FF-66—FF-466; *see also* FF-958—FF-987). The evidence further shows that consumers understand that claim to mean that they can file their taxes for free using

TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740).

Complaint Counsel also notes that William T. Maxson was the Bureau of Consumer Protection designee and not the FTC’s designee.

222. The “other context” provided by the challenged brand video ads was that a specific TurboTax SKU was free, that the SKU was available for simple tax returns only, and that further details were available on the TurboTax website. (*Supra* ¶¶215-218; Shiller (FTC) Tr. 234-239).

Response to Finding No. 222:

Complaint Counsel disputes this Proposed Finding. The challenged ads make clear that “free” pertains to the price of TurboTax. (*See, e.g.*, FF-66—FF-466; *see also* FF-958—FF-987). The evidence further shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). Moreover, specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

223. Indeed, the challenged brand video ads that repeated the word “free” did not state *anything* about TurboTax without supplying that context. Those 101 challenged brand video ads did not even mention “TurboTax” until the end of the ad, when they informed viewers that the free offer applied to a specific TurboTax SKU that had qualifications. (GX156 (Ryan (Intuit) IHT) at 130-131; Shiller (FTC) Tr. 235; GX59 (Intuit); GX200 (Intuit); GX202 (Intuit); GX204 (Intuit); GX206 (Intuit); GX208 (Intuit); GX299 (Intuit); GX300 (Intuit); GX326 (Intuit); GX327 (Intuit); GX328 (Intuit); GX329 (Intuit); GX330 (Intuit); GX331 (Intuit); GX332 (Intuit); GX348 (Intuit); GX349 (Intuit); GX350 (Intuit); GX351 (Intuit); GX356 (Intuit); GX604 (Intuit); GX605 (Intuit); GX606 (Intuit); GX608 (Intuit); GX609 (Intuit); GX610 (Intuit); GX611 (Intuit); GX612 (Intuit); GX613 (Intuit); GX615 (Intuit); GX620 (Intuit); GX621 (Intuit); GX623 (Intuit); GX624 (Intuit); GX625 (Intuit); GX626 (Intuit); GX628 (Intuit); GX629 (Intuit); GX669 (Intuit); GX670 (Intuit); GX671 (Intuit); GX672 (Intuit); GX691 (Intuit); GX692 (Intuit); GX693 (Intuit); GX694 (Intuit); GX695 (Intuit); GX696 (Intuit); GX697 (Intuit); GX698 (Intuit); GX699 (Intuit); GX700 (Intuit); GX701 (Intuit); GX702 (Intuit); GX703 (Intuit); GX704 (Intuit); GX705 (Intuit); GX706 (Intuit); GX707 (Intuit); GX708 (Intuit); GX709 (Intuit); GX710 (Intuit); GX711 (Intuit); GX712 (Intuit); GX713 (Intuit); GX714 (Intuit); GX715 (Intuit); GX716 (Intuit); GX717 (Intuit); GX718 (Intuit); GX719 (Intuit); GX720 (Intuit); GX721 (Intuit); GX722 (Intuit); GX778 (Intuit); GX779 (Intuit); GX800 (Intuit); GX802 (Intuit); GX803 (Intuit); GX804 (Intuit); GX805 (Intuit); GX806 (Intuit); GX807 (Intuit); GX811 (Intuit); GX815 (Intuit); GX816 (Intuit); GX820 (Intuit); GX821 (Intuit); GX822 (Intuit); GX825 (Intuit); GX826 (Intuit); GX827 (Intuit); GX829 (Intuit); GX835 (Intuit); GX836 (Intuit); GX837 (Intuit); GX848 (Intuit); GX849 (Intuit); GX855 (Intuit); RX201 (Intuit); RX202 (Intuit); *see also* Shiller (FTC) Tr. 235 (Ms. Shiller agreeing that the challenged “Free, Free, Free” video ads did not say anything about TurboTax until qualifications were provided and testifying that those ads first made viewers aware that the ads were for TurboTax only when a voiceover stated “TurboTax *Free Edition* is free” and invited viewers to “see details at TurboTax.com”)).

Response to Finding No. 223:

Complaint Counsel disputes this Proposed Finding. The challenged ads make clear that “free” pertains to the price of TurboTax. (*See, e.g.*, FF-66—FF-466; *see also* FF-958—FF-987). The evidence further shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). Moreover, specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall

TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

224. Copy testing of certain of the challenged ads confirmed that consumers did not associate challenged brand video ads that repeated the word “free” with TurboTax until “TurboTax Free Edition” was mentioned at the end of the ad. (GX460 (Intuit) at 8, 24; Shiller (FTC) Tr. 235).

Response to Finding No. 224:

Complaint Counsel disputes this Proposed Finding. The copy test cited by Intuit references “TurboTax” and “Intuit TurboTax” (not “TurboTax Free Edition”) when discussing brand linkage. (GX460 (Intuit) at 8 (CC-00009543), 24 (CC-00009559). This is consistent with the fact that TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without

specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

225. Moreover, Intuit no longer runs TurboTax ads that repeat “free” and has agreed, in a legally binding Consent Order, “not [to] publish, or cause to be published, in any medium (1) its ‘free, free, free’ Video Advertisements ... and (2) Video Advertisements that are substantially similar in their repetition of the word free.” (RX261 (Intuit) at 8; Ryan (Intuit) Tr. 754-755; Rubin (Intuit) Tr. 1555; GX352 (FTC) at 2; RX73 (Intuit) at 25; GX438 (Intuit) at 3-4).

Response to Finding No. 225:

Complaint Counsel partially disputes the Proposed Finding. While Intuit’s current TurboTax ads repeat the word “free” fewer times than the ads that aired in March 2022 when this case commenced, Intuit’s current TurboTax ads include multiple “free” claims. For example, the TY22 “Lasso” 15 second TurboTax video ad (RX1444 (Intuit)) includes two free claims: (1) a voiceover that states: “Filing a simple return for free with the help of a TurboTax expert. See if you qualify at turbotax.com” (RX1444 (Intuit) at 00:05); and (2) a prominent written claim that appears on the screen in bright yellow cursive and states: “File Free with Expert Help.” (RX1444 (Intuit) at 00:11). The TY22 “Roller Boogie” 15 second TurboTax video ad (RX1449 (Intuit)) and the TY22 “Taxbourine” 15 second TurboTax video ad (RX1470 (Intuit)) contain the same repeated free claims. Similarly, the TY22 TurboTax website (RX1500 (Intuit)) includes multiple free claims including: (1) a large \$0 behind Tax expert Claudell in the middle of the page; (2) the claim “Fill 100% FREE with expert help” in the middle of the page next to Claudell; (3) and the claim: “Get live help from tax experts, plus a final review before you file – all free” also in the middle of the page next to Claudell. So, a consumer that watched the TY22 Lasso video ad and then went to the TY22 TurboTax homepage would have been exposed to at least five free claims. (RX1444 (Intuit); RX1500 (Intuit)).

Subject to the above disputes, Complaint Counsel has no specific response to the remainder of this Proposed Finding.

226. It is not correct that one challenged brand video ad—“Boston Tea Party” (RX200 (Intuit))—expressly tells consumers, “You can file on TurboTax for absolutely nothing.” In fact, when the quoted words were spoken, the ad displayed not only the name of the specific product and time-limited offer being advertised—“Federal Free Edition” and “Absolute Zero”—but also text stating that “TurboTax Federal Free Edition is for simple U.S. returns only” and inviting consumers to “See offer details at TurboTax.com.” (RX200 (Intuit)).

Response to Finding No. 226:

Complaint Counsel disputes this Proposed Finding. The 2015 TurboTax Super Bowl ad, “Boston Tea Party” indeed contains the express claim: “you can file on TurboTax, for absolutely nothing. Intuit TurboTax. It’s amazing what you’re capable of.” (FF-66—FF-69; *see also* RX200 (Intuit) & GX321 (Complaint Counsel)). The fact that the ad also contains qualifying language does not vitiate the express claim.

227. It is also not correct that most of the challenged ads never mention Free Edition, or that many of the challenged ads stated only that “TurboTax Free is free.” In fact, all the challenged video advertisements that stated “TurboTax Free is free” also stated in writing that they were for the “Free Edition product only” or that “Free Edition is for simple U.S. returns only.” (Rubin (Intuit) Tr. 1561; *supra* ¶¶215-217, 223, 226; *infra* ¶244). And more broadly, all of the challenged brand video advertisements stated that the free offer being advertised applied to a specific TurboTax SKU—often by expressly referencing “Free Edition.” (*Supra* ¶¶212, 215, 222-223; *infra* ¶¶228, 244, 250-251, 261, 275, 281, 290, 294, 299).

Response to Finding No. 227:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Moreover, specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In

fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

228. Moreover, the reference to “TurboTax Free,” with the word “Free” appearing in lighter font weight than the “TurboTax” brand, was consistent with Intuit’s logo branding for all SKUs that year. (Rubin (Intuit) Tr. 1561-1562). The word “Edition” was not used in the ads for *any* of the various TurboTax SKUs. (Rubin (Intuit) Tr. 1561-1562). The reference to “TurboTax Free” was thus meant to convey the specific SKU being advertised, as reflected in the written disclosure appearing on the same title card at the end of the advertisements. (Rubin (Intuit) Tr. 1561-1562).

Response to Finding No. 228:

Complaint Counsel has no specific response.

229. Complaint Counsel contend that in challenged TurboTax brand video advertisements, “simple tax returns” and other disclosure language was too small for consumers to see. (Evans (FTC) Tr. 20-22). But Complaint Counsel—who did not make the same argument about any non-brand-video ads—produced no evidence that this was true. In fact, the disclosures in the challenged ads were larger and clearer than those run by many benchmark companies. (Golder (Intuit) Tr. 1150-1155). Moreover, as Intuit witnesses credibly explained, Intuit consistently placed those disclosures where consumers would expect to see them. (Ryan (Intuit) Tr. 775-777; Golder (Intuit) Tr. 1111-1114, 1153-1155).

Response to Finding No. 229:

Complaint Counsel disputes the Proposed Finding. Professor Novemsky opined that Intuit’s “simple tax returns” were inadequate for several reasons including the fact that they were

in small print, shown only for a few seconds, and not the exciting part of the ads that gets people's attention. (FF-492). Intuit executive Cathleen Ryan also testified that the "simple returns" language appeared in small font at the bottom of the screen in video and television advertising for TurboTax. (FF-493).

More broadly, Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit's false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers' detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter "Deception Policy Statement").

230. Complaint Counsel did not offer evidence demonstrating that consumers could not see or read the written qualifications in challenged brand video ads.

Response to Finding No. 230:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record."). The best evidence of the adequacy of the disclaimers are the challenged brand video ads themselves. A review of the challenge brand video ads reveals that the written disclaimers or written qualifications appeared in small font at the bottom of the screen, were shown for only a few seconds, and were insufficient to correct the misleading impression left by the more powerful, prominent and exciting free claims contained in the challenged TurboTax ads. (*See e.g.* RX200 (Intuit); GX323 (Complaint Counsel); GX324 (Intuit); GX350 (Intuit); RX1415 (Intuit); GX206 (Complaint Counsel); GX204 (Complaint Counsel); GX307 (Complaint Counsel)).

Complaint Counsel further disputes the Proposed Finding in that Professor Novemsky opined that Intuit’s disclaimers, including the “simple tax returns” disclaimers, were inadequate for several reasons including the fact that they were in small print, shown only for a few seconds, and not the exciting part of the ads that gets people’s attention. (FF-492). Intuit executive Cathleen Ryan also testified that the “simple returns” language appeared in small font at the bottom of the screen in video and television advertising for TurboTax. (FF-493).

More broadly, Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

231. Complaint Counsel did not offer evidence demonstrating that consumers could not hear the verbal qualifications in the challenged brand video ads.

Response to Finding No. 231:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). The best evidence of the adequacy of the disclaimers are the challenged brand video ads themselves. A review of the challenge brand video ads reveals that the verbal qualifications were short, and were insufficient to correct the misleading impression left by the more powerful, prominent and exciting free claims contained in the challenged TurboTax ads. (*See e.g.* RX200 (Intuit); GX323 (Complaint Counsel); GX324 (Intuit); GX350 (Intuit); RX1415

(Intuit); GX206 (Complaint Counsel); GX204 (Complaint Counsel); GX307 (Complaint Counsel)).

More broadly, Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

232. The evidence instead establishes that the written and verbal qualifications in the challenged brand video ads—such as “TurboTax Free Edition is for simple U.S. returns only” and “See if you qualify at turobtax.com”—were noticeable, legible or audible, and in a location where consumers would expect to find them. (*Supra* ¶¶215-218, 223; Golder (Intuit) Tr. 1138-1144, 1147-1155; Shiller (FTC) Tr. 246-247; GX159 (Ryan (Intuit) Dep.) at 45-49).

Response to Finding No. 232:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

233. Complaint Counsel’s witness acknowledged that the challenged brand video ads contained visible and/or audible qualifying language, including a specific product name, that the product was for simple tax returns only, and/or that consumers could see if they qualified at TurboTax.com. (Shiller (FTC) Tr. 246-247).

Response to Finding No. 233:

Complaint Counsel disputes this Proposed Finding. Intuit cites to FTC investigator testimony where Intuit’s attorneys are questioning her about video ads the investigator reviewed as evidence of what a “reasonable consumers” understand about TurboTax ads. (Shiller (Complaint Counsel) Tr. 246-47). Ms. Shiller obviously has significant additional knowledge

about TurboTax than an ordinary consumer. (*See, e.g.,* Shiller (Complaint Counsel) Tr. 142; 157 - 158 (describing work conducted as an investigator on this matter since 2019)). Given Ms. Shiller's vast experience as an investigator working on numerous advertising matters, she is more likely to notice elements of the ads that would not necessarily be clear and conspicuous to the average reasonable consumer. Moreover, during Ms. Shiller's testimony, Intuit's attorneys were highlighting and pointing her to specific components of the TurboTax ads. Consumers viewing the advertisements would not have the benefit of being pointed to specific qualifying language. Thus, the fact that Ms. Shiller acknowledged the existence of qualifying language in the TurboTax ads tells us nothing about whether the qualifying language was seen and understood by consumers.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.,* FF-491—FF-503; FF-669—FF-670). Intuit's false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers' detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter "Deception Policy Statement").

234. Professor Peter Golder's disclosure benchmarking analysis, which compared video ads for free TurboTax SKUs with ads from 18 benchmark companies across four industries, demonstrates that the qualifications in the challenged brand video ads were visible and consistent with disclosures in comparable ads. (Golder (Intuit) Tr. 1133-1136, 1138-1144, 1147-1155; RX1018 (Golder Expert Report) ¶¶127-137).

Response to Finding No. 234:

Complaint Counsel disputes this Proposed Finding. Professor Peter Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-

687; FF-693—FF-694). Instead, Professor Golder relies on his own opinions regarding Intuit’s marketing (FF-689), and speculative and unsupported opinions about Intuit’s purported disclaimers based on an uninformative comparative benchmarking exercise which compares Intuit’s disclaimers to disclaimers used by other advertisers. (FF-690—FF-704; FF-706; FF-710). A comparative study is irrelevant to determining whether Intuit’s ads were misleading, and Professor Golder made no effort to determine whether consumers saw or understood Intuit’s purported disclaimers. (FF-693; FF-702; FF-704).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

235. Professor Golder’s analysis was based on seven metrics identified in the FTC’s “.com Disclosures” guidelines for “How to Make Effective Disclosures in Digital Advertising”: height, color, duration, proximity, placement, distracting factors, and repetition. (Golder (Intuit) Tr. 1137-1141; RX1018 (Golder Expert Report) ¶¶125, 130-136; *see also* Novemsky (FTC) Tr. 1799-1800). The metrics considered by Professor Golder’s analysis were responsive to Complaint Counsel’s criticisms of TurboTax ads and the relief sought in this proceeding. (Golder (Intuit) Tr. 1137-1141; RX1018 (Golder Expert Report) ¶¶130-135; RX260 (FTC) ¶¶21- 36).

Response to Finding No. 235:

Complaint Counsel disputes this Proposed Finding in that Professor Golder’s analysis omits key guidance contained in the FTC’s “.com Disclosures” guidelines. For example, the FTC’s “.com Disclosures” guidelines make clear that basic principles of advertising law apply to online ads including that “[a]dvertising must be truthful and not misleading.” (GX316 (Complaint Counsel) at CC-00006732). The FTC’s “.com Disclosures” guidelines also make

clear that disclosures “cannot cure a false claim.” (GX316 (Complaint Counsel) at CC-00006733). The guidelines further state that “[i]f a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive.” (GX316 (Complaint Counsel) at CC-00006733). And that “[w]hether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad.” (GX316 (Complaint Counsel) at CC-00006734). Professor Golder did nothing to measure how consumers actually perceive the TurboTax ads and understand the disclosures within that context. He did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694). The comparative study or benchmarking conducted by Professor Golder is irrelevant to determining whether Intuit’s ads were misleading because Professor Golder made no effort to determine whether consumers saw or understood Intuit’s purported disclaimers. (FF-693; FF-702; FF-704). Therefore, Professor’s Golder’s analysis misses the forest for the trees and is not at all responsive to Complaint Counsel’s primary criticism of the TurboTax ads—that it leaves at least a significant minority of consumers with the misimpression they can file their taxes for free using TurboTax when they are not eligible to do so.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

236. In his disclosure benchmarking analysis, Professor Golder analyzed prominence by measuring the average height of disclosures as a percentage of the total screen height and comparing the color of the disclosure text to the background of the ad. (RX1018 (Golder Expert Report) ¶132). He analyzed duration by measuring the amount of time a disclosure appeared on-screen. (RX1018 (Golder Expert Report) ¶135). He analyzed proximity and placement by examining whether the disclosures were on-screen at the same time as the relevant claim, as well as where the disclosures were placed on the ads. (RX1018 (Golder Expert Report) ¶131). He analyzed distracting factors by reviewing whether—and for how long—disclosures were on a solid screen and whether multiple disclosures that discussed the cost of a product or eligibility requirements were present in an ad. (RX1018 (Golder Expert Report) ¶133). He analyzed repetition by examining whether the ad included a spoken voiceover of the exact written disclosure, and whether the ad disclosures were repeated on the company’s website. (RX1018 (Golder Expert Report) ¶134).

Response to Finding No. 236:

Complaint Counsel has no specific response.

237. Disclosures about qualifications for free products in TurboTax television ads were comparable or superior to disclosures in benchmark companies’ advertisements. (Golder (Intuit) Tr. 1148-1155). TurboTax’s disclosures were superior to other companies’ disclosures in terms of height and duration, and the difference in height and duration was statistically significant. (RX1018 (Golder Expert Report) ¶¶132, 135; Golder (Intuit) Tr. 1149-1152).

Response to Finding No. 237:

Complaint Counsel disputes this Proposed Finding in that Professor Golder’s analysis omits key guidance contained in the FTC’s “.com Disclosures” guidelines. For example, the FTC’s “.com Disclosures” guidelines make clear that basic principles of advertising law apply to online ads including that “[a]dvertising must be truthful and not misleading.” (GX316 (Complaint Counsel) at CC-00006732). The FTC’s “.com Disclosures” guidelines also make clear that disclosures “cannot cure a false claim.” (GX316 (Complaint Counsel) at CC-00006733). The guidelines further state that “[i]f a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive.” (GX316 (Complaint Counsel) at CC-00006733). And that “[w]hether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad.” (GX316 (Complaint Counsel) at CC-00006734). Professor Golder did nothing to measure how consumers perceive the TurboTax ads and understand the disclosures within that context. He did not conduct any surveys

or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694). The comparative study or benchmarking conducted by Professor Golder is irrelevant to determining whether Intuit’s ads were misleading because Professor Golder made no effort to determine whether consumers saw or understood Intuit’s purported disclaimers. (FF-693; FF-702; FF-704). Therefore, Professor’s Golder’s analysis tells us nothing about whether TurboTax’s disclosures are comparable or superior to disclosures used by other companies in conveying truthful information.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

238. The disclosures in Intuit’s television (i.e., brand video) ads for free TurboTax SKUs were consistent with the FTC’s guidelines and were presented in the form and manner that consumers expect. (RX1018 (Golder Expert Report) ¶¶137, 231; Golder (Intuit) Tr. 1148-1155).

Response to Finding No. 238:

Complaint Counsel disputes this Proposed Finding in that the disclosures in Intuit’s television ads were inconsistent with the FTC’s guidelines and Section 5(a) of the FTC Act. Professor Golder’s analysis ignores black letter advertising law and omits key guidance contained in the FTC’s “.com Disclosures” guidelines. For example, the FTC’s “.com Disclosures” guidelines make clear that basic principles of advertising law apply to online ads including that “[a]dvertising must be truthful and not misleading.” (GX316 (Complaint Counsel) at CC-00006732). The FTC’s “.com Disclosures” guidelines also make clear that disclosures

“cannot cure a false claim.” (GX316 (Complaint Counsel) at CC-00006733). The guidelines further state that “[i]f a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive.” (GX316 (Complaint Counsel) at CC-00006733). And that “[w]hether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad.” (GX316 (Complaint Counsel) at CC-00006734). Professor Golder did nothing to measure how consumers perceive the TurboTax ads and understand the disclosures within that context. He did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694). The comparative study or benchmarking conducted by Professor Golder is irrelevant to determining whether Intuit’s ads were misleading because Professor Golder made no effort to determine whether consumers saw or understood Intuit’s purported disclaimers. (FF-693; FF-702; FF-704). Therefore, Professor’s Golder’s analysis tells us nothing about whether TurboTax’s disclosures are comparable or superior to disclosures used by other companies in conveying truthful information.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670 *see also* RFF-514—RFF-525; RFF-527). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

239. Intuit’s disclosures in ads for free TurboTax SKUs were sufficient to put reasonable consumers on notice that TurboTax’s free SKUs are qualified, regardless of whether consumers read or understood the disclosures. (Golder (Intuit) Tr. 1111-1112, 1119-1120).

Response to Finding No. 239:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670; *see also* RFF-514—RFF-525; RFF-527). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Moreover, conveying “some limitation” or qualification is not sufficient under the FTC Act. Qualifying disclosures must be understandable. *Deception Policy Statement*, 103 F.T.C. at 180. To prevent an ad from being misleading, disclosures must convey material information in clear language “understandable to the intended audience.” *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186-Orl-28TBS, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, Fed. Trade Comm’n., .com Disclosures: How to Make Effective Disclosures in Digital Advertising at 21 (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>. (“For disclosures to be effective, consumers must be able to understand them.”).

240. The fact that TurboTax’s disclosures were comparable or superior to benchmark companies’ disclosures is inconsistent with Complaint Counsel’s theory of deception. (RX1018 (Golder Expert Report) ¶¶124, 137, 231; Golder (Intuit) Tr. 1148-1155).

Response to Finding No. 240:

Complaint Counsel disputes this Proposed Finding which is based on Professor’s Golder’s benchmarking analysis. This analysis tells us nothing about whether TurboTax’s disclosures are comparable or superior to disclosures used by other companies in conveying

truthful information. (FF-689—FF-690; FF-701—FF-702; FF-706). Professor Golder’s analysis ignores black letter advertising law and omits key guidance contained in the FTC’s “.com Disclosures” guidelines. For example, the FTC’s “.com Disclosures” guidelines make clear that basic principles of advertising law apply to online ads including that “[a]dvertising must be truthful and not misleading.” (GX316 (Complaint Counsel) at CC-00006732). The FTC’s “.com Disclosures” guidelines also make clear that disclosures “cannot cure a false claim.” (GX316 (Complaint Counsel) at CC-00006733). The guidelines further state that “[i]f a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive.” (GX316 (Complaint Counsel) at CC-00006733). And that “[w]hether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad.” (GX316 (Complaint Counsel) at CC-00006734). Professor Golder did nothing to measure how consumers perceive the TurboTax ads and understand the disclosures within that context. He did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694). The comparative study or benchmarking conducted by Professor Golder is irrelevant to determining whether Intuit’s ads were misleading because Professor Golder made no effort to determine whether consumers saw or understood Intuit’s purported disclaimers, or whether the ads he tested complied with the law. (FF-693; FF-702; FF-704; FF-706).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174,

176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

241. The disclosures in the challenged brand video ads, considered as a whole, were also appropriate for the audience targeted and consistent with the video advertising medium. (Ryan (Intuit) Tr. 776-777; Golder (Intuit) Tr. 1105-1107, 1116-1117, 1120, 1129-1132). The challenged brand video ads provided the appropriate amount of information about the existence and category of the relevant qualifications, at a level of detail that allowed consumers to process that information, while directing consumers to the TurboTax website for more information. (Golder (Intuit) Tr. 1116-1117, 1120, 1129-1130).

Response to Finding No. 241:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Moreover, conveying “some limitation” or the mere existence of qualifying information to be found elsewhere is not sufficient under the FTC Act. Qualifying disclosures must be understandable. *Deception Policy Statement*, 103 F.T.C. at 180. To prevent an ad from being misleading, disclosures must convey material information in clear language “understandable to the intended audience.” *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186-Orl-28TBS, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, Fed. Trade Comm’n., .com Disclosures: How to Make Effective Disclosures in Digital Advertising at 21 (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>. (“For disclosures to be effective, consumers must be able to understand them.”).

242. None of the challenged brand video ads expressly conveyed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (GX59 (FTC); GX200 (FTC); GX202 (FTC); GX204 (FTC); GX206 (FTC); GX208 (FTC); GX299 (Intuit); GX300 (Intuit); GX307 (FTC); GX309 (FTC); GX321 (FTC); GX323 (FTC); GX324 (Intuit); GX325 (Intuit); GX326 (FTC); GX327 (FTC); GX328 (Intuit); GX329 (Intuit); GX330 (Intuit); GX331 (Intuit); GX332 (FTC); GX344 (Intuit); GX345 (Intuit); GX346 (Intuit); GX347 (Intuit); GX348 (Intuit); GX349 (Intuit); GX350 (Intuit); GX351 (Intuit); GX356 (Intuit); GX601 (Intuit); GX602 (Intuit); GX603 (Intuit); GX604 (Intuit); GX605 (Intuit); GX606 (Intuit); GX607 (Intuit); GX608 (Intuit); GX609 (Intuit); GX610 (Intuit); GX611 (Intuit); GX612 (Intuit); GX613 (Intuit); GX614 (Intuit); GX615 (Intuit); GX616 (Intuit); GX619 (Intuit); GX620 (Intuit); GX621 (Intuit); GX622 (Intuit); GX623 (Intuit); GX624 (Intuit); GX625 (Intuit); GX626 (Intuit); GX628 (Intuit); GX629 (Intuit); GX668 (Intuit); GX669 (Intuit); GX670 (Intuit); GX671 (Intuit); GX672 (Intuit); GX691 (FTC); GX692 (FTC); GX693 (FTC); GX694 (FTC); GX695 (FTC); GX696 (FTC); GX697 (FTC); GX698 (FTC); GX699 (FTC); GX700 (FTC); GX701 (FTC); GX702 (FTC); GX703 (FTC); GX704 (FTC); GX705 (FTC); GX706 (FTC); GX707 (FTC); GX708 (FTC); GX709 (FTC); GX710 (FTC); GX711 (FTC); GX712 (FTC); GX713 (FTC); GX714 (FTC); GX715 (FTC); GX716 (FTC); GX717 (FTC); GX718 (FTC); GX719 (FTC); GX720 (FTC); GX721 (FTC); GX722 (FTC); GX774 (FTC); GX775 (FTC); GX776 (FTC); GX777 (FTC); GX778 (FTC); GX779 (FTC); GX785 (FTC); GX786 (FTC); GX800 (FTC); GX802 (FTC); GX803 (FTC); GX804 (FTC); GX805 (FTC); GX806 (FTC); GX807 (FTC); GX811 (FTC); GX815 (FTC); GX816 (FTC); GX820 (FTC); GX821 (FTC); GX822 (FTC); GX825 (FTC); GX826 (FTC); GX827 (FTC); GX828 (FTC); GX829 (FTC); GX835 (FTC); GX836 (FTC); GX837 (FTC); GX838 (FTC); GX844 (FTC); GX848 (FTC); GX849 (FTC); GX855 (FTC); GX856 (FTC); RX32 (Intuit); RX200 (Intuit); RX201 (Intuit); RX202 (Intuit)).

Response to Finding No. 242:

Complaint Counsel disputes this Proposed Finding. “Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 n.4 (7th Cir. 1992). Even advertisements that do not use the specific terms alleged in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax brand video ads. (*See, e.g.*, FF-66—FF-194).

There is nothing oblique or indirect about Intuit’s ads. They directly represent that TurboTax is free. For example, in 2015, Intuit told the television audience of Super Bowl XLIX:

“[Y]ou can file on TurboTax for absolutely nothing.” (FF-66—FF-67). Intuit repeated this messaging in its 2016 Super Bowl Ad featuring Sir Anthony Hopkins (as himself) and claiming, “I would never tarnish my name by selling you something. Now, if I were to tell you to go to turbotax.com, it’s because TurboTax Absolute Zero lets you file your taxes for free.” (FF-70—FF-71). In 2018, Intuit told consumers: “At least your taxes are free.” (*E.g.*, FF-74—FF-75 & FF-80). In 2019 and 2020, Intuit’s message to consumers was: “Free free, free free, free free! ... That’s right, TurboTax Free is free. Free, free free free.” (FF-99—FF-100 & FF-103—FF-104). And in 2021 and 2022, Intuit went back to repeating free dozens of times in a fresh set of ads where the message to consumers was: “And free, and free, and free, and free, and free. That’s right, TurboTax Free Edition is free. See details at TurboTax.com.” (FF-161—FF-184). These are a few among many similar TurboTax brand video and television ads containing express free claims or the functional equivalent. (*See, e.g.*, FF-66—FF-194). The representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax.

243. None of the challenged brand video ads impliedly conveyed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (GX59 (FTC); GX200 (FTC); GX202 (FTC); GX204 (FTC); GX206 (FTC); GX208 (FTC); GX299 (Intuit); GX300 (Intuit); GX307 (FTC); GX309 (FTC); GX321 (FTC); GX323 (FTC); GX324 (Intuit); GX325 (Intuit); GX326 (FTC); GX327 (FTC); GX328 (Intuit); GX329 (Intuit); GX330 (Intuit); GX331 (Intuit); GX332 (FTC); GX344 (Intuit); GX345 (Intuit); GX346 (Intuit); GX347 (Intuit); GX348 (Intuit); GX349 (Intuit); GX350 (Intuit); GX351 (Intuit); GX356 (Intuit); GX601 (Intuit); GX602 (Intuit); GX603 (Intuit); GX604 (Intuit); GX605 (Intuit); GX606 (Intuit); GX607 (Intuit); GX608 (Intuit); GX609 (Intuit); GX610 (Intuit); GX611 (Intuit); GX612 (Intuit); GX613 (Intuit); GX614 (Intuit); GX615 (Intuit); GX616 (Intuit); GX619 (Intuit); GX620 (Intuit); GX621 (Intuit); GX622 (Intuit); GX623 (Intuit); GX624 (Intuit); GX625 (Intuit); GX626 (Intuit); GX628 (Intuit); GX629 (Intuit); GX668 (Intuit); GX669 (Intuit); GX670 (Intuit); GX671 (Intuit); GX672 (Intuit); GX691 (FTC); GX692 (FTC); GX693 (FTC); GX694 (FTC); GX695 (FTC); GX696 (FTC); GX697 (FTC); GX698 (FTC); GX699 (FTC); GX700 (FTC); GX701 (FTC); GX702 (FTC); GX703 (FTC); GX704 (FTC); GX705 (FTC); GX706 (FTC); GX707 (FTC); GX708 (FTC); GX709 (FTC); GX710 (FTC); GX711 (FTC); GX712 (FTC); GX713 (FTC); GX714 (FTC); GX715 (FTC); GX716 (FTC); GX717 (FTC); GX718 (FTC); GX719 (FTC); GX720 (FTC); GX721 (FTC); GX722 (FTC); GX774 (FTC); GX775 (FTC); GX776 (FTC); GX777 (FTC); GX778 (FTC); GX779 (FTC); GX785 (FTC); GX786 (FTC); GX800 (FTC); GX802 (FTC); GX803 (FTC); GX804 (FTC); GX805 (FTC); GX806

(FTC); GX807 (FTC); GX811 (FTC); GX815 (FTC); GX816 (FTC); GX820 (FTC); GX821 (FTC); GX822 (FTC); GX825 (FTC); GX826 (FTC); GX827 (FTC); GX828 (FTC); GX829 (FTC); GX835 (FTC); GX836 (FTC); GX837 (FTC); GX838 (FTC); GX844 (FTC); GX848 (FTC); GX849 (FTC); GX855 (FTC); GX856 (FTC); RX32 (Intuit); RX200 (Intuit); RX201 (Intuit); RX202 (Intuit)).

Response to Finding No. 243:

Complaint Counsel disputes this Proposed Finding. “Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 n.4 (7th Cir. 1992). Even advertisements that do not use the specific terms alleged in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax brand video ads. (*See, e.g.*, FF-66—FF-194).

Even if the Court were to decide that the claims at issue are implied claims, there is nothing oblique or indirect about Intuit’s ads. They directly represent that TurboTax is free. For example, in 2015, Intuit told the television audience of Super Bowl XLIX: “[Y]ou can file on TurboTax for absolutely nothing.” (FF-66—FF-67). Intuit repeated this messaging in its 2016 Super Bowl Ad featuring Sir Anthony Hopkins (as himself) and claiming, “I would never tarnish my name by selling you something. Now, if I were to tell you to go to turbotax.com, it’s because TurboTax Absolute Zero lets you file your taxes for free.” (FF-70—FF-71). In 2018, Intuit told consumers: “At least your taxes are free.” (*E.g.*, FF-74—FF-75 & FF-80). In 2019 and 2020, Intuit’s message to consumers was: “Free free, free free, free free! ... That’s right, TurboTax Free is free. Free, free free free.” (FF-99—FF-100 & FF-103—FF-104). And in 2021 and 2022, Intuit went back to repeating free dozens of times in a fresh set of ads where the message to consumers was: “And free, and free, and free, and free, and free. That’s right, TurboTax Free Edition is free. See details at TurboTax.com.” (FF-161—FF-184). These are a few among many similar TurboTax brand video and television ads containing express free claims or the functional

equivalent. (*See, e.g.*, FF-66—FF-194). Whether they are considered express or implied claim, the representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax.

244. Instead, the disclosures in the challenged brand video ads left the impression (1) that the ad was for a specific TurboTax SKU that was free, (2) that a consumer’s ability to use the free SKU was tied to the complexity of that consumer’s tax return, and (3) that there was additional information about the SKU and its qualifications on the TurboTax website. (GX59 (FTC); GX200 (FTC); GX202 (FTC); GX204 (FTC); GX206 (FTC); GX208 (FTC); GX299 (Intuit); GX300 (Intuit); GX307 (FTC); GX309 (FTC); GX321 (FTC); GX323 (FTC); GX324 (Intuit); GX325 (Intuit); GX326 (FTC); GX327 (FTC); GX328 (Intuit); GX329 (Intuit); GX330 (Intuit); GX331 (Intuit); GX332 (FTC); GX344 (Intuit); GX345 (Intuit); GX346 (Intuit); GX347 (Intuit); GX348 (Intuit); GX349 (Intuit); GX350 (Intuit); GX351 (Intuit); GX356 (Intuit); GX601 (Intuit); GX602 (Intuit); GX603 (Intuit); GX604 (Intuit); GX605 (Intuit); GX606 (Intuit); GX607 (Intuit); GX608 (Intuit); GX609 (Intuit); GX610 (Intuit); GX611 (Intuit); GX612 (Intuit); GX613 (Intuit); GX614 (Intuit); GX615 (Intuit); GX616 (Intuit); GX619 (Intuit); GX620 (Intuit); GX621 (Intuit); GX622 (Intuit); GX623 (Intuit); GX624 (Intuit); GX625 (Intuit); GX626 (Intuit); GX628 (Intuit); GX629 (Intuit); GX668 (Intuit); GX669(Intuit); GX670 (Intuit); GX671 (Intuit); GX672 (Intuit); GX691 (FTC); GX692 (FTC); GX693 (FTC); GX694 (FTC); GX695 (FTC); GX696 (FTC); GX697 (FTC); GX698 (FTC); GX699 (FTC); GX700 (FTC); GX701 (FTC); GX702 (FTC); GX703 (FTC); GX704 (FTC); GX705 (FTC); GX706 (FTC); GX707 (FTC); GX708 (FTC); GX709 (FTC); GX710 (FTC); GX711 (FTC); GX712 (FTC); GX713 (FTC); GX714 (FTC); GX715 (FTC); GX716 (FTC); GX717 (FTC); GX718 (FTC); GX719 (FTC); GX720 (FTC); GX721 (FTC); GX722 (FTC); GX774 (FTC); GX775 (FTC); GX776 (FTC); GX777 (FTC); GX778 (FTC); GX779 (FTC); GX785 (FTC); GX786 (FTC); GX800 (FTC); GX802 (FTC); GX803 (FTC); GX804 (FTC); GX805 (FTC); GX806 (FTC); GX807 (FTC); GX811 (FTC); GX815 (FTC); GX816 (FTC); GX820 (FTC); GX821 (FTC); GX822 (FTC); GX825 (FTC); GX826 (FTC); GX827 (FTC); GX828 (FTC); GX829 (FTC); GX835 (FTC); GX836 (FTC); GX837 (FTC); GX838 (FTC); GX844 (FTC); GX848 (FTC); GX849 (FTC); GX855 (FTC); GX856 (FTC); RX32 (Intuit); RX200 (Intuit); RX201 (Intuit); RX202 (Intuit)).

Response to Finding No. 244:

Complaint Counsel disputes this Proposed Finding. The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax brand video ads. (*See, e.g.*, FF-66—FF-194).

There is nothing oblique or indirect about Intuit’s ads. They directly represent that TurboTax is free. For example, in 2015, Intuit told the television audience of Super Bowl XLIX:

“[Y]ou can file on TurboTax for absolutely nothing.” (FF-66—FF-67). Intuit repeated this messaging in its 2016 Super Bowl Ad featuring Sir Anthony Hopkins (as himself) and claiming, “I would never tarnish my name by selling you something. Now, if I were to tell you to go to turbotax.com, it’s because TurboTax Absolute Zero lets you file your taxes for free.” (FF-70—FF-71). In 2018, Intuit told consumers: “At least your taxes are free.” (*E.g.*, FF-74—FF-75 & FF-80). In 2019 and 2020, Intuit’s message to consumers was: “Free free, free free, free free! ... That’s right, TurboTax Free is free. Free, free free free.” (FF-99—FF-100 & FF-103—FF-104). And in 2021 and 2022, Intuit went back to repeating free dozens of times in a fresh set of ads where the message to consumers was: “And free, and free, and free, and free, and free. That’s right, TurboTax Free Edition is free. See details at TurboTax.com.” (FF-161—FF-184). These are a few among many similar TurboTax brand video and television ads containing express free claims or the functional equivalent. (*See, e.g.*, FF-66—FF-194). Whether they are considered express or implied claim, the representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Complaint Counsel further disputes the Proposed Finding in that specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax

well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

245. Because the challenged brand video ads effectively disclosed the qualifications of the free TurboTax SKU advertised, coupled with the background knowledge and understanding of reasonable consumers in this industry, none of the challenged brand video ads misled consumers into believing that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (Golder (Intuit) Tr. 1104-1105, 1113-1116, 1153-1155; *supra* ¶¶215-218, 222-223, 226-228, 230-244).

Response to Finding No. 245:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit’s purported disclaimers were inadequate and insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Complaint Counsel further disputes the Proposed Finding in that specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in

the ordinary course of business shows that Intuit's ads "communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live)." (FF-609). According to its own copy testing "[m]ost viewers can recall TurboTax, but only a handful mention the specific product name" when asked "Which brand do you think this ad was for?" (FF-610). In other words, consumers remember and think of the product as "TurboTax" and don't distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to "TurboTax" as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating "I have been using TurboTax for years..." without specifying a SKU and third consumer testimonial stating: "TurboTax is way better than HR Block" without specifying a SKU; GX183A (two out of three customer testimonials featured refer to "TurboTax" without specifying a SKU or version).

246. Accordingly, even a facial analysis of the challenged brand video ads establishes that none of those ads were deceptive.

Response to Finding No. 246:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.").

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: "consumers can file their taxes for free using TurboTax." Compl. ¶ 119. The evidence shows that many TurboTax advertisements include such a "free" claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that

claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (See FF-21—FF-23). The evidence shows that price is a material term to consumers. (See, e.g., FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (See, e.g., FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (See, e.g., FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

2. Display Advertisements

247. Complaint Counsel contend that 54 video display ads from Tax Years 2020 and 2021, and 54 static display advertisements from Tax Years 2015 to 2022, were deceptive to reasonable consumers. (Complaint Counsel’s Pretrial Brief at App’x B (Feb. 17, 2023)).

Response to Finding No. 247:

Complaint Counsel has no specific response.

248. Every one of the 108 challenged display ads stated in writing—using the phrases “simple tax returns only,” “simple U.S. returns only,” or “simple tax returns”—that the free TurboTax offer being advertised was only available to consumers with simple tax returns. (GX173 (FTC); GX174-A (FTC); GX175-A (FTC); GX187 (FTC); GX188 (FTC); GX189 (FTC); GX196 (FTC); GX197 (FTC); GX198 (FTC); GX199 (FTC); GX505 (Intuit); GX506 (Intuit); GX507 (Intuit); GX508 (Intuit); GX509 (Intuit); GX510 (Intuit); GX511 (Intuit); GX512 (Intuit); GX513 (Intuit); GX514 (Intuit); GX515 (Intuit); GX516 (Intuit); GX517 (Intuit); GX518 (Intuit); GX519 (Intuit); GX520 (Intuit); GX521 (Intuit); GX522 (Intuit); GX523 (Intuit); GX524 (Intuit); GX525 (Intuit); GX526 (Intuit); GX527 (Intuit); GX528 (Intuit); GX529 (Intuit); GX530 (Intuit); GX531 (Intuit); GX532 (Intuit); GX533 (Intuit);

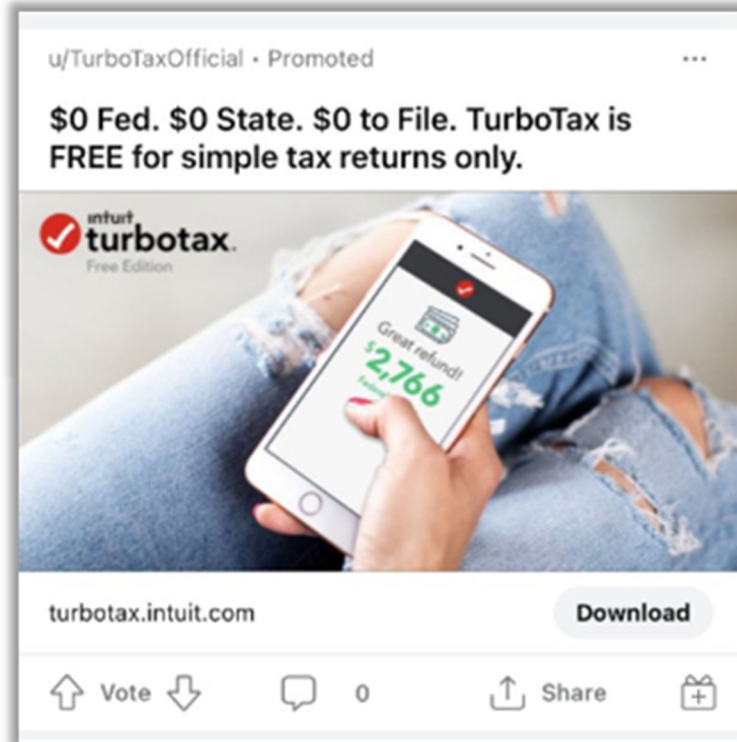
GX534 (Intuit); GX535 (Intuit); GX536 (Intuit); GX537 (Intuit); GX538 (Intuit); GX539 (Intuit); GX540 (Intuit); GX541 (Intuit); GX542 (Intuit); GX543 (Intuit); GX544 (Intuit); GX545 (Intuit); GX546 (Intuit); GX547 (Intuit); GX548 (Intuit); GX549 (Intuit); GX550 (Intuit); GX551 (Intuit); GX552 (Intuit); GX553 (Intuit); GX554 (Intuit); GX555 (Intuit); GX556 (Intuit); GX557 (Intuit); GX558 (Intuit); GX559 (Intuit); GX560 (Intuit); GX561 (Intuit); GX562 (Intuit); GX563 (Intuit); GX564 (Intuit); GX565 (Intuit); GX566 (Intuit); GX567 (Intuit); GX568 (Intuit); GX569 (Intuit); GX570 (Intuit); GX571 (Intuit); GX572 (Intuit); GX573 (Intuit); GX574 (Intuit); GX575 (Intuit); GX576 (Intuit); GX577 (Intuit); GX578 (Intuit); GX579 (Intuit); GX580 (Intuit); GX581 (Intuit); GX582 (Intuit); GX583 (Intuit); GX584 (Intuit); GX585 (Intuit); GX586 (Intuit); GX587 (Intuit); GX588 (Intuit); GX589 (Intuit); GX590 (Intuit); GX591 (Intuit); GX592 (Intuit); GX593 (Intuit); GX594 (Intuit); GX595 (Intuit); GX596 (Intuit); GX597 (Intuit); GX598 (Intuit); GX599 (Intuit); GX600 (Intuit); GX843 (Intuit); RX139 (Intuit)).

Response to Finding No. 248:

Complaint Counsel agrees that 108 challenged display ads contained one of the following phrases “simple tax returns only,” “simple U.S. returns only,” or “simple tax returns.”

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax display advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

249. A screenshot of a challenged static display ad is provided below. (GX197 (Intuit)).



Response to Finding No. 249:

Complaint Counsel has no specific response.

250. Most of the challenged display ads (70) also stated in writing that the advertisement was for a specific TurboTax SKU, either TurboTax Free Edition or TurboTax Live Basic. (GX173 (Intuit); GX174-A (Intuit); GX175-A (Intuit); GX187 (Intuit); GX188 (Intuit); GX189 (Intuit); GX196 (Intuit); GX197 (Intuit); GX198 (Intuit); GX199 (Intuit); GX505 (Intuit); GX506 (Intuit); GX507 (Intuit); GX508 (Intuit); GX509 (Intuit); GX511 (Intuit); GX512 (Intuit); GX513 (Intuit); GX514 (Intuit); GX515 (Intuit); GX516 (Intuit); GX517 (Intuit); GX519 (Intuit); GX520 (Intuit); GX521 (Intuit); GX523 (Intuit); GX524 (Intuit); GX525 (Intuit); GX526 (Intuit); GX527 (Intuit); GX528 (Intuit); GX529 (Intuit); GX530 (Intuit); GX531 (Intuit); GX532 (Intuit); GX533 (Intuit); GX534 (Intuit); GX535 (Intuit); GX536 (Intuit); GX537 (Intuit); GX538 (Intuit); GX542 (Intuit); GX543 (Intuit); GX545 (Intuit); GX546 (Intuit); GX547 (Intuit); GX549 (Intuit); GX550 (Intuit); GX551 (Intuit); GX552 (Intuit); GX553 (Intuit); GX554 (Intuit); GX556 (Intuit); GX557 (Intuit); GX558 (Intuit); GX559 (Intuit); GX561 (Intuit); GX562 (Intuit); GX563 (Intuit); GX564 (Intuit); GX566 (Intuit); GX569 (Intuit); GX583 (Intuit); GX584 (Intuit); GX585 (Intuit); GX586 (Intuit); GX588 (Intuit); GX600 (Intuit); GX843 (Intuit); RX139 (Intuit)).

Response to Finding No. 250:

Complaint Counsel agrees that most the challenged display ads contain the name of a sub brand or TurboTax SKU such as TurboTax Free Edition or TurboTax Live.

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Complaint Counsel further disputes this Proposed Finding because the presence of a written reference to a specific TurboTax SKU or sub brand does not necessarily leave consumers with the impression that the offer made in the advertisement was limited to a specific TurboTax SKU. Specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

251. Another 25 challenged display ads communicated that the free TurboTax offer being advertised only applied to certain SKUs. (GX539 (Intuit); GX548 (Intuit); GX560 (Intuit); GX565 (Intuit); GX567 (Intuit); GX568 (Intuit); GX570 (Intuit); GX571 (Intuit); GX572 (Intuit); GX573 (Intuit); GX576 (Intuit); GX577 (Intuit); GX578 (Intuit); GX579 (Intuit); GX581 (Intuit); GX582 (Intuit); GX586 (Intuit); GX589 (Intuit); GX590 (Intuit); GX592 (Intuit); GX593 (Intuit); GX594 (Intuit); GX595 (Intuit); GX597 (Intuit); GX598 (Intuit)). An example is provided below. (GX573 (Intuit)).



Response to Finding No. 251:

Complaint Counsel disputes this Proposed Finding. The example provided (GX573 (Intuit)) does not reference a specific SKU. Instead it references the parent brand “Intuit TurboTax.”

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Complain Counsel further disputes this Proposed Finding because the presence of a written reference to a specific TurboTax SKU or sub brand does not necessarily leave consumers with the impression that the offer made in the advertisement was limited to a specific TurboTax SKU. Specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and

think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

252. Nearly all of the challenged video display ads with audible free claims also included a voiceover stating that the free offer was available for “simple tax returns only.” (GX510 (Intuit); GX511 (Intuit); GX512 (Intuit); GX513 (Intuit); GX514 (Intuit); GX515 (Intuit); GX516 (Intuit); GX517 (Intuit); GX518 (Intuit); GX519 (Intuit); GX525 (Intuit); GX526 (Intuit); GX540 (Intuit); GX541 (Intuit); GX542 (Intuit); GX544 (Intuit); GX547 (Intuit); GX558 (Intuit); GX581 (Intuit); GX582 (Intuit); GX589 (Intuit); GX590 (Intuit); GX591 (Intuit); GX592 (Intuit); GX593 (Intuit); GX843 (Intuit)). Indeed, in many of the challenged video display ads, the first audio presented to consumers is a voiceover stating, “simple tax returns only.” (Baburek (FTC) Tr. 334-336; GXD2 (FTC) at 8-17).

Response to Finding No. 252:

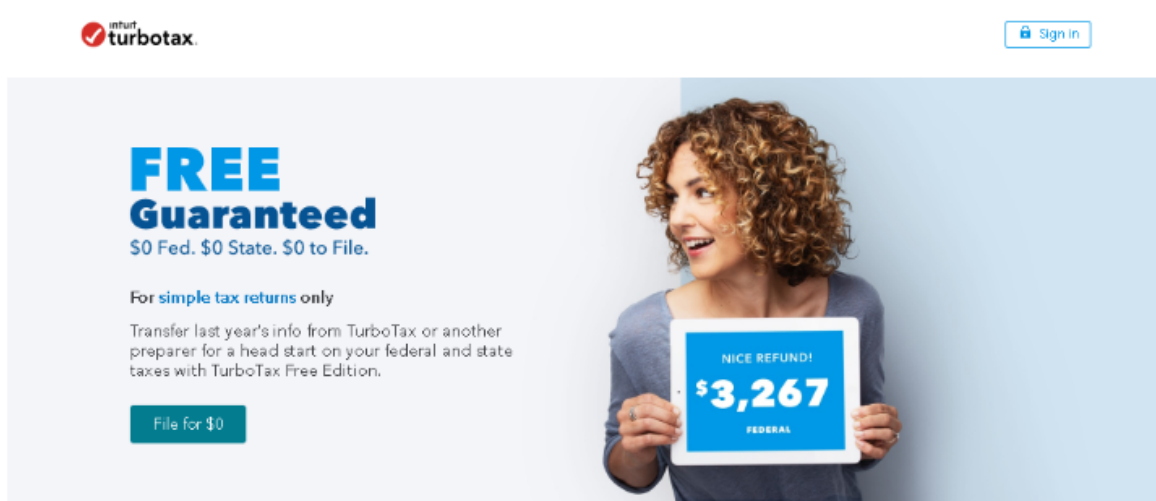
Complaint Counsel has no specific response.

253. Any consumer who clicked on a challenged display ad—video or static—was also taken directly to relevant webpages on the TurboTax website, where they would see detailed information about the free offer’s qualifications. (Ryan (Intuit) Tr. 757; Johnson (Intuit) 595-596; Rubin (Intuit) 1563-1565; JX1 ¶¶59-61; *infra* ¶¶364-441). For challenged display ads for TurboTax Free Edition, for example, consumers who clicked on the ads were taken directly to the TurboTax Free Edition landing page, where they would see detailed information about Free Edition’s qualifications. (Johnson (Intuit) 595-596; Rubin (Intuit) 1563-1565; JX1 ¶¶59-61).

Response to Finding No. 253:

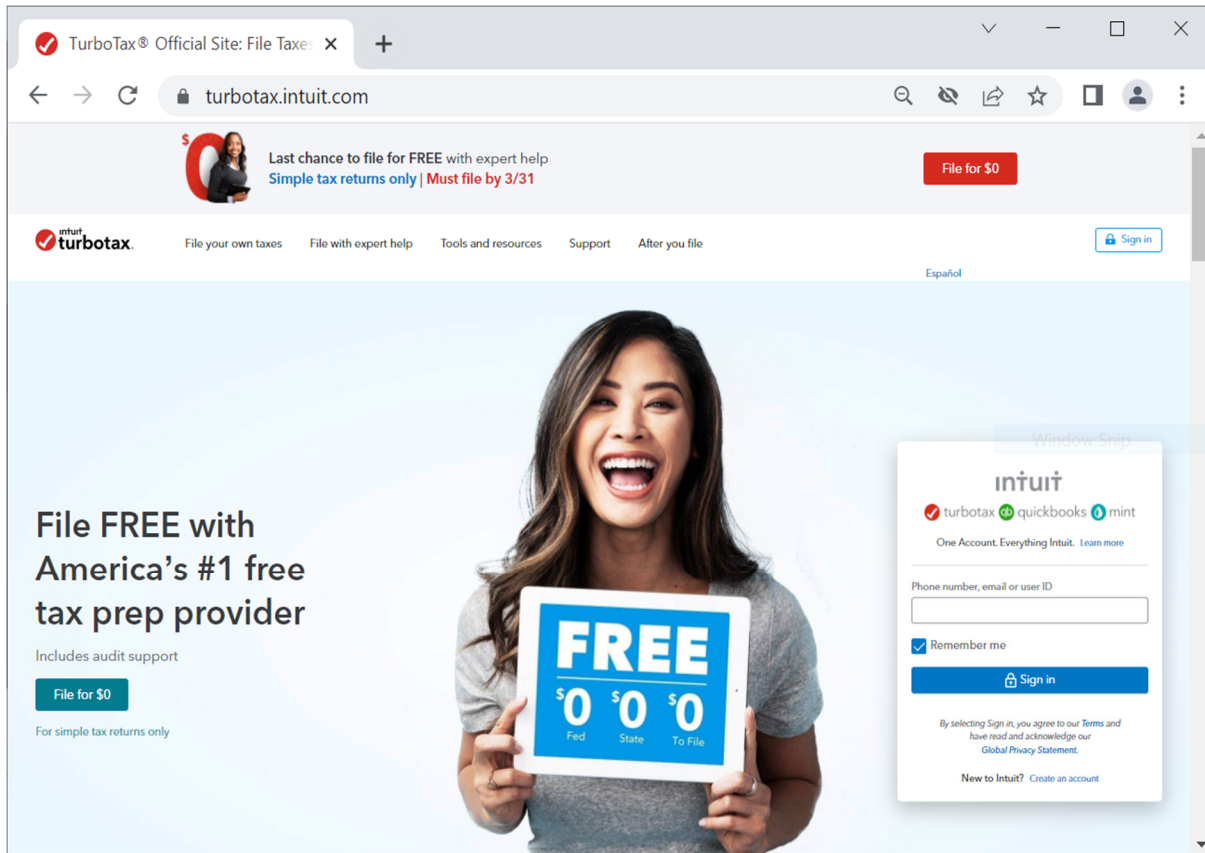
Complaint Counsel agrees that, in many instances, consumers who click on a challenged display ad are taken directly to webpages on the TurboTax website and disputes the remainder of this Proposed Finding. Even though the TurboTax website contains qualifying information, it is not clear that consumers see it, read it, or understand it. In fact, the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

In analyzing the effectiveness of any qualifications on the TurboTax website, it is critical to first understand that the website repeats the express false “free” claims contained in the display ads and other TurboTax ads consumers are exposed to. (FF-456—FF-466). Those claims are enticing to consumers and likely distract them from any qualifications found on the TurboTax website. When consumers click on Intuit’s display advertisements and arrive at the TurboTax website, the website’s home page makes additional false and deceptive “free” claims. (FF-456—FF-466). For example, a screen Intuit used on its website, for TY 2020, is pictured below. (FF-461).



Here, Intuit’s website emphasizes “FREE Guaranteed,” “\$0 Fed. \$0 State. \$0 to File.” As well as “File for \$0,” (FF-461), when in truth, about two-thirds of taxpayers (or approximately 100 million taxpayers) are not eligible to file for free using TurboTax. (FF21—FF-23).

A screen Intuit used on its website for TY 2021, is pictured below. (FF-463).



Again, Intuit’s website emphasizes “FREE,” “\$0,” and “File for \$0,” (FF-463), even though most consumers cannot prepare and file their taxes for free using TurboTax. (FF21—FF-23; *see also* FF-456—FF-458, FF-459—FF-460, FF-463—FF-466 (providing additional examples of TurboTax website advertising claims)).

Thus, Intuit bombards consumers with the message that they can file their taxes for “free.” (FF-47—FF-54 & FF-66—FF-466). Intuit baits consumers with false and deceptive ads on television, radio, social media, email, and online designed to drive traffic to the TurboTax website (FF-57—FF-65 & FF-66—FF-466), where it compounds the deception with more false claims. (FF-456—FF-458, FF-459—FF-461, FF-463—FF-466).

Any purported disclaimers on the TurboTax website are inadequate to correct the express false claims and deceptive net impression made by its “free” advertising. Intuit’s website disclaimers have principally taken the form of a hyperlink on some permutation of the words

“see why it’s free” or “simple tax returns only.” (*See, e.g.*, Figures shown at FF-456 (citing GX163 (Complaint Counsel)), FF-461 (citing GX183 (Complaint Counsel)) & FF-463 (citing GX486 (Complaint Counsel))).

Purported website disclaimers appearing behind hyperlinks are wholly inadequate to correct the express false claim and deceptive net impression made by Intuit’s ads and the prominent “Free, free free free” claim on the website. The disclaimers:

- 1) Are usually **hidden behind a hyperlink** over the words “See why it’s free” or the inscrutable phrase “simple tax returns”, even though the eligibility requirements of the “free” offer are integral to the “free” claim—consumers had to decide to click on the hyperlink to trigger a pop-up explaining the limitations, which is insufficient. (*See .com Disclosures: How to Make Effective Disclosures in Digital Advertising* (Mar. 2013) (marked GX316 (Complaint Counsel)), at 10 (“Disclosures that are an *integral part of a claim* or inseparable from it should not be communicated through a hyperlink. Instead, they should be placed on the same page and immediately next to the claim, and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information. This is *particularly true for cost information* or certain health and safety disclosures.” (emphasis added)) As Professor Novemsky opines, consumers are unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-503; *see also* GX316 (Complaint Counsel) at 14 (“Some consumers may not read information in pop-up windows or interstitials because they immediately close the pop-ups or move to the next page in pursuit of completing their intended tasks, or because they don’t associate

information in a pop-up window or on an interstitial page to a claim or product they haven't encountered yet.”)).

- 2) Are **dramatically less prominent** than the advertising claims on the page, e.g., “FREE.” *See* Deception Policy Statement, at 180 (“Other practices of the company may direct consumers’ attention away from the qualifying disclosures.”).
- 3) Again use the phrase “**simple tax returns**,” which is anything but simple, and changes regularly at Intuit’s whim.

It is also important to note that Intuit has changed its website from tax year to tax year. It has, until recently, hidden the truth about eligibility for TurboTax Free Edition behind a hyperlink. (*See, e.g.*, FF-458). Consumers who are not eligible for TurboTax Free Edition do not learn they are ineligible until they have already invested significant time and effort into creating an account and inputting their sensitive personal and financial information into TurboTax. (FF-14 & FF-671—FF-673).

Intuit “expressly, repeatedly, and prominently made the ... claims to potential customers over a long period of time. It is well-established that an advertiser cannot ‘cure the deception’ in one advertisement with different statements in another.” *In re ECM Biofilms, Inc.*, 160 F.T.C. 652, 734 n.75 (2015). That is especially true when the second set of disclaimers is as flawed as those on Intuit’s website. Thus, Intuit’s website disclaimers are inadequate as a matter of law. *See, e.g., Fleetcor*, 2022 WL 3273286, at *10 (“the Court concludes as a matter of law that the tiny, inscrutable print of the disclaimers does not cure the net impression of the representations in the ads cited”).

254. Reasonable consumers understood that clicking on the challenged display ads would take the consumer to a website with more information about the advertised free offer. (Golder (Intuit) Tr. 1116-1117; RX1018 (Golder Expert Report) ¶182). Thus, by linking directly to the TurboTax website, the challenged display ads incorporated the information on the TurboTax website. (Golder (Intuit) Tr. 1124-1126).

Response to Finding No. 254:

Complaint Counsel disputes the Proposed Finding. It is well-established that an advertiser cannot ‘cure the deception’ in one advertisement with different statements in another.” *In re ECM Biofilms, Inc.*, 160 F.T.C. 652, 734 n.75 (2015). Conveying “some limitation” or the mere existence of qualifying information to be found elsewhere is not sufficient under the FTC Act. Qualifying disclosures must be understandable. Deception Policy Statement, 103 F.T.C. at 180. To prevent an ad from being misleading, disclosures must convey material information in clear language “understandable to the intended audience.” *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186-Orl-28TBS, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, Fed. Trade Comm’n., .com Disclosures: How to Make Effective Disclosures in Digital Advertising at 21 (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>. (“For disclosures to be effective, consumers must be able to understand them.”). Pointing consumers to a website does not accomplish this.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Complaint Counsel further disputes this Proposed Finding because it relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder

(who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694). Instead, Professor Golder relies on his own opinions regarding Intuit’s marketing (FF-689), and speculative and unsupported opinions about Intuit’s purported disclaimers based on an uninformative comparative benchmarking exercise which compares Intuit’s disclaimers to disclaimers used by other advertisers. (FF-690—FF-704; FF-706; FF-710). A comparative study is irrelevant to determining whether Intuit’s ads were misleading, and Professor Golder made no effort to determine whether consumers saw or understood Intuit’s purported disclaimers. (FF-693; FF-702; FF-704). By contrast, Professor Novemsky has deep expertise in consumer psychology and consumer decision making (FF-472—FF-479), conducted a perception survey designed to understand consumer perceptions around TurboTax advertising and disclosures (FF-480—FF-503), considered additional materials including copy testing conducted by Intuit in the ordinary course of business (FF-546—FF-571), and opined (based on the perception survey, Intuit’s copy tests, and his experience studying consumer psychology) there was deception caused by TurboTax advertising and marketing giving consumers a false impression they can file for free when that is not the case. (FF-471, FF-480, FF-491). In reaching his opinion, Professor Novemsky considered Intuit’s disclaimers and qualifiers, including those on the TurboTax website, and found them ineffective. (FF-491—FF-503).

What is more, consumers testified during depositions taken by Intuit that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674). One consumer who had on the job website operation experience testified that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

255. Complaint Counsel did not offer evidence demonstrating that consumers could not see or read the written qualifications in the challenged display ads.

Response to Finding No. 255:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements, including the challenged display ads, contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

256. Complaint Counsel did not offer evidence demonstrating that consumers could not hear the verbal qualifications in the challenged video display ads.

Response to Finding No. 256:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements, including the challenged video display ads, contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

257. The evidence instead establishes that the written and verbal qualifications in the challenged display ads were noticeable, legible or audible, and in a location where consumers would expect to find them. (*Supra* ¶¶248-252; Ryan (Intuit) Tr. 733-734; Golder (Intuit) Tr. 1163; Shiller (FTC) Tr. 248-249; Baburek (FTC) Tr. 330-336; RX73 (Intuit) at 36 (Judge Breyer observing that challenged display ad “says ‘TurboTax Free Edition, for simple returns only’”); RX1018 (Golder Expert Report) ¶138; *see also* Ryan (Intuit) Tr. 747; GX651 (Intuit) at 15). Complaint Counsel’s witnesses, for instance, repeatedly acknowledged that the challenged display ads contained visible and/or audible qualifying language, including a specific product

name, that the product was for simple tax returns only, and/or that consumers could see if they qualified at TurboTax.com. (Shiller (FTC) Tr. 248-249; Baburek (FTC) Tr. 330-336). Indeed, the Court properly observed that challenged display ads contained prominent qualifying language stating “simple returns only.” (Chappell (ALJ) Tr. 45).

Response to Finding No. 257:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694).

Complaint Counsel notes that Intuit improperly relies on questions asked and comments made by Judge Breyer and Judge Chappell. During oral argument, it is, of course, typical for judges to pose hypothetical and other questions to test the limits of the evidence and principles underlying a litigant’s argument. A hypothetical question or comment by a judge during oral argument or trial does not constitute evidence and is not a ruling unless it is identified as such.

258. Professor Golder’s disclosure benchmarking analysis further demonstrates that the qualifications in the challenged display ads were visible and consistent with disclosures in comparable ads. (Golder (Intuit) Tr. 1156-1163; RX1018 (Golder Expert Report) ¶138). Similar to his analysis of TurboTax TV ads, Professor Golder compared TurboTax social media ads (i.e., display ads) to the social media ads of benchmark companies using the seven metrics drawn from the FTC’s “.com Disclosures” guidelines on “How to Make Effective Disclosures in Digital Advertising.” (Golder (Intuit) Tr. 1156-1163; RX1018 (Golder Expert Report) ¶138).

Response to Finding No. 258:

Complaint Counsel disputes this Proposed Finding in that Professor Golder’s analysis omits key guidance contained in the FTC’s “.com Disclosures” guidelines. For example, the FTC’s “.com Disclosures” guidelines make clear that basic principles of advertising law apply to

online ads including that “[a]dvertising must be truthful and not misleading.” (GX316 (Complaint Counsel) at CC-00006732). The FTC’s “.com Disclosures” guidelines also make clear that disclosures “cannot cure a false claim.” (GX316 (Complaint Counsel) at CC-00006733). The guidelines further state that “[i]f a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive.” (GX316 (Complaint Counsel) at CC-00006733). And that “[w]hether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad.” (GX316 (Complaint Counsel) at CC-00006734). Professor Golder did nothing to measure how consumers perceive the TurboTax ads and understand the disclosures within that context. He did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694). The comparative study or benchmarking conducted by Professor Golder is irrelevant to determining whether Intuit’s ads were misleading because Professor Golder made no effort to determine whether consumers saw or understood Intuit’s purported disclaimers. (FF-693; FF-702; FF-704). Therefore, Professor’s Golder’s analysis tells us nothing about whether TurboTax’s disclosures are comparable or superior to disclosures used by other companies in conveying truthful information.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

259. That benchmarking analysis revealed that disclosures about qualifications for free products in TurboTax social media ads were comparable to disclosures in benchmark companies’ advertisements on every metric. (Golder (Intuit) Tr. 1159-1163); Golder Expert Report) ¶138). Based on that analysis, Professor Golder concluded that the disclosures in Intuit’s social-media ads were (1) consistent with FTC guidelines and (2) presented in the form and manner that consumers expect. (Golder (Intuit) Tr. 1163).

Response to Finding No. 259:

Complaint Counsel disputes this Proposed Finding in that Professor Golder’s analysis omits key guidance contained in the FTC’s “.com Disclosures” guidelines. For example, the FTC’s “.com Disclosures” guidelines make clear that basic principles of advertising law apply to online ads including that “[a]dvertising must be truthful and not misleading.” (GX316 (Complaint Counsel) at CC-00006732). The FTC’s “.com Disclosures” guidelines also make clear that disclosures “cannot cure a false claim.” (GX316 (Complaint Counsel) at CC-00006733). The guidelines further state that “[i]f a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive.” (GX316 (Complaint Counsel) at CC-00006733). And that “[w]hether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad.” (GX316 (Complaint Counsel) at CC-00006734). Professor Golder did nothing to measure how consumers perceive the TurboTax ads and understand the disclosures within that context. He did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694). The comparative study or benchmarking conducted by Professor Golder is irrelevant to determining whether Intuit’s ads were misleading because Professor Golder made no effort to determine whether consumers saw or understood Intuit’s purported disclaimers. (FF-693; FF-702; FF-704). Therefore, Professor’s Golder’s analysis tells us nothing about whether TurboTax’s disclosures are comparable or superior to disclosures used by other companies in conveying truthful information.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

260. None of the challenged display ads expressly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (GX173 (FTC); GX174 (FTC); GX175-A (FTC); GX179 (FTC); GX187 (FTC); GX188 (FTC); GX189 (FTC); GX196 (FTC); GX197 (FTC); GX198 (FTC); GX199 (FTC); GX505 (Intuit); GX506 (Intuit); GX507 (Intuit); GX508 (Intuit); GX509 (Intuit); GX510 (Intuit); GX511 (Intuit); GX512 (Intuit); GX513 (Intuit); GX514 (Intuit); GX515 (Intuit); GX516 (Intuit); GX517 (Intuit); GX518 (Intuit); GX519 (Intuit); GX520 (Intuit); GX521 (Intuit); GX522 (Intuit); GX523 (Intuit); GX524 (Intuit); GX525 (Intuit); GX526 (Intuit); GX527 (Intuit); GX528 (Intuit); GX529 (Intuit); GX530 (Intuit); GX531 (Intuit); GX532 (Intuit); GX533 (Intuit); GX534 (Intuit); GX535 (Intuit); GX536 (Intuit); GX537 (Intuit); GX538 (Intuit); GX539 (Intuit); GX540 (Intuit); GX541 (Intuit); GX542 (Intuit); GX543 (Intuit); GX544 (Intuit); GX545 (Intuit); GX546 (Intuit); GX547 (Intuit); GX548 (Intuit); GX549 (Intuit); GX550 (Intuit); GX551 (Intuit); GX552 (Intuit); GX553 (Intuit); GX554 (Intuit); GX555 (Intuit); GX556 (Intuit); GX557 (Intuit); GX558 (Intuit); GX559 (Intuit); GX560 (Intuit); GX561 (Intuit); GX562 (Intuit); GX563 (Intuit); GX564 (Intuit); GX565 (Intuit); GX566 (Intuit); GX567 (Intuit); GX568 (Intuit); GX569 (Intuit); GX570 (Intuit); GX571 (Intuit); GX572 (Intuit); GX573 (Intuit); GX574 (Intuit); GX575 (Intuit); GX576 (Intuit); GX577 (Intuit); GX578 (Intuit); GX579 (Intuit); GX580 (Intuit); GX581 (Intuit); GX582 (Intuit); GX583 (Intuit); GX584 (Intuit); GX585 (Intuit); GX586 (Intuit); GX587 (Intuit); GX588 (Intuit); GX589 (Intuit); GX590 (Intuit); GX591 (Intuit); GX592 (Intuit); GX593 (Intuit); GX594 (Intuit); GX595 (Intuit); GX596 (Intuit); GX597 (Intuit); GX598 (Intuit); GX599 (Intuit); GX600 (Intuit); GX843 (Intuit); RX139 (Intuit)).

Response to Finding No. 260:

Complaint Counsel disputes this Proposed Finding. “Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 n.4 (7th Cir. 1992). Even advertisements that do not use the specific terms alleged in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax online ads, including display ads. (*See, e.g.*, FF-212—FF-429).

There is nothing oblique or indirect about Intuit’s ads. They directly represent that TurboTax is free. For example, in 2021 (TY 2020), Intuit disseminated a TurboTax display ad via Facebook that included the following express claim: “FREE guaranteed \$0 Fed \$0 State \$0

To File.” (FF-212 (citing GX173 (Complaint Counsel)). Also for TY 2020, Intuit widely disseminated a display ad that included the following express free claim: “100% FREE File Fed & State + Expert final review.” (FF-290—FF-291). In TY 2021, Intuit widely disseminated a display ad that included the following express free claim: “3 WAYS TO FILE FREE Do it yourself \$0 An expert files for you \$0 File with expert help \$0.” (FF-328—FF-329). These are a few among many similar TurboTax online ads containing express free claims or the functional equivalent. (*See, e.g.*, FF-212—FF-429). The representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax. The fact that each of these ads also included the inadequate “simple returns only” qualifying language does not change the fact that these ads contained express triggering or primary claims that clearly communicated “TurboTax is free.”

261. None of the challenged display ads impliedly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (GX173 (FTC); GX174 (FTC); GX175 (FTC); GX176 (FTC); GX179 (FTC); GX187 (FTC); GX188 (FTC); GX189 (FTC); GX196 (FTC); GX197 (FTC); GX198 (FTC); GX199 (FTC); GX505 (Intuit); GX506 (Intuit); GX507 (Intuit); GX508 (Intuit); GX509 (Intuit); GX510 (Intuit); GX511 (Intuit); GX512 (Intuit); GX513 (Intuit); GX514 (Intuit); GX515 (Intuit); GX516 (Intuit); GX517 (Intuit); GX518 (Intuit); GX519 (Intuit); GX520 (Intuit); GX521 (Intuit); GX522 (Intuit); GX523 (Intuit); GX524 (Intuit); GX525 (Intuit); GX526 (Intuit); GX527 (Intuit); GX528 (Intuit); GX529 (Intuit); GX530 (Intuit); GX531 (Intuit); GX532 (Intuit); GX533 (Intuit); GX534 (Intuit); GX535 (Intuit); GX536 (Intuit); GX537 (Intuit); GX538 (Intuit); GX539 (Intuit); GX540 (Intuit); GX541 (Intuit); GX542 (Intuit); GX543 (Intuit); GX544 (Intuit); GX545 (Intuit); GX546 (Intuit); GX547 (Intuit); GX548 (Intuit); GX549 (Intuit); GX550 (Intuit); GX551 (Intuit); GX552 (Intuit); GX553 (Intuit); GX554 (Intuit); GX555 (Intuit); GX556 (Intuit); GX557 (Intuit); GX558 (Intuit); GX559 (Intuit); GX560 (Intuit); GX561 (Intuit); GX562 (Intuit); GX563 (Intuit); GX564 (Intuit); GX565 (Intuit); GX566 (Intuit); GX567 (Intuit); GX568 (Intuit); GX569 (Intuit); GX570 (Intuit); GX571 (Intuit); GX572 (Intuit); GX573 (Intuit); GX574 (Intuit); GX575 (Intuit); GX576 (Intuit); GX577 (Intuit); GX578 (Intuit); GX579 (Intuit); GX580 (Intuit); GX581 (Intuit); GX582 (Intuit); GX583 (Intuit); GX584 (Intuit); GX585 (Intuit); GX586 (Intuit); GX587 (Intuit); GX588 (Intuit); GX589 (Intuit); GX590 (Intuit); GX591 (Intuit); GX592 (Intuit); GX593 (Intuit); GX594 (Intuit); GX595 (Intuit); GX596 (Intuit); GX597 (Intuit); GX598 (Intuit); GX599 (Intuit); GX600 (Intuit); GX843 (Intuit); RX139 (Intuit)).

Response to Finding No. 261:

Complaint Counsel disputes this Proposed Finding. “Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 n.4 (7th Cir. 1992). Even advertisements that do not use the specific terms alleged in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax online ads, including display ads. (*See, e.g.*, FF-212—FF-429).

Even if the Court were to decide that the claims at issue are implied claims, there is nothing oblique or indirect about Intuit’s ads. They directly represent that TurboTax is free. For example, in 2021 (TY 2020), Intuit disseminated a TurboTax display ad via Facebook that included the following express claim: “FREE guaranteed \$0 Fed \$0 State \$0 To File.” (FF-212 (citing GX173 (Complaint Counsel))). Also for TY 2020, Intuit widely disseminated a display ad that included the following express free claim: “100% FREE File Fed & State + Expert final review.” (FF-290—FF-291). In TY 2021, Intuit widely disseminated a display ad that included the following express free claim: “3 WAYS TO FILE FREE Do it yourself \$0 An expert files for you \$0 File with expert help \$0.” (FF-328—FF-329). These are a few among many similar TurboTax online ads containing express free claims or the functional equivalent. (*See, e.g.*, FF-212—FF-429). Whether they are considered express or implied, the representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax. The fact that each of these ads also included the inadequate “simple returns only” qualifying language does not change the fact that these ads contained triggering or primary claims that clearly communicated “TurboTax is free.”

262. Instead, the challenged display ads left the impression (1) that the ad was for a specific TurboTax SKU or a limited set of TurboTax SKUs, (2) that consumers’ ability to use the

SKU or SKUs was tied to the complexity of their tax returns, and (3) that there was additional information about the SKU or SKUs and the qualifications to use them available on the TurboTax website. (GX173 (FTC); GX174 (FTC); GX175 (FTC); GX176 (FTC); GX179 (FTC); GX187 (FTC); GX188 (FTC); GX189 (FTC); GX196 (FTC); GX197 (FTC); GX198 (FTC); GX199 (FTC); GX505 (Intuit); GX506 (Intuit); GX507 (Intuit); GX508 (Intuit); GX509 (Intuit); GX510 (Intuit); GX511 (Intuit); GX512 (Intuit); GX513 (Intuit); GX514 (Intuit); GX515 (Intuit); GX516 (Intuit); GX517 (Intuit); GX518 (Intuit); GX519 (Intuit); GX520 (Intuit); GX521 (Intuit); GX522 (Intuit); GX523 (Intuit); GX524 (Intuit); GX525 (Intuit); GX526 (Intuit); GX527 (Intuit); GX528 (Intuit); GX529 (Intuit); GX530 (Intuit); GX531 (Intuit); GX532 (Intuit); GX533 (Intuit); GX534 (Intuit); GX535 (Intuit); GX536 (Intuit); GX537 (Intuit); GX538 (Intuit); GX539 (Intuit); GX540 (Intuit); GX541 (Intuit); GX542 (Intuit); GX543 (Intuit); GX544 (Intuit); GX545 (Intuit); GX546 (Intuit); GX547 (Intuit); GX548 (Intuit); GX549 (Intuit); GX550 (Intuit); GX551 (Intuit); GX552 (Intuit); GX553 (Intuit); GX554 (Intuit); GX555 (Intuit); GX556 (Intuit); GX557 (Intuit); GX558 (Intuit); GX559 (Intuit); GX560 (Intuit); GX561 (Intuit); GX562 (Intuit); GX563 (Intuit); GX564 (Intuit); GX565 (Intuit); GX566 (Intuit); GX567 (Intuit); GX568 (Intuit); GX569 (Intuit); GX570 (Intuit); GX571 (Intuit); GX572 (Intuit); GX573 (Intuit); GX574 (Intuit); GX575 (Intuit); GX576 (Intuit); GX577 (Intuit); GX578 (Intuit); GX579 (Intuit); GX580 (Intuit); GX581 (Intuit); GX582 (Intuit); GX583 (Intuit); GX584 (Intuit); GX585 (Intuit); GX586 (Intuit); GX587 (Intuit); GX588 (Intuit); GX589 (Intuit); GX590 (Intuit); GX591 (Intuit); GX592 (Intuit); GX593 (Intuit); GX594 (Intuit); GX595 (Intuit); GX596 (Intuit); GX597 (Intuit); GX598 (Intuit); GX599 (Intuit); GX600 (Intuit); GX843 (Intuit); RX139 (Intuit)).

Response to Finding No. 262:

Complaint Counsel disputes this Proposed Finding. The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax online ads, including display ads. (*See, e.g.*, FF-212—FF-429).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Complaint Counsel further disputes the Proposed Finding in that specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax

well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

263. None of the challenged display ads misled reasonable consumers into believing that all TurboTax products were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (Golder (Intuit) Tr. 1104-1105, 1163; *supra* ¶¶248-252).

Response to Finding No. 263:

Complaint Counsel disputes this Proposed Finding. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign, including through the challenged display ads, that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements, including display ads, include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141;

FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit)); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit)); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

264. Accordingly, even a facial analysis of the challenged display ads establishes that none of those ads were deceptive.

Response to Finding No. 264:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign, including through the challenged display ads, that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements, including display ads, include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a

material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit)); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit)); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

3. Paid-Search Advertisements

265. Complaint Counsel contend that 17 paid-search ads from Tax Years 2019 to 2021 were deceptive to reasonable consumers. (Complaint Counsel’s Pretrial Brief at App’x B (Feb. 17, 2023)).

Response to Finding No. 265:

Complaint Counsel has no specific response.

266. Nearly all of the challenged paid-search ads stated in writing—next to or below the hyperlink to the TurboTax website—that the free offer being advertised was for “TurboTax Free Edition” and conveyed that the offer was available only to consumers who qualify. (GX167 (FTC); GX168-A (FTC); GX169 (FTC); GX170 (FTC); GX178 (FTC); GX179 (FTC); GX190 (FTC); GX191 (FTC); GX192 (FTC); GX193 (FTC); GX194 (FTC); GX195 (FTC); GX496 (FTC); GX497 (FTC); GX666 (FTC)).

Response to Finding No. 266:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax paid search advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message

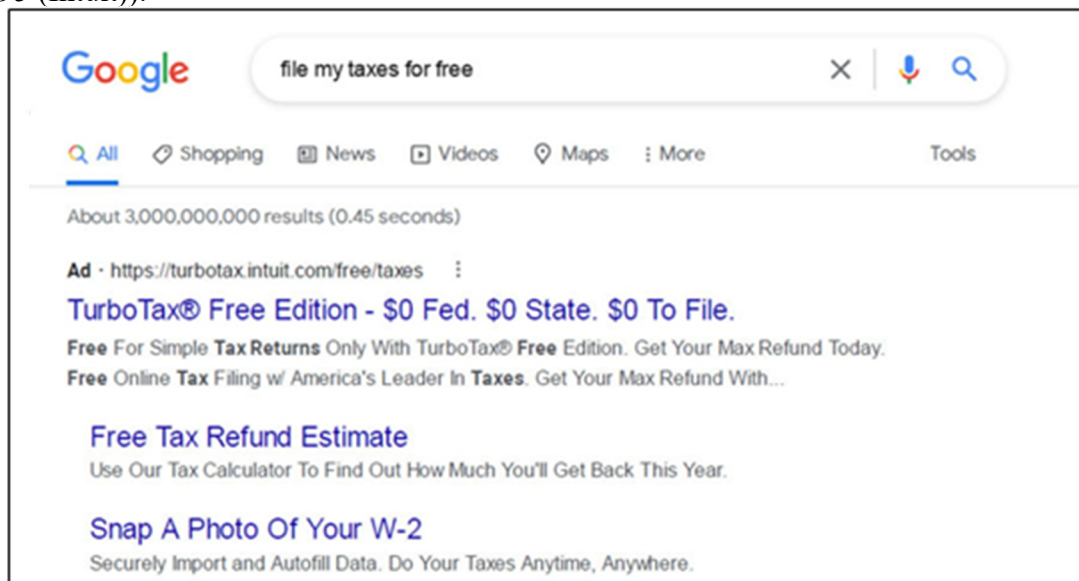
conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Thus, Intuit’s advertisements, including its paid search ads, failed to adequately convey the limitations of its offer. Complaint Counsel further notes that paid search ads in TY 2019 omitted the “simple returns only” language. (*See e.g.*, FF-445—FF-446). Similarly, a TY20 paid search ad on Bing omitted the “simple returns only” language. (FF-447).

267. In most of the challenged paid-search ads, the ad conveyed that there were qualifications by stating in writing that it was for “simple tax returns only.” GX178 (FTC); GX179 (FTC); GX180 (FTC); GX190 (FTC); GX191 (FTC); GX192 (FTC); GX193 (FTC); GX194 (FTC); GX195 (FTC); GX496 (FTC); GX497 (FTC); GX666 (FTC)). In other challenged paid-search ads, the qualifications were communicated by stating that “Over 50 million Americans can file with TurboTax Free Edition.” (GX167; GX168-A; GX169; GX170).

Response to Finding No. 267:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax paid search advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Thus, Intuit’s advertisements, including its paid search ads, failed to adequately convey the limitations of its offer.

268. A screenshot of an example of a challenged paid-search ad is provided below. (GX195 (Intuit)).



Response to Finding No. 268:

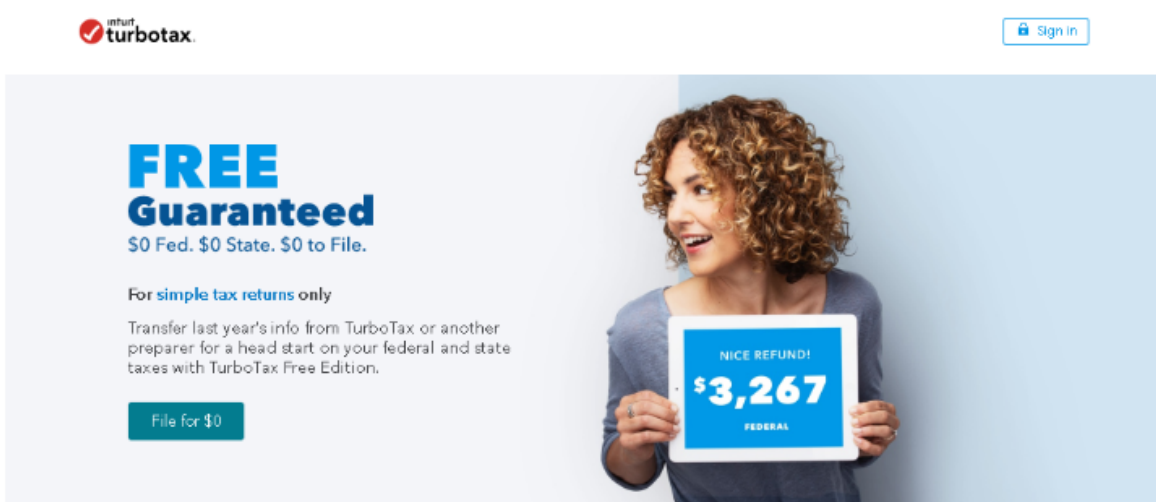
Complaint Counsel has no specific response.

269. Any consumer who clicked on a challenged paid-search ad for TurboTax Free Edition was taken directly to the TurboTax Free Edition landing page, where they would see detailed information about Free Edition's qualifications. (Johnson (Intuit) Tr. 595-596; Ryan (Intuit) Tr. 697; GX167 (FTC); GX168-A (FTC); GX169 (FTC); GX170 (FTC); GX178 (FTC); GX179 (FTC); GX180 (FTC); GX190 (FTC); GX191 (FTC); GX192 (FTC); GX193 (FTC); GX194 (FTC); GX195 (FTC); GX496 (FTC); GX666 (FTC); *infra* ¶¶364-441; *see also* Rubin (Intuit) 1563-1565; JX1 ¶62).

Response to Finding No. 269:

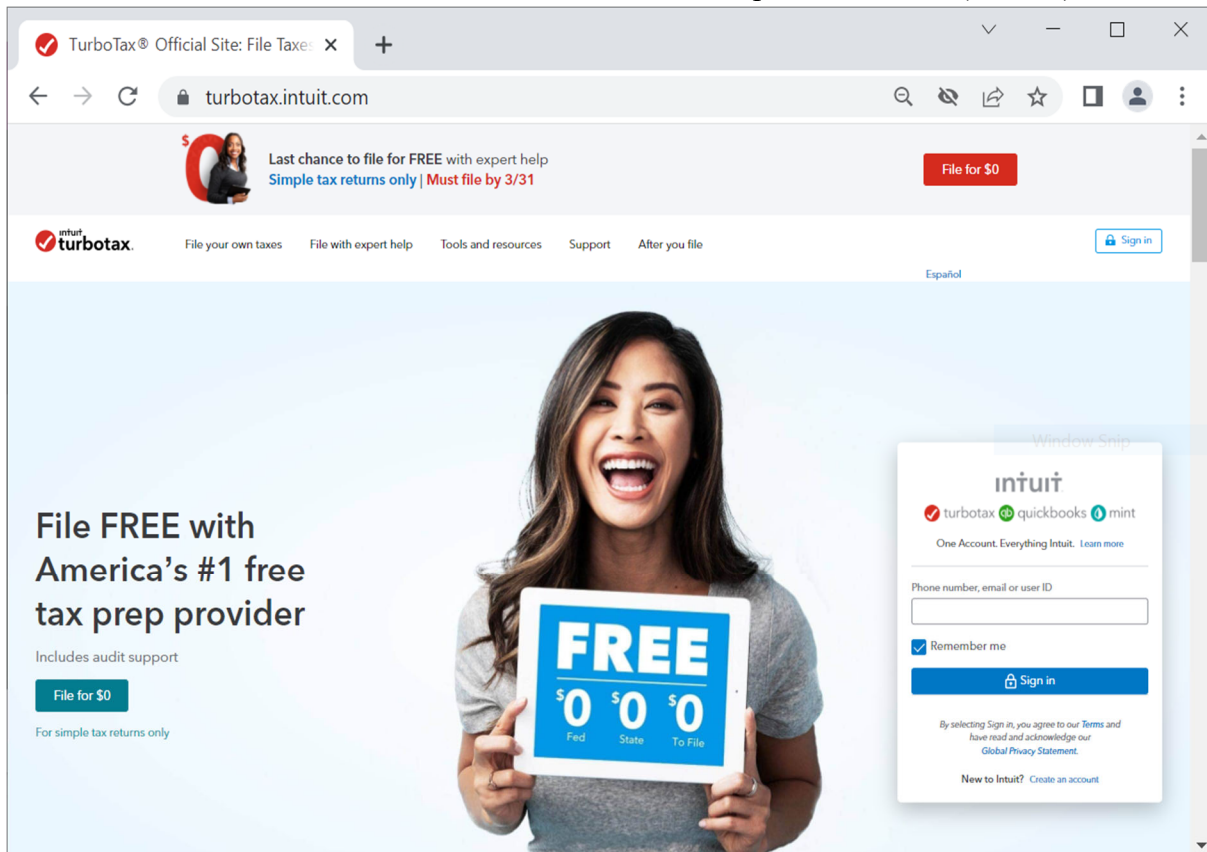
Complaint Counsel agrees that consumers who click on a challenged paid search ad are taken directly to webpages on the TurboTax website and disputes the remainder of this Proposed Finding. Even though the TurboTax website contains qualifying information, it is not clear that consumers see it, read it, or understand it. In fact, the evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

In analyzing the effectiveness of any qualifications on the TurboTax website, it is critical to first understand that the website repeats the express false "free" claims contained in the paid search ads and other TurboTax ads consumers are exposed to. (FF-456—FF-466). Those claims are enticing to consumers and likely distract them from any qualifications found on the TurboTax website. When consumers click on Intuit's paid search advertisements and arrive at the TurboTax website, the website's home page makes additional false and deceptive "free" claims. (FF-456—FF-466). For example, a screen Intuit used on its website, for TY 2020, is pictured below. (FF-461).



Here, Intuit’s website emphasizes “FREE Guaranteed,” “\$0 Fed. \$0 State. \$0 to File.” As well as “File for \$0,” (FF-461), when in truth, about two-thirds of taxpayers (or approximately 100 million taxpayers) are not eligible to file for free using TurboTax. (FF21—FF-23).

A screen Intuit used on its website for TY 2021, is pictured below. (FF-463).



Again, Intuit’s website emphasizes “FREE,” “\$0,” and “File for \$0,” (FF-463), even though most consumers cannot prepare and file their taxes for free using TurboTax. (FF21—FF-23; *see also* FF-456—FF-458, FF-459—FF-460, FF-463—FF-466 (providing additional examples of TurboTax website advertising claims)).

Thus, Intuit bombards consumers with the message that they can file their taxes for “free.” (FF-47—FF-54 & FF-66—FF-466). Intuit baits consumers with false and deceptive ads on television, radio, social media, email, and online designed to drive traffic to the TurboTax website (FF-57—FF-65 & FF-66—FF-466), where it compounds the deception with more false claims. (FF-456—FF-458, FF-459—FF-461, FF-463—FF-466).

Any purported disclaimers on the TurboTax website are inadequate to correct the express false claims and deceptive net impression made by its “free” advertising. Intuit’s website disclaimers have principally taken the form of a hyperlink on some permutation of the words “see why it’s free” or “simple tax returns only.” (*See, e.g.*, Figures shown at FF-456 (citing GX163 (Complaint Counsel)), FF-461 (citing GX183 (Complaint Counsel)) & FF-463 (citing GX486 (Complaint Counsel))).

Purported website disclaimers appearing behind hyperlinks are wholly inadequate to correct the express false claim and deceptive net impression made by Intuit’s ads and the prominent “Free, free free free” claim on the website. The disclaimers:

- 1) Are usually **hidden behind a hyperlink** over the words “See why it’s free” or the inscrutable phrase “simple tax returns”, even though the eligibility requirements of the “free” offer are integral to the “free” claim—consumers had to decide to click on the hyperlink to trigger a pop-up explaining the limitations, which is insufficient. (*See .com Disclosures: How to Make Effective Disclosures in Digital Advertising* (Mar. 2013) (marked GX316 (Complaint Counsel)), at 10 (“Disclosures that are an *integral part of a claim* or inseparable from it should not be communicated through a hyperlink. Instead, they should be placed on the same page and

immediately next to the claim, and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information. This is *particularly true for cost information* or certain health and safety disclosures.” (emphasis added)) As Professor Novemsky opines, consumers are unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-503; *see also* GX316 (Complaint Counsel) at 14 (“Some consumers may not read information in pop-up windows or interstitials because they immediately close the pop-ups or move to the next page in pursuit of completing their intended tasks, or because they don’t associate information in a pop-up window or on an interstitial page to a claim or product they haven’t encountered yet.”)).

- 2) Are **dramatically less prominent** than the advertising claims on the page, e.g., “FREE.” *See* Deception Policy Statement, at 180 (“Other practices of the company may direct consumers’ attention away from the qualifying disclosures.”).
- 3) Again use the phrase “**simple tax returns**,” which is anything but simple, and changes regularly at Intuit’s whim.

It is also important to note that Intuit has changed its website from tax year to tax year. It has, until recently, hidden the truth about eligibility for TurboTax Free Edition behind a hyperlink. (*See, e.g.*, FF-458). Consumers who are not eligible for TurboTax Free Edition do not learn they are ineligible until they have already invested significant time and effort into creating an account and inputting their sensitive personal and financial information into TurboTax. (FF-14 & FF-671—FF-673).

Intuit “expressly, repeatedly, and prominently made the ... claims to potential customers over a long period of time. It is well-established that an advertiser cannot ‘cure the deception’ in one advertisement with different statements in another.” *In re ECM Biofilms, Inc.*, 160 F.T.C. 652, 734 n.75 (2015). That is especially true when the second set of disclaimers is as flawed as those on Intuit’s website. Thus, Intuit’s website disclaimers are inadequate as a matter of law. *See, e.g., Fleetcor*, 2022 WL 3273286, at *10 (“the Court concludes as a matter of law that the tiny, inscrutable print of the disclaimers does not cure the net impression of the representations in the ads cited”).

270. Reasonable consumers understood that clicking on the challenged paid-search ads would take the consumer to a website with more information about the advertised free offer. (Golder (Intuit) Tr. 1116-1117, 1126; RX1018 (Golder Expert Report) ¶159). Thus, by linking directly to the TurboTax website, the challenged paid-search ads incorporated the information on the TurboTax website. (Golder (Intuit) Tr. 1123-1126).

Response to Finding No. 270:

Complaint Counsel disputes the Proposed Finding. It is well-established that an advertiser cannot ‘cure the deception’ in one advertisement with different statements in another.” *In re ECM Biofilms, Inc.*, 160 F.T.C. 652, 734 n.75 (2015). Conveying “some limitation” or the mere existence of qualifying information to be found elsewhere is not sufficient under the FTC Act. Qualifying disclosures must be understandable. Deception Policy Statement, 103 F.T.C. at 180. To prevent an ad from being misleading, disclosures must convey material information in clear language “understandable to the intended audience.” *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186-Orl-28TBS, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, Fed. Trade Comm’n., .com Disclosures: How to Make Effective Disclosures in Digital Advertising at 21 (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>. (“For disclosures to be effective, consumers must be able to understand them.”). Pointing consumers to a website does not accomplish this.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit's false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers' detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter "Deception Policy Statement").

Complaint Counsel further disputes this Proposed Finding because it relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694). Instead, Professor Golder relies on his own opinions regarding Intuit's marketing (FF-689), and speculative and unsupported opinions about Intuit's purported disclaimers based on an uninformative comparative benchmarking exercise which compares Intuit's disclaimers to disclaimers used by other advertisers. (FF-690—FF-704; FF-706; FF-710). A comparative study is irrelevant to determining whether Intuit's ads were misleading, and Professor Golder made no effort to determine whether consumers saw or understood Intuit's purported disclaimers. (FF-693; FF-702; FF-704). By contrast, Professor Novemsky has deep expertise in consumer psychology and consumer decision making (FF-472—FF-479), conducted a perception survey designed to understand consumer perceptions around TurboTax advertising and disclosures (FF-480—FF-503), considered additional materials including copy testing conducted by Intuit in the ordinary course of business (FF-546—FF-571), and opined (based on the perception survey, Intuit's copy tests, and his experience studying consumer psychology) there was deception caused by TurboTax advertising and marketing giving consumers a false

impression they can file for free when that is not the case. (FF-471, FF-480, FF-491). In reaching his opinion, Professor Novemsky considered Intuit's disclaimers and qualifiers, including those on the TurboTax website, and found them ineffective. (FF-491—FF-503).

What is more, consumers testified during depositions taken by Intuit that the hyperlinked disclaimers on the TurboTax website were not "obvious." (FF-674). One consumer who had on the job website operation experience testified that "it is highly unlikely that people will click through to an external link." (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

271. Complaint Counsel did not offer evidence demonstrating that consumers could not see or read the written qualifications in the challenged paid-search ads.

Response to Finding No. 271:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.").

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements, including the challenged paid search ads, contained adequate disclosures. The evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

272. The evidence instead establishes that all written qualifications in the challenged paid-search ads were noticeable and legible. (GX167 (FTC); GX168-A (FTC); GX169 (FTC); GX170 (FTC); GX178 (FTC); GX179 (FTC); GX180 (FTC); GX190 (FTC); GX191 (FTC); GX192 (FTC); GX193 (FTC); GX194 (FTC); GX195 (FTC); GX496 (FTC); GX497 (FTC); GX666 (FTC); Ryan (Intuit) Tr. 696-698, 701-702; Shiller (FTC) Tr. 262-263; Chappell (ALJ) Tr. 45 (observing that challenged "Google ad said 'simple returns only'"); Evans (FTC) Tr. 49 (reading paid-search ad stating "TurboTax Free Edition, zero dollars fed, zero dollars state, zero dollars to file. Free for simple tax returns only").

Response to Finding No. 272:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

273. None of the challenged paid-search ads expressly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (GX167 (FTC); GX168-A (FTC); GX169 (FTC); GX170 (FTC); GX177 (FTC); GX178 (FTC); GX179 (FTC); GX180 (FTC); GX190 (FTC); GX191 (FTC); GX192 (FTC); GX193 (FTC); GX194 (FTC); GX195 (FTC); GX496 (FTC); GX497 (FTC); GX666 (FTC)).

Response to Finding No. 273:

Complaint Counsel disputes this Proposed Finding. "Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way." *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 n.4 (7th Cir. 1992). Even advertisements that do not use the specific terms alleged in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., "that consumers can file their taxes for free using TurboTax," Compl. ¶ 119), or the functional equivalent, in numerous TurboTax paid search ads. (*See, e.g.*, FF-212—FF-429).

There is nothing oblique or indirect about Intuit's ads. They directly represent that TurboTax is free. For example, in TY 2019, Intuit disseminated a TurboTax paid search ad that included the following express claim in the headline: "TurboTax® Official Site – 100% Free Online Tax Filing" (FF-445 (citing GX168 (Complaint Counsel))). In TY 2020, Intuit disseminated a paid search ad that included the following express free claim in the headline: "\$0 Fed. \$0 State. \$0 to File – TurboTax® Official Site." (FF-449 (citing GX180 (Complaint Counsel))). In TY 2021, Intuit disseminated paid search ads that included the following express free claim in the headline: "TurbTax® Free Edition - \$0 Fed. \$0 State. \$0 To File." (FF-451).

These are a few among many similar TurboTax paid ads containing express free claims or the functional equivalent. (*See, e.g.*, FF-443—FF-454). The representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax. The fact that each of these ads sometimes included the inadequate “simple returns only” qualifying language does not change the fact that these ads contained express triggering or primary claims that clearly communicated “TurboTax is free.”

274. None of the challenged paid-search ads impliedly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (GX167 (FTC); GX168-A (FTC); GX169 (FTC); GX170 (FTC); GX177 (FTC); GX178 (FTC); GX179 (FTC); GX180 (FTC); GX190 (FTC); GX191 (FTC); GX192 (FTC); GX193 (FTC); GX194 (FTC); GX195 (FTC); GX496 (FTC); GX497 (FTC); GX666 (FTC)).

Response to Finding No. 274:

Complaint Counsel disputes this Proposed Finding. “Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 n.4 (7th Cir. 1992). Even advertisements that do not use the specific terms alleged in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax paid search ads. (*See, e.g.*, FF-212—FF-429).

Even if the Court were to decide that the claims at issue are technically implied claims, there is nothing oblique or indirect about Intuit’s ads. They directly represent that TurboTax is free. For example, in TY 2019, Intuit disseminated a TurboTax paid search ad that included the following express claim in the headline: “TurboTax® Official Site – 100% Free Online Tax Filing” (FF-445 (citing GX168 (Complaint Counsel))). In TY 2020, Intuit disseminated a paid search ad that included the following express free claim in the headline: “\$0 Fed. \$0 State. \$0 to File – TurboTax® Official Site.” (FF-449 (citing GX180 (Complaint Counsel))). In TY 2021,

Intuit disseminated paid search ads that included the following express free claim in the headline: “TurbTax® Free Edition - \$0 Fed. \$0 State. \$0 To File.” (FF-451). These are a few among many similar TurboTax paid ads containing express free claims or the functional equivalent. (*See, e.g.*, FF-443—FF-454). Whether they are considered express or implied, the representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax. The fact that each of these ads sometimes included the inadequate “simple returns only” qualifying language does not change the fact that these ads contained triggering or primary claims that clearly communicated “TurboTax is free.”

275. Instead, the challenged paid-search ads left the impression (1) that the ad was for a specific TurboTax SKU, (2) that consumers’ ability to use the SKU was qualified based on the complexity of the consumers’ tax returns, and (3) that there was additional information about the SKU and its qualifications on the TurboTax website. (Ryan (Intuit) Tr. 741; Golder (Intuit) Tr. 1274; GX167 (FTC); GX168-A (FTC); GX169 (FTC); GX170 (FTC); GX178 (FTC); GX179 (FTC); GX180 (FTC); GX190 (FTC); GX191 (FTC); GX192 (FTC); GX193 (FTC); GX194 (FTC); GX195 (FTC); GX496 (FTC); GX497 (FTC); GX666 (FTC)).

Response to Finding No. 275:

Complaint Counsel disputes this Proposed Finding. The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax paid search ads. (*See, e.g.*, FF-443—FF-454).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Complaint Counsel further disputes the Proposed Finding in that specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax

well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

276. None of the challenged paid-search ads misled reasonable consumers into believing that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (*Supra* ¶¶266-275; *infra* 277-286; Golder (Intuit) Tr. 1116-1117, 1126; RX1018 (Golder Expert Report) ¶¶98, 159, fig. 12 n.2; *see also* Ryan (Intuit) Tr. 740-741).

Response to Finding No. 276:

Complaint Counsel disputes this Proposed Finding. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign, including through the challenged paid search ads, that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements, including paid search ads, include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television,

radio, and online, including via paid search. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

277. Accordingly, even a facial analysis of the challenged paid-search ads establishes that none of those ads were deceptive.

Response to Finding No. 277:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign, including through the challenged paid search ads, that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements, including paid search ads, include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-

664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online, including via paid search. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

278. Testimony from Ms. Shiller characterizing a search result for the IRS Free File program—with no disclosure language—as not deceptive bolsters the finding that Intuit’s paid-search advertisements were not deceptive. At trial, Ms. Shiller was presented with a screenshot of a Google search for “free file taxes ONLINE” with a result for the IRS Free File website that stated: “Welcome to Free File, where you can prepare and file your federal individual income tax return for free using tax-preparation-and-filing software,” but that did not disclose that only qualifying taxpayers with a certain adjusted gross income could use the IRS Free File offer. (Shiller (FTC) Tr. 258-261; GX168-A (Intuit)). When asked whether the Free File search ad was deceptive, Ms. Shiller initially responded “I don’t know,” before then suggesting it was not deceptive because “it says you can file your taxes for free by going to that website, and I do believe taxpayers can file their taxes for free going through the Free File Program.” (Shiller (FTC) Tr. 262). When Ms. Shiller was reminded that “taxpayers can file for free [by] going to the TurboTax website,” she said that was only true of “[s]ome taxpayers,” but acknowledged that similarly, “only some taxpayers can file for free if they go to IRS.gov” “depending on their qualification” and that the snippet did not include that limitation. (Shiller (FTC) Tr. 262).

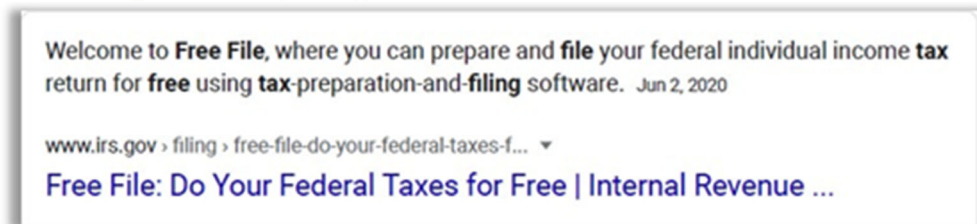
Response to Finding No. 278:

Complaint Counsel disputes this Proposed Finding to the extent Intuit suggests or claims it bolsters its argument Intuit's paid search advertisements were not deceptive. At best, this testimony may show that Google searches for the IRS Free File website are misleading or deceptive to consumers. Advertising for the IRS Free File program is not at issue in this case and is irrelevant to whether Intuit's TurboTax advertising is deceptive.

The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign, including through the challenged paid search ads, that delivers an inescapable message: "consumers can file their taxes for free using TurboTax." Compl. ¶ 119. The evidence shows that many TurboTax advertisements, including paid search ads, include such a "free" claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online, including via paid search. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit's false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers'

detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

279. A screenshot of the IRS Free File search result that Ms. Shiller was shown at trial is provided below. (GX168-A (Intuit)).



Response to Finding No. 279:

Complaint Counsel has no specific response.

4. Email Advertisements

280. Complaint Counsel contend that 24 email ads for free TurboTax SKUs that were sent from Tax Years 2015 to 2021 were deceptive to reasonable consumers. (Complaint Counsel’s Pretrial Brief at App’x B (Feb. 17, 2023)).

Response to Finding No. 280:

Complaint Counsel has no specific response.

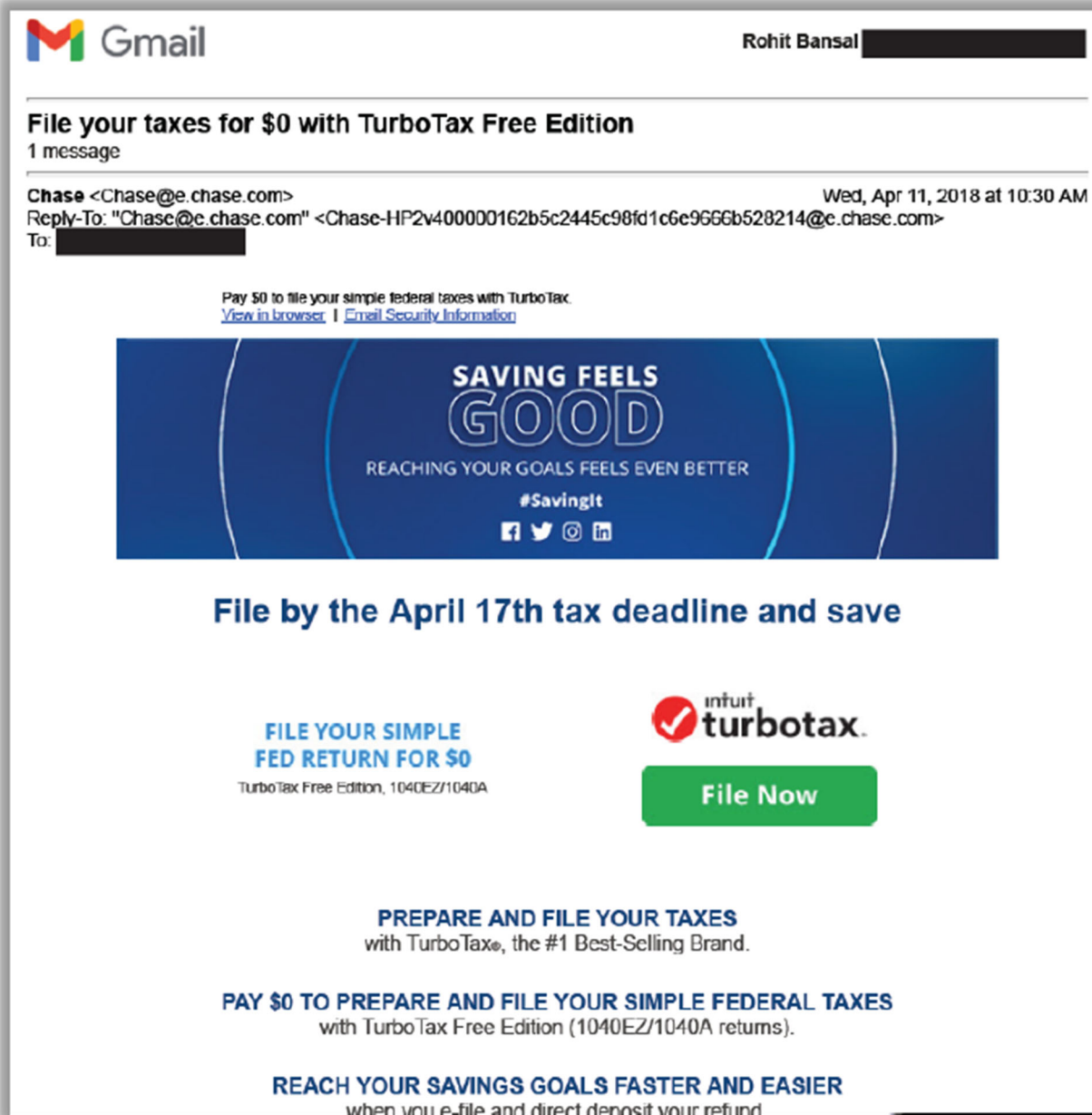
281. The challenged email ads all included disclosure language indicating that the free TurboTax offer was only available to consumers who qualify, through language such as “TurboTax Free Edition, for simple tax returns only. See if you qualify,” or “Pay \$0 to file your simple federal taxes with TurboTax Free Edition (1040EZ/1040A returns)” —with the qualifications often written in different ways in multiple locations in a single email. Most of the challenged email ads also expressly identified the TurboTax SKU being advertised. (GX171 (FTC); GX172 (FTC); GX181 (FTC); GX182 (FTC); GX371 (FTC); GX374 (FTC); GX375 (FTC); GX376 (FTC); GX377 (FTC); GX378 (FTC); GX379 (FTC); GX380 (FTC); GX381 (FTC); GX383 (FTC); GX386 (FTC); GX387 (FTC); GX388 (FTC); GX389 (FTC); GX390 (FTC); GX477 (FTC); GX480 (FTC); RX127 (Intuit); RX128 (Intuit); RX129 (Intuit); *see also* Ryan (Intuit) Tr. 768).

Response to Finding No. 281:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax email advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Thus,

Intuit’s advertisements, including its email ads, failed to adequately convey the limitations of its offer. Complaint Counsel further notes that paid search ads in TY 2019 omitted the “simple returns only” language. (See e.g., FF-445—FF-446). Similarly, a TY20 paid search ad on Bing omitted the “simple returns only” language. (FF-447).

282. A screenshot of an example challenged email ad is provided below. (GX371 (FTC)).



IMPORTANT INFORMATION

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

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

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

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

Response to Finding No. 282:

Complaint Counsel has no specific response.

283. The challenged email ads were sent to TurboTax customers who previously used TurboTax Free Edition or had started their return in TurboTax Free Edition but had yet to complete it. (Ryan (Intuit) Tr. 769; Shiller (FTC) Tr. 256; *see also* RX1018 (Golder Expert Report) ¶160).

Response to Finding No. 283:

Complaint Counsel has no specific response.

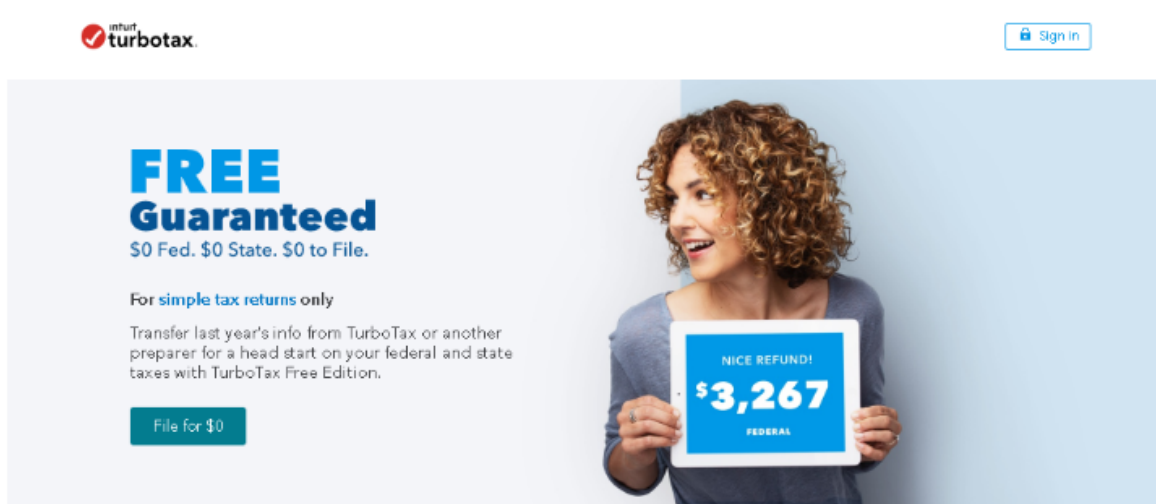
284. Any consumer who clicked on any of the challenged email ads, all of which contain visible hyperlinks, would also be taken directly to the TurboTax website, where they would find detailed information about TurboTax Free Edition qualifications. (GX171 (FTC); GX172 (FTC); GX181 (FTC); GX182 (FTC); GX371 (FTC); GX374 (FTC); GX375 (FTC); GX376 (FTC); GX377 (FTC); GX378 (FTC); GX379 (FTC); GX380 (FTC); GX381 (FTC); GX383 (FTC); GX386 (FTC); GX387 (FTC); GX388 (FTC); GX389 (FTC); GX390 (FTC); GX477 (FTC); GX480 (FTC); RX127 (Intuit); RX128 (Intuit); RX129 (Intuit); Johnson (Intuit) 595-596; JX1 ¶63; *infra* ¶¶364-441).

Response to Finding No. 284:

Complaint Counsel agrees that consumers who click on hyperlinks in a challenged email ad are taken directly to webpages on the TurboTax website and disputes the remainder of this Proposed Finding. Even though the TurboTax website contains qualifying information, it is not clear that consumers see it, read it, or understand it. In fact, the evidence shows that Intuit's

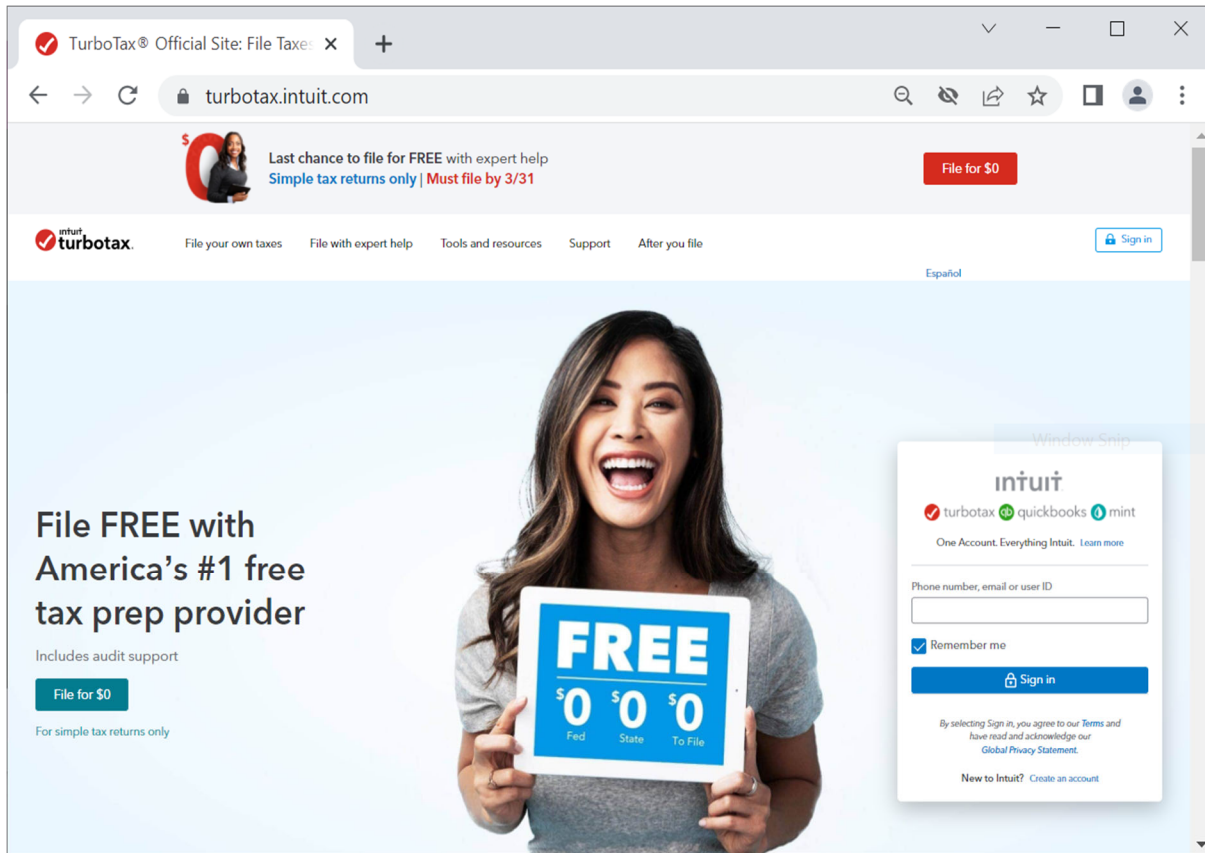
purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

In analyzing the effectiveness of any qualifications on the TurboTax website, it is critical to first understand that the website repeats the express false "free" claims contained in the email ads and other TurboTax ads consumers are exposed to. (FF-456—FF-466). Those claims are enticing to consumers and likely distract them from any qualifications found on the TurboTax website. When consumers click on hyperlinks in Intuit's email advertisements and arrive at the TurboTax website, the website's home page makes additional false and deceptive "free" claims. (FF-456—FF-466). For example, a screen Intuit used on its website, for TY 2020, is pictured below. (FF-461).



Here, Intuit's website emphasizes "FREE Guaranteed," "\$0 Fed. \$0 State. \$0 to File." As well as "File for \$0," (FF-461), when in truth, about two-thirds of taxpayers (or approximately 100 million taxpayers) are not eligible to file for free using TurboTax. (FF21—FF-23).

A screen Intuit used on its website for TY 2021, is pictured below. (FF-463).



Again, Intuit’s website emphasizes “FREE,” “\$0,” and “File for \$0,” (FF-463), even though most consumers cannot prepare and file their taxes for free using TurboTax. (FF21—FF-23; *see also* FF-456—FF-458, FF-459—FF-460, FF-463—FF-466 (providing additional examples of TurboTax website advertising claims)).

Thus, Intuit bombards consumers with the message that they can file their taxes for “free.” (FF-47—FF-54 & FF-66—FF-466). Intuit baits consumers with false and deceptive ads on television, radio, social media, email, and online designed to drive traffic to the TurboTax website (FF-57—FF-65 & FF-66—FF-466), where it compounds the deception with more false claims. (FF-456—FF-458, FF-459—FF-461, FF-463—FF-466).

Any purported disclaimers on the TurboTax website are inadequate to correct the express false claims and deceptive net impression made by its “free” advertising. Intuit’s website disclaimers have principally taken the form of a hyperlink on some permutation of the words

“see why it’s free” or “simple tax returns only.” (*See, e.g.*, Figures shown at FF-456 (citing GX163 (Complaint Counsel)), FF-461 (citing GX183 (Complaint Counsel)) & FF-463 (citing GX486 (Complaint Counsel))).

Purported website disclaimers appearing behind hyperlinks are wholly inadequate to correct the express false claim and deceptive net impression made by Intuit’s ads and the prominent “Free, free free free” claim on the website. The disclaimers:

- 1) Are usually **hidden behind a hyperlink** over the words “See why it’s free” or the inscrutable phrase “simple tax returns”, even though the eligibility requirements of the “free” offer are integral to the “free” claim—consumers had to decide to click on the hyperlink to trigger a pop-up explaining the limitations, which is insufficient. (*See .com Disclosures: How to Make Effective Disclosures in Digital Advertising* (Mar. 2013) (marked GX316 (Complaint Counsel)), at 10 (“Disclosures that are an *integral part of a claim* or inseparable from it should not be communicated through a hyperlink. Instead, they should be placed on the same page and immediately next to the claim, and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information. This is *particularly true for cost information* or certain health and safety disclosures.” (emphasis added)) As Professor Novemsky opines, consumers are unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-503; *see also* GX316 (Complaint Counsel) at 14 (“Some consumers may not read information in pop-up windows or interstitials because they immediately close the pop-ups or move to the next page in pursuit of completing their intended tasks, or because they don’t associate

information in a pop-up window or on an interstitial page to a claim or product they haven't encountered yet.”)).

- 2) Are **dramatically less prominent** than the advertising claims on the page, e.g., “FREE.” *See* Deception Policy Statement, at 180 (“Other practices of the company may direct consumers’ attention away from the qualifying disclosures.”).
- 3) Again use the phrase “**simple tax returns**,” which is anything but simple, and changes regularly at Intuit’s whim.

It is also important to note that Intuit has changed its website from tax year to tax year. It has, until recently, hidden the truth about eligibility for TurboTax Free Edition behind a hyperlink. (*See, e.g.*, FF-458). Consumers who are not eligible for TurboTax Free Edition do not learn they are ineligible until they have already invested significant time and effort into creating an account and inputting their sensitive personal and financial information into TurboTax. (FF-14 & FF-671—FF-673).

Intuit “expressly, repeatedly, and prominently made the ... claims to potential customers over a long period of time. It is well-established that an advertiser cannot ‘cure the deception’ in one advertisement with different statements in another.” *In re ECM Biofilms, Inc.*, 160 F.T.C. 652, 734 n.75 (2015). That is especially true when the second set of disclaimers is as flawed as those on Intuit’s website. Thus, Intuit’s website disclaimers are inadequate as a matter of law. *See, e.g., Fleetcor*, 2022 WL 3273286, at *10 (“the Court concludes as a matter of law that the tiny, inscrutable print of the disclaimers does not cure the net impression of the representations in the ads cited”).

285. Reasonable consumers understood that clicking on the challenged email ads would take the consumer to a website with more information about the advertised free offer. (*Golder (Intuit) Tr.* 1116-1117). Thus, by linking directly to the TurboTax website, the challenged email ads incorporated the information on the TurboTax website. (*Golder (Intuit) Tr.* 1124-1126).

Response to Finding No. 285:

Complaint Counsel disputes the Proposed Finding. It is well-established that an advertiser cannot ‘cure the deception’ in one advertisement with different statements in another.” *In re ECM Biofilms, Inc.*, 160 F.T.C. 652, 734 n.75 (2015). Conveying “some limitation” or the mere existence of qualifying information to be found elsewhere is not sufficient under the FTC Act. Qualifying disclosures must be understandable. Deception Policy Statement, 103 F.T.C. at 180. To prevent an ad from being misleading, disclosures must convey material information in clear language “understandable to the intended audience.” *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186-Orl-28TBS, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, Fed. Trade Comm’n., .com Disclosures: How to Make Effective Disclosures in Digital Advertising at 21 (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>. (“For disclosures to be effective, consumers must be able to understand them.”). Pointing consumers to a website does not accomplish this.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Complaint Counsel further disputes this Proposed Finding because it relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder

(who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694). Instead, Professor Golder relies on his own opinions regarding Intuit’s marketing (FF-689), and speculative and unsupported opinions about Intuit’s purported disclaimers based on an uninformative comparative benchmarking exercise which compares Intuit’s disclaimers to disclaimers used by other advertisers. (FF-690—FF-704; FF-706; FF-710). A comparative study is irrelevant to determining whether Intuit’s ads were misleading, and Professor Golder made no effort to determine whether consumers saw or understood Intuit’s purported disclaimers. (FF-693; FF-702; FF-704). By contrast, Professor Novemsky has deep expertise in consumer psychology and consumer decision making (FF-472—FF-479), conducted a perception survey designed to understand consumer perceptions around TurboTax advertising and disclosures (FF-480—FF-503), considered additional materials including copy testing conducted by Intuit in the ordinary course of business (FF-546—FF-571), and opined (based on the perception survey, Intuit’s copy tests, and his experience studying consumer psychology) there was deception caused by TurboTax advertising and marketing giving consumers a false impression they can file for free when that is not the case. (FF-471, FF-480, FF-491). In reaching his opinion, Professor Novemsky considered Intuit’s disclaimers and qualifiers, including those on the TurboTax website, and found them ineffective. (FF-491—FF-503).

What is more, consumers testified during depositions taken by Intuit that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674). One consumer who had on the job website operation experience testified that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

286. Complaint Counsel did not offer evidence demonstrating that consumers could not see or read the written qualifications in challenged email ads.

Response to Finding No. 286:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements, including the challenged email ads, contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

287. The evidence instead establishes that the written qualifications in the challenged email ads were noticeable and legible. (Shiller (FTC) Tr. 252-254; RX1390 (Shiller (FTC) Dep.) at 200-201; GX171 (FTC); GX172 (FTC); GX181 (FTC); GX182 (FTC); GX371 (FTC); GX374 (FTC); GX375 (FTC); GX376 (FTC); GX377 (FTC); GX378 (FTC); GX379 (FTC); GX380 (FTC); GX381 (FTC); GX383 (FTC); GX386 (FTC); GX387 (FTC); GX388 (FTC); GX389 (FTC); GX390 (FTC); GX477 (FTC); GX480 (FTC); RX127 (Intuit); RX128 (Intuit); RX129 (Intuit); *see also* Ryan (Intuit) Tr. 768).

Response to Finding No. 287:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

288. None of the 24 challenged email ads expressly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (GX171 (FTC); GX172 (FTC); GX181 (FTC); GX182 (FTC); GX371 (FTC); GX374 (FTC); GX375 (FTC); GX376 (FTC); GX377 (FTC); GX378 (FTC); GX379 (FTC); GX380 (FTC); GX381 (FTC); GX383 (FTC); GX386 (FTC); GX387 (FTC); GX388 (FTC); GX389 (FTC); GX390 (FTC); GX477 (FTC); GX480 (FTC); RX127 (Intuit); RX128 (Intuit); RX129 (Intuit)).

Response to Finding No. 288:

Complaint Counsel disputes this Proposed Finding. “Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way.” *Kraft, Inc. v. FTC*, 970

F.2d 311, 318 n.4 (7th Cir. 1992). Even advertisements that do not use the specific terms alleged in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax email ads. (*See, e.g.*, FF-430—FF-442).

There is nothing oblique or indirect about Intuit’s ads. They directly represent that TurboTax is free. For example, in TY 2019, Intuit sent a TurboTax email ad that included the following express claims: the following claims:

- “Get that Green for St. Patty’s Day FREE guaranteed \$0 Fed \$0 State \$0 To File.”
- “Do your taxes for FREE! The IRS is sending refunds out every day—the sooner you file, the faster you’ll get yours. Get started today!”

(FF-432—FF-433 (citing GX171 (Complaint Counsel) at CC-00005813)). In TY 2020, Intuit sent an email that included the following express free claim: “GET YOUR MAXIMUM REFUND FAST. FREE guaranteed \$0 Fed \$0 State \$0 To File.” (FF-438—FF-439 (citing GX181 (Complaint Counsel) at CC-00005823)). In TY 2021, Intuit sent an email that included the following express free claim: “FREE \$0 Fed \$0 State \$0 To File.” (FF-441 (citing GX477 (Complaint Counsel) at CC-00010142)). These are a few among many similar TurboTax email ads containing express free claims or the functional equivalent. (*See, e.g.*, FF-430—FF-442). The representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax. The fact that each of these ads often included the inadequate “simple returns only” qualifying language does not change the fact that these ads contained express triggering or primary claims that clearly communicated “TurboTax is free.”

289. None of the 24 challenged email ads impliedly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the

viewer, or any of the other claims asserted by Complaint Counsel. (GX171 (FTC); GX172 (FTC); GX181 (FTC); GX182 (FTC); GX371 (FTC); GX374 (FTC); GX375 (FTC); GX376 (FTC); GX377 (FTC); GX378 (FTC); GX379 (FTC); GX380 (FTC); GX381 (FTC); GX383 (FTC); GX386 (FTC); GX387 (FTC); GX388 (FTC); GX389 (FTC); GX390 (FTC); GX477 (FTC); GX480 (FTC); RX127 (Intuit); RX128 (Intuit); RX129 (Intuit)).

Response to Finding No. 289:

Complaint Counsel disputes this Proposed Finding. “Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 n.4 (7th Cir. 1992). Even advertisements that do not use the specific terms alleged in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax email ads. (*See, e.g.*, FF-430—FF-442).

Even if the Court were to decide that the claims at issue are technically implied claims, there is nothing oblique or indirect about Intuit’s ads. They directly represent that TurboTax is free. For example, in TY 2019, Intuit a TurboTax email ad that included the following express claims: the following claims:

- “Get that Green for St. Patty’s Day FREE guaranteed \$0 Fed \$0 State \$0 To File.”
- “Do your taxes for FREE! The IRS is sending refunds out every day—the sooner you file, the faster you’ll get yours. Get started today!”

(FF-432—FF-433 (citing GX171 (Complaint Counsel) at CC-00005813)). In TY 2020, Intuit sent an email that included the following express free claim: “GET YOUR MAXIMUM REFUND FAST. FREE guaranteed \$0 Fed \$0 State \$0 To File.” (FF-438—FF-439 (citing GX181 (Complaint Counsel) at CC-00005823)). In TY 2021, Intuit sent an email that included the following express free claim: “FREE \$0 Fed \$0 State \$0 To File.” (FF-441 (citing GX477 (Complaint Counsel) at CC-00010142)). These are a few among many similar TurboTax email ads containing express free claims or the functional equivalent. (*See, e.g.*, FF-430—FF-442).

Whether they are considered express or implied, the representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax. The fact that each of these ads often included the inadequate “simple returns only” qualifying language does not change the fact that these ads contained triggering or primary claims that clearly communicated “TurboTax is free.”

290. Instead, the challenged email ads left the impression (1) that consumers’ ability to use the free TurboTax offer advertised was qualified, (2) that there was additional information about the free offer and its qualifications on the TurboTax website, and nearly always (3) that the ad was for a specific TurboTax SKU. (GX171 (FTC); GX172 (FTC); GX181 (FTC); GX182 (FTC); GX371 (FTC); GX374 (FTC); GX375 (FTC); GX376 (FTC); GX377 (FTC); GX378 (FTC); GX379 (FTC); GX380 (FTC); GX381 (FTC); GX383 (FTC); GX386 (FTC); GX387 (FTC); GX388 (FTC); GX389 (FTC); GX390 (FTC); GX477 (FTC); GX480 (FTC); RX127 (Intuit); RX128 (Intuit); RX129 (Intuit)).

Response to Finding No. 290:

Complaint Counsel disputes this Proposed Finding. The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax email ads. (*See, e.g.*, FF-430—FF-442).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Complaint Counsel further disputes the Proposed Finding in that specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful

mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

291. None of the challenged email ads misled reasonable consumers into believing that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (Shiller (FTC) Tr. 252-254; RX1390; Shiller (FTC) Dep.) at 200-201; *supra* ¶¶281-282, 287-290; *see also* Ryan (Intuit) Tr. 768).

Response to Finding No. 291:

Complaint Counsel disputes this Proposed Finding. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign, including through the challenged email ads, that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements, including email ads, include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online, including via email. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-

184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit)); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit)); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

292. Accordingly, even a facial analysis of the challenged email ads establishes that none of those ads were deceptive.

Response to Finding No. 292:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign, including through the challenged email ads, that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements, including email ads, include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a

material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online, including via email. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

5. Radio Advertisements

293. Complaint Counsel contend that four TurboTax radio advertisements that aired in Tax Years 2020 and 2021 were deceptive to reasonable consumers. (Complaint Counsel’s Pretrial Brief at App’x B (Feb. 17, 2023)).

Response to Finding No. 293:

Complaint Counsel has no specific response.

294. All challenged radio ads stated that the TurboTax SKU being advertised was “TurboTax Free Edition” or the “Free Edition product,” and that the SKU was “only for simple U.S. returns” or “for simple U.S. returns only.” Every challenged radio ad also said that consumers could find more information on the TurboTax website by stating, “See if you qualify at turbotax.com” or “See details at turbotax.com.” (GX617 (Intuit); GX618 (Intuit); GX627 (Intuit); GX630 (Intuit)).

Response to Finding No. 294:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax radio ads contained adequate disclosures. The evidence shows that Intuit’s

purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Thus, Intuit's advertisements, including its radio ads, failed to adequately convey the limitations of its offer.

295. Complaint Counsel did not offer evidence demonstrating that consumers could not hear the qualifications in the challenged radio ads.

Response to Finding No. 295:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.").

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax radio ads contained adequate disclosures. The evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Thus, Intuit's advertisements, including its radio ads, failed to adequately convey the limitations of its offer.

296. The evidence instead establishes that the qualifications in the challenged radio ads were noticeable and audible. (GX617 (FTC); GX618 (FTC); GX627 (FTC); GX630 (FTC); Evans (FTC) Tr. 57 (Complaint Counsel playing challenged radio ad that stated "TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com"))).

Response to Finding No. 296:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax radio ads contained adequate disclosures. The evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Thus, Intuit's advertisements, including its radio ads, failed to adequately convey the limitations of its offer.

297. None of these challenged radio ads expressly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the

viewer, or any of the other claims asserted by Complaint Counsel. (GX617 (FTC); GX618 (FTC); GX627 (FTC); GX630 (FTC)).

Response to Finding No. 297:

Complaint Counsel disputes this Proposed Finding. “Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 n.4 (7th Cir. 1992). Even advertisements that do not use the specific terms alleged in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in multiple TurboTax radio ads. (*See, e.g.*, FF-195—FF-211).

There is nothing oblique or indirect about Intuit’s ads. They directly represent that TurboTax is free. For example, in TY 2020, Intuit disseminated a TurboTax radio ad featuring a jingle where every word sung is “free.” (FF-197 (citing GX627 (Intuit))). This radio ad also includes the following claim: “That’s right, TurboTax Free is free. Free, free free free.” (GX627 (Intuit) at 00:22). A similar radio ad aired in TY 2021 which also featured featuring a jingle where every word sung is “free.” (FF-204 (citing GX617 (Intuit))). This TY 2021 radio ad also included the following claim: “That’s right, TurboTax Free Edition is free. Free, free free free.” (FF-206 (citing GX617 (Intuit) at 00:20))). Two other similar TurboTax radio ads also contained express free claims or the functional equivalent. (*See, e.g.*, FF-200—FF-203 & FF-208—FF-211). The representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax. Each of these ads included inadequate qualifying language such as “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at turbotax.com.” (FF-199, FF-203, FF-207 & FF-211). Such qualifying language does not change the fact that these ads contained express triggering or primary claims that clearly communicated “TurboTax is free.”

298. None of these challenged radio ads impliedly claimed that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (GX617 (FTC); GX618 (FTC); GX627 (FTC); GX630 (FTC)).

Response to Finding No. 298:

Complaint Counsel disputes this Proposed Finding. “Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 n.4 (7th Cir. 1992). Even advertisements that do not use the specific terms alleged in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in multiple TurboTax radio ads. (*See, e.g.*, FF-195—FF-211).

Even if the Court were to decide that the claims at issue are technically implied claims, There is nothing oblique or indirect about Intuit’s ads. They directly represent that TurboTax is free. For example, in TY 2020, Intuit disseminated a TurboTax radio ad featuring a jingle where every word sung is “free.” (FF-197 (citing GX627 (Intuit))). This radio ad also includes the following claim: “That’s right, TurboTax Free is free. Free, free free free.” (GX627 (Intuit) at 00:22). A similar radio ad aired in TY 2021 which also featured featuring a jingle where every word sung is “free.” (FF-204 (citing GX617 (Intuit))). This TY 2021 radio ad also included the following claim: “That’s right, TurboTax Free Edition is free. Free, free free free.” (FF-206 (citing GX617 (Intuit) at 00:20)). Two other similar TurboTax radio ads also contained express free claims or the functional equivalent. (*See, e.g.*, FF-200—FF-203 & FF-208—FF-211). Whether they are considered express or implied, the representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax. Each of these ads included inadequate qualifying language such as “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at

turbotax.com.” (FF-199, FF-203, FF-207 & FF-211). Such qualifying language does not change the fact that these ads contained express triggering or primary claims that clearly communicated “TurboTax is free.”

299. Instead, the challenged radio ads left the impression (1) that the ad was for a specific TurboTax SKU, (2) that consumers’ ability to use the SKU was tied to the complexity of consumers’ tax returns, and (3) that there was additional information about the SKU and its qualifications on the TurboTax website. (GX617 (FTC); GX618 (FTC); GX627 (FTC); GX630 (FTC)).

Response to Finding No. 299:

Complaint Counsel disputes this Proposed Finding. The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in multiple TurboTax radio ads. (*See, e.g.*, FF-195—FF-211).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Complaint Counsel further disputes the Proposed Finding in that specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a

particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

300. None of the challenged radio ads misled reasonable consumers into believing that all TurboTax SKUs were free, that TurboTax was free to everyone, that TurboTax would necessarily be free for the viewer, or any of the other claims asserted by Complaint Counsel. (*Supra* ¶¶294-299).

Response to Finding No. 300:

Complaint Counsel disputes this Proposed Finding. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign, including through the challenged radio ads, that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements, including radio ads, include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online, including via email. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-

669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

301. Accordingly, even a facial analysis of the challenged radio ads establishes that none of those ads were deceptive.

Response to Finding No. 301:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign, including through the challenged radio ads, that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements, including radio ads, include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online, including via email. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint

Counsel) (summarizing GX434 (Intuit)); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit)); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

6. Complaint Counsel’s Concessions Confirm That The Ads Did Not Convey The Claims Asserted By Complaint Counsel

302. Complaint Counsel’s failure to prove that the ads impliedly or expressly conveyed the claims alleged, or that consumers were deceived by those claims, is reinforced by their concessions both before and during trial. (Complaint Counsel’s Responses and Objections to Intuit’s Statement of Material Facts ¶17 (Sept. 8, 2022); Complaint Counsel’s Pretrial Brief at App’x B (Feb. 17, 2023); Shiller (FTC) Tr. 240; GX161 (Maxson (FTC) Dep.) at 71). Through those representations, Complaint Counsel have in essence conceded that none of the ads made the express claim Complaint Counsel contend.

Response to Finding No. 302:

Complaint Counsel disputes this Proposed Finding. Intuit misstates the record when it claims “Complaint Counsel have in essence conceded that none of the ads made the express claim Complaint Counsel contend.” This is simply untrue and none of the testimony cited supports that notion. In fact, the evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-

740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

303. Complaint Counsel conceded during summary decision that “Intuit’s Free Edition advertisements do not expressly contain the phrase ‘all consumers can file their taxes for free with TurboTax.’” (Complaint Counsel’s Responses and Objections to Intuit’s Statement of Material Facts ¶17 (Sept. 8, 2022)).

Response to Finding No. 303:

Complaint Counsel has no specific response.

304. Moreover, Appendix B to Complaint Counsel’s pretrial brief, which lists the express claims purportedly made by each challenged ad, fails to identify a single ad that expressly stated that “TurboTax is free” or any of the other claims alleged. (Complaint Counsel’s Pretrial Brief at App’x B (Feb. 17, 2023)).

Response to Finding No. 304:

Complaint Counsel disputes this Proposed Finding. “Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 n.4 (7th Cir. 1992). Even advertisements that do not use the specific terms alleged

in the Complaint can constitute the functional equivalent of express claims where, as here, they contain synonymous statements that are clear, repetitive, and unambiguous. *FTC v. Bronson Partners, LLC*, 564 F.Supp.2d 119, 128 (D. Conn. 2008). The hearing record shows that Intuit made the express free claims alleged in the Complaint (i.e., “that consumers can file their taxes for free using TurboTax,” Compl. ¶ 119), or the functional equivalent, in numerous TurboTax ads. (*See, e.g.*, FF-66—FF-466). Appendix B to Complaint Counsel’s pretrial brief identifies, catalogues, and summarizes these ads. However, the best evidence of the claims contained in the ads are the ads themselves.

There is nothing oblique or indirect about Intuit’s ads. They directly represent that TurboTax is free. For example, in 2015, Intuit told the television audience of Super Bowl XLIX: “[Y]ou can file on TurboTax for absolutely nothing.” (FF-66—FF-67). Intuit repeated this messaging in its 2016 Super Bowl Ad featuring Sir Anthony Hopkins (as himself) and claiming, “I would never tarnish my name by selling you something. Now, if I were to tell you to go to turbotax.com, it’s because TurboTax Absolute Zero lets you file your taxes for free.” (FF-70—FF-71). In 2018, Intuit told consumers: “At least your taxes are free.” (*E.g.*, FF-74—FF-75 & FF-80). In 2019, Intuit’s message to consumers was: “Free free, free free, free free! ... That’s right, TurboTax Free is free. Free, free free free.” (FF-99—FF-100 & FF-104). In 2020, Intuit told consumers Googling “free file taxes ONLINE” that the “TurboTax® Official Site” offered “100% Free Online Tax Filing.” (FF-445). And in 2021, Intuit told TikTok users that the energetic dance of its “Dance Workout” ad was: “What it feels like to file your taxes for free, aka the TurboTax #FreeFileDance.” (FF-214). These are a few among many similar ads containing express free claims or the functional equivalent. (*See, e.g.*, FF-66—FF-466). The representation and meaning of these TurboTax ads are clear, repetitive, and unambiguous: consumers can file their taxes for free using TurboTax.

305. The FTC’s rule 3.33(c)(1) agency designee could not identify a single TurboTax “advertisement saying TurboTax is free” or that “consumers can file their taxes for free using TurboTax,” and he acknowledged that the word “free” must be understood in the context of its use. (GX161 (Maxson (FTC) Dep.) at 71, 238-239).

Response to Finding No. 305:

Complaint Counsel disputes this Proposed Finding in that it takes the testimony of Bureau of Consumer Protection designee William T. Maxson out of context and presents it in a misleading manner.

During his deposition, Bureau of Consumer Protection designee William T. Maxson was asked to identify specific ads containing certain exact phrases and he testified truthfully that he could not remember the exact quotes that are used in each of the TurboTax ads. (GX161 (Maxson (BCP) Dep. at 71, 238-39). Instead of guessing or speculating, Mr. Maxson correctly pointed to the TurboTax ads identified in the complaint, the summary decision record, and the discovery taken in the case. *Id.* Not recalling a specific and exact phrase in a specific TurboTax ad is materially different from Intuit's contention in this Proposed Finding that Mr. Maxson "could not identify a single TurboTax 'advertisement saying TurboTax is free.'"

Also during his deposition, Bureau of Consumer Protection designee William T. Maxson was also asked: "If I say the words: 'And free and free and free and free and free and free,' is that an express claim that TurboTax is free?." (GX161 (Maxson (BCP) Dep. at 239). In response, Mr. Maxson testified as follows: "If you simply say that, it depends whether there is any context for the person that is hearing that statement. If you walk up to someone on the street and say that sentence, no, I'm not sure they would know what you're talking about." (GX161 (Maxson (BCP) Dep. at 239). By answering defense counsel's hypothetical question, Mr. Maxson was not making a sweeping acknowledgment that the word "free" always requires context to be understood. In any event, the context of all the challenged ads make clear that "free" pertains to the price of TurboTax. (*See, e.g.*, FF-66—FF-466; *see also* FF-958—FF-987). The evidence further shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740).

Complaint Counsel also notes that William T. Maxson was the Bureau of Consumer Protection designee and not the FTC's designee.

306. The FTC’s investigator, and Complaint Counsel’s lead witness, testified that the challenged ads do not state that “everyone can file for free using TurboTax Free Edition” or “say all TurboTax products are free,” but rather convey that a specific TurboTax product is free, that the product is available for simple tax returns only, and that further details are available on the TurboTax website. (Shiller (FTC) Tr. 234-243). Indeed, Ms. Shiller repeatedly acknowledged that the TurboTax ads contained in her declaration consistently included both written and voiceover disclosures identifying the specific TurboTax product or offer that was being advertised (such as TurboTax Free Edition), disclosing that the product or offer was available only for consumers with simple tax returns, and instructing consumers to visit the TurboTax website for more information. (Shiller (FTC) Tr. 222-224, 233, 237, 247, 249, 253-254, 256, 262-263; *see also* Shiller (FTC) Tr. 239 (reading aloud 20-second Tax Year 2021 video containing a voiceover stating that “anyone with a simple tax return can get help from an expert for free” and that “[f]or a limited time TurboTax is free for simple returns no matter how you file”).

Response to Finding No. 306:

Complaint Counsel agrees that the FTC’s investigator testified that the challenged ads do not state that “everyone can file for free using TurboTax Free Edition” or “say all TurboTax products are free.” Complaint Counsel further agrees that Ms. Shiller acknowledged that the TurboTax ads contained in her declaration consistently included both written and voiceover disclosures. Complaint Counsel disputes the remainder of the Proposed Finding in that it inaccurately summarizes Ms. Shiller’s testimony and the qualifying language she testified about.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Therefore, the qualifications contained in the ads referenced in this Proposed Finding were not adequately “conveyed” to consumers.

The fact that the words “TurboTax Free Edition” appear in an ad does not necessarily mean that consumers will understand what “TurboTax Free Edition” is and how it is different from “TurboTax.” The evidence shows that specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course

of business shows that Intuit's ads "communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live)." (FF-609). According to its own copy testing "[m]ost viewers can recall TurboTax, but only a handful mention the specific product name" when asked "Which brand do you think this ad was for?" (FF-610). In other words, consumers remember and think of the product as "TurboTax" and don't distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to "TurboTax" as the product without referencing a particular SKU. (See e.g. RX1500 at 2 (first visible consumer testimonial stating "I have been using TurboTax for years..." without specifying a SKU and third consumer testimonial stating: "TurboTax is way better than HR Block" without specifying a SKU; GX183A (two out of three customer testimonials featured refer to "TurboTax" without specifying a SKU or version).

307. FTC data analyst Megan Baburek acknowledged that challenged TurboTax ads state that free offers are for "simple tax returns only." (Baburek (FTC) Tr. 330, 336).

Response to Finding No. 307:

Complaint Counsel has no specific response.

308. Complaint Counsel similarly acknowledged in the statement of facts for their motion for summary decision that the challenged ads included the "simple tax returns only" qualification (RX600 (FTC) at Statement of Material Facts ¶¶25-37, 49-59, 90, 94-95, 100-118, 121, 123-131), and at trial Complaint Counsel conceded that "there is a simple tax returns only" qualifier in "most, if not all" of the challenged TurboTax advertisements (Evans (FTC) Tr. 45-46).

Response to Finding No. 308:

Complaint Counsel disputes the Proposed Finding in that it misdescribes the statement of facts for Complaint Counsel's motion for summary decision and misquotes Complaint Counsel's opening statement. Many, but not all, of the challenged ads included "the simple returns only" qualification. At times, Intuit has made "free" claims without any qualification. (FF-48; FF-445—FF-447). During opening statement, Complaint Counsel was going through a timeline of ads and stated: "yes, there is a simple tax returns only disclaimer on most, if not all, ads after a certain point, and I think we've passed that point, so we will continue to see it." (Evans

(Complaint Counsel) Tr. 46). Thus, Complaint Counsel’s statement about the “simple returns only” qualifier was only applicable to the more recent challenged ads and not as sweeping as suggested by the Proposed Finding as drafted.

7. The Challenged Ads Did Not Mislead Reasonable Consumers

309. Complaint Counsel contend that the disclosures in the challenged ads are insufficient to prevent deception. (Complaint Counsel’s Pretrial Brief at 44-50 (Feb. 17, 2023)). In so doing, Complaint Counsel have focused solely on the disclosures in challenged video ads (*see* Evans (FTC) Tr. 18-19; Complaint Counsel’s Pretrial Brief at 30 (Feb. 17, 2023)), and largely disregarded challenged display ads, paid-search ads, email ads, and radio ads, even though the Commission’s order denying summary decision—which also “focused heavily on [Intuit’s] video ads” (Opinion and Order Denying Summary Decision at 8 (Jan. 31, 2023))—called for “the analysis of [the] other, equally important ads [to] be further developed during the course of trial.” Complaint Counsel failed to “develop” the analysis of the challenged non-video ads—i.e., the display (both static and video), paid-search, email, and radio ads—“during the course of trial,” offering next to no analysis of those “equally important ads.” (Opinion and Order Denying Summary Decision at 8 (Jan. 31, 2023)).

Response to Finding No. 309:

Complaint Counsel objects to this Proposed Finding in that it does not set forth a factual assertion supported by the evidentiary record. Instead, this Proposed Finding is argumentative and mischaracterizes contentions or arguments made by Complaint Counsel. While Complaint Counsel challenges Intuit’s deceptive free TurboTax advertising campaign across multiple advertising and marketing channels, including television, display (both static and video), paid-search, email, and radio ads, deception on one ad on any one of these channels violates Section 5(a) of the FTC Act and would be sufficient for a finding of liability on Count I of the Complaint and entry of a cease and desist order.

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-

958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

310. As discussed, all challenged ads—video, display, paid-search, email, and radio—included disclosures that sufficiently informed consumers that there were qualifications for the free TurboTax SKUs being advertised, the nature and character of those qualifications, and where additional detail was available. (*Supra* ¶¶214-301).

Response to Finding No. 310:

Complaint Counsel disputes this Proposed Finding. At times, Intuit has made “free” claims without any qualification. (FF-48; FF-445—FF-447).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message

conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

311. Moreover, Complaint Counsel failed to introduce evidence that even without the disclosures, consumers were misled by the challenged ads.

Response to Finding No. 311:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-

503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

312. The challenged ads communicated to reasonable consumers the qualifications of free TurboTax offers, and it would not have been reasonable in light of the nature of the advertisements, their format, and the surfeit of available information for reasonable consumers to unequivocally conclude that they qualified to use TurboTax’s free SKUs based on the use of the phrase “simple tax returns only” unless consumers did, in fact, have a simple tax return. (Johnson (Intuit) Tr. 582-583; Golder (Intuit) Tr. 1115, 1119-1122, 1127-1131; *supra* ¶¶214-301).

Response to Finding No. 312:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

313. The disclosures in the challenged ads, considered as a whole, were appropriate for the audience targeted and consistent with the form or medium of advertising that was presented to consumers. (Golder (Intuit) Tr. 1105-1107, 1116-1117, 1120, 1129-1132).

Response to Finding No. 313:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

314. Just the existence of those noticeable disclosures was enough to put reasonable consumers on notice that the offer was qualified, regardless of whether consumers read or understood them. (Golder (Intuit) Tr. 1111-1112, 1119-1120, 1122). That alone renders the challenged ads not deceptive, because it means consumers viewing the ads could not reasonably have been misled into believing that all TurboTax SKUs were free or that they necessarily could file for free using TurboTax regardless of their tax situation.

Response to Finding No. 314:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Conveying "some limitation" or qualification is not sufficient under the FTC Act. Qualifying disclosures must be understandable. Deception Policy Statement, 103 F.T.C. at 180. To prevent an ad from being misleading, disclosures must convey material information in clear language "understandable to the intended audience." *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186-Orl-28TBS, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, Fed. Trade Comm'n., .com Disclosures: How to Make Effective Disclosures in Digital Advertising at 21 (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>. ("For disclosures to be effective, consumers must be able to understand them.").

Moreover, specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don't resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit's ads "communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live)." (FF-609). According to its own copy testing "[m]ost viewers can recall TurboTax, but only a handful mention the specific product name" when asked "Which brand do you think this ad was for?" (FF-610). In other words, consumers remember and think of the product as "TurboTax" and don't distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to "TurboTax" as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating "I have been using TurboTax for years..." without specifying a SKU and third consumer testimonial stating: "TurboTax is way better than HR

Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

315. Beyond communicating the existence of qualifications, the challenged ads also made consumers aware of the category of qualification and where to get more information, and did so at the level of detail appropriate for where consumers are in the buying process. (Golder (Intuit) Tr. 1104-1105, 1113-1116).

Response to Finding No. 315:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Conveying “some limitation” or qualification is not sufficient under the FTC Act. Qualifying disclosures must be understandable. Deception Policy Statement, 103 F.T.C. at 180. To prevent an ad from being misleading, disclosures must convey material information in clear language “understandable to the intended audience.” *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186-Orl-28TBS, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, Fed. Trade Comm’n., .com Disclosures: How to Make Effective Disclosures in Digital Advertising at 21 (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>. (“For disclosures to be effective, consumers must be able to understand them.”). Moreover, It is well-established that an advertiser cannot ‘cure the deception’ in one advertisement with different statements in another.” *In re ECM Biofilms, Inc.*, 160 F.T.C. 652, 734 n.75 (2015). That is especially true when the second set of disclaimers is as flawed as those on Intuit’s website.

316. In providing that information, the ads satisfied the “key criteria” of “effective disclosure[s]” by (1) communicating that the disclosures and qualifications existed; (2) informing consumers about the nature of the qualifications; (3) informing consumers where they should go to learn more about the qualifications; and (4) being appropriate for where consumers who viewed the ads were in the buying process. (Golder (Intuit) Tr. 1104-1106, 1113-1116).

Response to Finding No. 316:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Conveying "some limitation" or qualification is not sufficient under the FTC Act. Qualifying disclosures must be understandable. Deception Policy Statement, 103 F.T.C. at 180. To prevent an ad from being misleading, disclosures must convey material information in clear language "understandable to the intended audience." *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186-Orl-28TBS, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, Fed. Trade Comm'n., .com Disclosures: How to Make Effective Disclosures in Digital Advertising at 21 (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>. ("For disclosures to be effective, consumers must be able to understand them."). Moreover, It is well-established that an advertiser cannot 'cure the deception' in one advertisement with different statements in another." *In re ECM Biofilms, Inc.*, 160 F.T.C. 652, 734 n.75 (2015). That is especially true when the second set of disclaimers is as flawed as those on Intuit's website.

Complaint Counsel further disputes this Proposed Finding in that it is based on Professor Golder's analysis which omits key guidance contained in the FTC's ".com Disclosures" guidelines. For example, the FTC's ".com Disclosures" guidelines make clear that basic principles of advertising law apply to online ads including that "[a]dvertising must be truthful and not misleading." (GX316 (Complaint Counsel) at CC-00006732). The FTC's ".com Disclosures" guidelines also make clear that disclosures "cannot cure a false claim." (GX316 (Complaint Counsel) at CC-00006733). The guidelines further state that "[i]f a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive." (GX316 (Complaint Counsel) at CC-00006733). And that "[w]hether a disclosure meets this standard is measured by its performance—that is, how

consumers actually perceive and understand the disclosure within the context of the entire ad.” (GX316 (Complaint Counsel) at CC-00006734). Professor Golder did nothing to measure how consumers actually perceive the TurboTax ads and understand the disclosures within that context. He did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694). The comparative study or benchmarking conducted by Professor Golder is irrelevant to determining whether Intuit’s ads were misleading because Professor Golder made no effort to determine whether consumers saw or understood Intuit’s purported disclaimers. (FF-693; FF-702; FF-704). Therefore, Professor’s Golder’s analysis misses the forest for the trees and is not at all responsive to Complaint Counsel’s primary criticism of the TurboTax ads—that it leaves at least a significant minority of consumers with the misimpression they can file their taxes for free using TurboTax when they are not eligible to do so.

317. By identifying the specific free TurboTax SKU being offered, ads for free TurboTax SKUs inform consumers that the advertised offer does not apply to all TurboTax SKUs, but rather only the specific product being advertised. (Golder (Intuit) Tr. 1118-1120; RX96 (FTC) at 5; GX156 (Ryan (Intuit) IHT) at 130-131; Shiller (FTC) Tr. 237-243, 247, 249-257 (Ms. Shiller conceding that ads conveyed that they were for a specific, identified product or offer).

Response to Finding No. 317:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit’s purported disclaimers or qualifiers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Complain Counsel further disputes this Proposed Finding because the presence of a written reference to a specific TurboTax SKU or sub brand does not necessarily leave consumers with the impression that the offer made in the advertisement was limited to a specific TurboTax SKU. Specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub

brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

318. Just as Merriam-Webster defines the word “edition” to mean “one of the forms in which something is presented” (RX85 (Intuit) at 1), the inclusion of “TurboTax Free Edition” or other specific TurboTax SKU name in an advertisement tells consumers that only the single version of TurboTax mentioned in the ad is being offered for free (Golder (Intuit) Tr. 1118-1120; RX96 (FTC) at 5; GX156 (Ryan (Intuit) IHT) at 130-131).

Response to Finding No. 318:

Complaint Counsel disputes this Proposed Finding. Most consumers are not lawyers, and they don’t watch television or otherwise consume advertisements with the aid of a dictionary. The evidence shows that Intuit’s purported disclaimers or qualifiers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Complaint Counsel further disputes this Proposed Finding because the presence of a written reference to a specific TurboTax SKU or sub brand does not necessarily leave consumers with the impression that the offer made in the advertisement was limited to a specific TurboTax SKU. Specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub

brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (See e.g. RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

319. The challenged ads’ inclusion of the product name alone was sufficient to prevent reasonable consumers from being misled into believing that all TurboTax SKUs were free because it made clear to reasonable consumers that there were multiple TurboTax SKUs and that only the one being advertised was free. (Golder (Intuit) Tr. 1118-1119; see also RX85 (Intuit) at 1).

Response to Finding No. 319:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit’s purported disclaimers or qualifiers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (See, e.g., FF-491—FF-503; FF-669—FF-670).

Complaint Counsel further disputes this Proposed Finding because the presence of a written reference to a specific TurboTax SKU or sub brand does not necessarily leave consumers with the impression that the offer made in the advertisement was limited to a specific TurboTax SKU. Specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked

“Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694).

320. The inclusion of the product name in the challenged ads not only makes for an effective disclosure, but also is critical under the FTC’s “.com Disclosures” guidelines, which specify that “[w]hen identifying the[] claims” in an ad, the analysis must “consider the ad as a whole, including the ... product name.” (RX96 (FTC) at 5).

Response to Finding No. 320:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit’s purported disclaimers or qualifiers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Complaint Counsel further disputes this Proposed Finding because it overlooks and omits key guidance contained in the FTC’s “.com Disclosures” guidelines. For example, the FTC’s “.com Disclosures” guidelines make clear that basic principles of advertising law apply to online ads including that “[a]dvertising must be truthful and not misleading.” (GX316 (Complaint Counsel) at CC-00006732). The FTC’s “.com Disclosures” guidelines also make clear that disclosures “cannot cure a false claim.” (GX316 (Complaint Counsel) at CC-00006733). The

guidelines further state that “[i]f a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive.” (GX316 (Complaint Counsel) at CC-00006733). And that “[w]hether a disclosure meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad.” (GX316 (Complaint Counsel) at CC-00006734).

The evidence shows that consumers don’t understand the presence of a written reference to a specific TurboTax SKU or sub brand as an indication that the offer made in the advertisement is limited to a specific TurboTax SKU. Specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

321. Complaint Counsel offered no contrary evidence suggesting that the inclusion of the name of the TurboTax SKU being advertised was not an effective disclosure.

Response to Finding No. 321:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial

Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes the Proposed Finding because the evidence shows that consumers don’t understand the presence of a written reference to a specific TurboTax SKU or sub brand as an indication that the offer made in the advertisement is limited to a specific TurboTax SKU. Specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

322. By stating that free TurboTax SKUs are available for consumers with “simple tax returns only” (or similar qualifying language), the challenged ads also informed consumers that TurboTax Free Edition is not free for everyone, and that eligibility is contingent on the complexity of the consumer’s tax return—i.e., that the free offer was only for taxpayers with

“simple tax returns.” (Shiller (FTC) Tr. 237-263; Golder (Intuit) Tr. 1113-1115, 1118-1120; RX600 (FTC) at Statement of Material Facts ¶5; GX159 (Ryan (Intuit) Dep.) at 45; GX156 (Ryan (Intuit) IHT) at 135). And because the term “simple tax return” is used across the tax-preparation industry, it also allows consumers to assess their eligibility across tax-preparation products. (*Supra* ¶¶122-123, 141-144, 454, 458-459).

Response to Finding No. 322:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670).

Complaint Counsel further disputes the Proposed Finding because the evidence shows that consumers don’t understand the presence of a written reference to a specific TurboTax SKU or sub brand as an indication that the offer made in the advertisement is limited to a specific TurboTax SKU. Specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

Complaint Counsel further disputes this Proposed Finding because Intuit’s “simple returns” disclaimers are ineffective. Professor Novemsky opined that a substantial portion of the respondents have the misimpression that their returns meet TurboTax’s definition of a “simple

U.S. return.” (FF-491). He further opined that the use of the “simple returns” language as Intuit’s purported disclaimer is ineffective and fails to convey to consumers that they may not qualify for free TurboTax in a manner that is consistent with TurboTax’s qualification criteria. (FF-492—FF-495 & FF-498—FF-500). The perception survey showed that 55% of consumers ineligible for Free Edition who had not used TurboTax in the previous three years had the misimpression that they had a “simple U.S. return.” (FF-496). Of survey respondents who recently paid to use TurboTax, 28.6% thought they had a “simple return” even though they did not. (FF-497). Consumer testimony also shows that consumers do not understand the term. (FF-669—FF-670 (with one consumer testifying that “they “ha[d] no idea unless it told me — Unless TurboTax explicitly told me ‘You qualify for free,’ I would have no idea ... So I am putting my trust in them to do that” and that the phrase simple tax returns “has no connotation to me because I don’t understand what is and is not a simple tax return.”)). What is more, the fact that Intuit’s competitors use the term differently than Intuit makes it *less*, not more, likely that consumers will understand what it means. (FF-697—FF-698). Even Intuit changed the meaning of “simple returns” over time. (FF-13). Thus, the phrase “simple returns” is an ambiguous moving target that is unlikely to overcome the power of Intuit’s free claims. *See Book-of-the-Month Club*, 48 F.T.C. at 1312 (“the meaning of the word ‘free’... can never be completely eradicated’ from the consumer’s mind.”)

323. Further, by instructing consumers to “see if you qualify” and “see details at TurboTax.com,” the challenged ads conveyed to consumers that not every taxpayer qualifies for the TurboTax SKU advertised and that consumers can find more information about qualifications on the TurboTax website. (Golder (Intuit) Tr. 1123-1124).

Response to Finding No. 323:

Complaint Counsel disputes this Proposed Finding. The evidence shows that Intuit’s purported disclaimers, including “see if you qualify” and “see details at TurboTax.com,” were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-471, FF-480, FF-491—FF-503; FF-669—FF-670). Based on his consumer perception survey, Professor Novemsky opined that consumers not eligible for the TurboTax Free

Edition have the misimpression that they can file their taxes for free with TurboTax. (FF-480). According to the perception survey, ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (FF-481). The results of the consumer perception survey measured all of the information in the marketplace in mid to late March 2022 when the survey was in the field. (Novemsky (Complaint Counsel) Tr. 1826). This included measurement of any curative effect of the “see if you qualify” disclaimer language used in the challenged ads, (Novemsky (Complaint Counsel) Tr. 1826), and would have included measurement of any curative effect of the “see details at TurboTax.com” disclaimer language used in the challenged ads. (Novemsky (Complaint Counsel) Tr. 1826-27 (testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey)).

Furthermore, Professor Hauser’s disclosure efficacy survey is consistent with the results of the consumer perception survey in terms of the inadequacy of the “see if you qualify” disclaimer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Even making purported “enhancements” to ads and website pages intended to mimic TurboTax’s, where the phrase “see if you qualify” was used more prominently (though still not very prominently, *see, e.g.*, FF-759), similar to the way Intuit uses the phrase now, survey respondents showed no change in their consideration of the fictional Vertax brand and showed an *increase* in considering using the free Vertax option. (FF-765—FF-766; GX749 (Novemsky Rebuttal Expert Report) ¶ 136 (referring to Hauser disclosure efficacy survey results reported in RX1017 (Hauser Expert Report) ¶85, p. 60 Table 5 & Appendix C at C-1-6 Table 2, C-1-9 Table 3, C-1-19 Table 4)). Professor Novemsky opined: “Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims left in both stimuli.” (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Thus, Intuit’s recent changed use of the qualifying phrase “see if you qualify” in its TurboTax advertising is unlikely to have a material impact on consumers.

324. As Professor Golder explained, the “see if you qualify” language “presents the existence of the disclosure” by “clearly” informing consumers “that there will be some restrictions.” (Golder (Intuit) Tr. 1123-1124).

Response to Finding No. 324:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers, including “see if you qualify” and “see details at TurboTax.com,” were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-471, FF-480, FF-491—FF-503; FF-669—FF-670). Based on his consumer perception survey, Professor Novemsky opined that consumers not eligible for the TurboTax Free Edition have the misimpression that they can file their taxes for free with TurboTax. (FF-480). According to the perception survey, ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (FF-481). The results of the consumer perception survey measured all of the information in the marketplace in mid to late March 2022 when the survey was in the field. (Novemsky (Complaint Counsel) Tr. 1826). This included measurement of any curative effect of the “see if you qualify” disclaimer language used in the challenged ads (Novemsky (Complaint Counsel) Tr. 1826), and would have included measurement of any curative effect of the “see details at TurboTax.com” disclaimer language used in the challenged ads. ((Novemsky (Complaint Counsel) Tr. 1826-27 (testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey)).

Furthermore, Professor Hauser’s disclosure efficacy survey is consistent with the results of the consumer perception survey in terms of the inadequacy of the “see if you qualify” disclaimer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Even making purported “enhancements” to ads and website pages intended to mimic TurboTax’s, where the phrase “see if you qualify” was used more prominently (though still not very prominently, *see, e.g.*, FF-759), similar to the way Intuit uses the phrase now, survey respondents showed no change in their consideration of the fictional Vertax brand and showed an *increase* in considering using the free

Vertax option. (FF-765—FF-766; GX749 (Novemsky Rebuttal Expert Report) ¶ 136 (referring to Hauser disclosure efficacy survey results reported in RX1017 (Hauser Expert Report) ¶85, p. 60 Table 5 & Appendix C at C-1-6 Table 2, C-1-9 Table 3, C-1-19 Table 4)). Professor Novemsky opined: “Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims left in both stimuli.” (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Thus, Intuit’s recent changed use of the qualifying phrase “see if you qualify” in its TurboTax advertising is unlikely to have a material impact on consumers.

325. The “see if you qualify” and “see details at TurboTax.com” language also told consumers precisely where to go to find additional information about eligibility qualifications, satisfying yet another important criterion for effective disclosures. (Golder (Intuit) Tr. 1123-1124).

Response to Finding No. 325:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers, including “see if you qualify” and “see details at TurboTax.com,” were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-471, FF-480, FF-491—FF-503; FF-669—FF-670). Based on his consumer perception survey, Professor Novemsky opined that consumers not eligible for the TurboTax Free Edition have the misimpression that they can file their taxes for free with TurboTax. (FF-480). According to the perception survey, ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (FF-481). The results of the consumer perception survey measured all of the information in the marketplace in mid to late March 2022 when the survey was in the field. (Novemsky (Complaint Counsel) Tr. 1826). This included measurement of any curative effect of the “see if you qualify” disclaimer language used in the challenged ads, (Novemsky (Complaint Counsel) Tr. 1826), and would have included measurement of any curative effect of the “see details at TurboTax.com” disclaimer language used in the challenged ads. ((Novemsky (Complaint Counsel) Tr. 1826-27

(testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey).

Furthermore, Professor Hauser’s disclosure efficacy survey is consistent with the results of the consumer perception survey in terms of the inadequacy of the “see if you qualify” disclaimer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Even making purported “enhancements” to ads and website pages intended to mimic TurboTax’s, where the phrase “see if you qualify” was used more prominently (though still not very prominently, *see, e.g.*, FF-759), similar to the way Intuit uses the phrase now, survey respondents showed no change in their consideration of the fictional Vertax brand and showed an *increase* in considering using the free Vertax option. (FF-765—FF-766; GX749 (Novemsky Rebuttal Expert Report) ¶ 136 (referring to Hauser disclosure efficacy survey results reported in RX1017 (Hauser Expert Report) ¶85, p. 60 Table 5 & Appendix C at C-1-6 Table 2, C-1-9 Table 3, C-1-19 Table 4)). Professor Novemsky opined: “Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims left in both stimuli.” (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Thus, Intuit’s recent changed use of the qualifying phrase “see if you qualify” in its TurboTax advertising is unlikely to have a material impact on consumers.

326. The challenged ads’ instruction to visit the website was also appropriate for the stage in the buying process at which consumers viewed the challenged ads. (Golder (Intuit) Tr. 1105-1107). That invitation reinforced what consumers already knew to do, and what they routinely do for “high-involvement” products like tax-preparation software (especially products that consumers use or purchase online): go to the product’s website for further details. (Golder (Intuit) Tr. 1070-1071, 1105-1107).

Response to Finding No. 326:

Complaint Counsel disputes the Proposed Finding. It is well-established that an advertiser cannot ‘cure the deception’ in one advertisement with different statements in another.” *In re ECM Biofilms, Inc.*, 160 F.T.C. 652, 734 n.75 (2015). Conveying “some limitation” or the mere existence of qualifying information to be found elsewhere is not sufficient under the FTC Act. Qualifying disclosures must be understandable. Deception Policy Statement, 103 F.T.C. at 180.

To prevent an ad from being misleading, disclosures must convey material information in clear language “understandable to the intended audience.” *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186-Orl-28TBS, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, Fed. Trade Comm'n., .com Disclosures: How to Make Effective Disclosures in Digital Advertising at 21 (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>. (“For disclosures to be effective, consumers must be able to understand them.”). Pointing consumers to a website does not accomplish this.

327. Complaint Counsel offered no contrary evidence suggesting that the inclusion of “see details at trubotax.com” or “see if you qualify at turbotax.com” was not an effective disclosure.

Response to Finding No. 327:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding in that the evidence shows that Intuit’s purported disclaimers, including “see if you qualify” and “see details at TurboTax.com,” were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-471, FF-480, FF-491—FF-503; FF-669—FF-670). Based on his consumer perception survey, Professor Novemsky opined that consumers not eligible for the TurboTax Free Edition have the misimpression that they can file their taxes for free with TurboTax. (FF-480). According to the perception survey, ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (FF-481). The results of the consumer perception survey measured all of the information in the marketplace in mid to late March 2022 when the survey was in the field. (Novemsky (Complaint

Counsel) Tr. 1826). This included measurement of any curative effect of the “see if you qualify” disclaimer language used in the challenged ads. (Novemsky (Complaint Counsel) Tr. 1826). And would have included measurement of any curative effect of the “see details at TurboTax.com” disclaimer language used in the challenged ads. ((Novemsky (Complaint Counsel) Tr. 1826-27 (testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey)).

Furthermore, Professor Hauser’s disclosure efficacy survey is consistent with the results of the consumer perception survey in terms of the inadequacy of the “see if you qualify” disclaimer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Even making purported “enhancements” to ads and website pages intended to mimic TurboTax’s, where the phrase “see if you qualify” was used more prominently (though still not very prominently, *see, e.g.*, FF-759), similar to the way Intuit uses the phrase now, survey respondents showed no change in their consideration of the fictional Vertax brand and showed an *increase* in considering using the free Vertax option. (FF-765—FF-766; GX749 (Novemsky Rebuttal Expert Report) ¶ 136 (referring to Hauser disclosure efficacy survey results reported in RX1017 (Hauser Expert Report) ¶85, p. 60 Table 5 & Appendix C at C-1-6 Table 2, C-1-9 Table 3, C-1-19 Table 4)). Professor Novemsky opined: “Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims left in both stimuli.” (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Thus, Intuit’s recent changed use of the qualifying phrase “see if you qualify” in its TurboTax advertising is unlikely to have a material impact on consumers.

328. Moreover, because the challenged ads “specifically invoked” the website, or linked directly to it, the TurboTax website content was effectively “integrated” into the ads themselves. (Golder (Intuit) Tr. 1124-1126; RX1018 (Golder Expert Report) ¶103).

Response to Finding No. 328:

Complaint Counsel disputes the Proposed Finding. It is well-established that an advertiser cannot ‘cure the deception’ in one advertisement with different statements in another.” *In re ECM*

Biofilms, Inc., 160 F.T.C. 652, 734 n.75 (2015). Conveying “some limitation” or the mere existence of qualifying information to be found elsewhere is not sufficient under the FTC Act. Qualifying disclosures must be understandable. Deception Policy Statement, 103 F.T.C. at 180. To prevent an ad from being misleading, disclosures must convey material information in clear language “understandable to the intended audience.” *FTC v. Direct Benefits Group, LLC*, No. 6:11-cv-1186-Orl-28TBS, 2013 U.S. Dist. LEXIS 100593, at *48 (M.D. Fla. Jul. 18, 2013); *see also*, Fed. Trade Comm'n., .com Disclosures: How to Make Effective Disclosures in Digital Advertising at 21 (Mar. 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>. (“For disclosures to be effective, consumers must be able to understand them.”). Pointing consumers to a website does not accomplish this.

329. Indeed, the website is *completely* integrated into the TurboTax product experience, as consumers must visit it (or the mobile application) to use TurboTax Free Edition. (Johnson (Intuit) Tr. 593, Golder (Intuit) Tr. 1125-1126, 1068).

Response to Finding No. 329:

Complaint Counsel has no specific response.

330. Considering the detailed information about the qualifications for free TurboTax SKUs provided on the TurboTax website makes clear that reasonable consumers were not deceived by the challenged ads. (*Infra* ¶¶364-441).

Response to Finding No. 330:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their

taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

331. Complaint Counsel failed to offer evidence that providing additional or more detailed disclosures in ads for free TurboTax SKUs would be helpful to consumers.

Response to Finding No. 331:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Furthermore, it is not Complaint Counsel’s burden to offer such evidence as it is not relevant to any of the elements necessary to prove deception. Moreover, this Proposed Finding ignores the following guidance contained in the FTC’s .com Disclosures: How to Make Effective Disclosures in Digital Advertising: “If a disclosure is necessary to prevent an

advertisement from being deceptive, unfair, or otherwise violated of a Commission rule, and it is not possible to make the disclosure clearly and conspicuously, then that ad should not be disseminated.” (GX316 (Complaint Counsel) at CC-00006728).

332. Rather, evidence shows that providing a more detailed description of qualifications for free TurboTax SKUs in ads with space and time constraints—such as brand video, display, paid-search, and radio ads—would confuse consumers by providing too much information for them to process. (Ryan (Intuit) Tr. 776-777; Golder (Intuit) Tr. 1105-1107, 1173-1174, 1177; RX1018 (Golder Expert Report) ¶231).

Response to Finding No. 332:

Complaint Counsel disputes the Proposed Finding. The evidence and testimony offered on this is speculative and not based on scientific study of consumer perceptions. Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers let alone additional disclaimers that may or may not be required pursuant to a potential cease and desist order in this matter. (FF-683—FF-685; FF-687; FF-693—FF-694). Moreover, this Proposed Finding ignores the following guidance contained in the FTC’s .com Disclosures: How to Make Effective Disclosures in Digital Advertising: “If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violated of a Commission rule, and it is not possible to make the disclosure clearly and conspicuously, then that ad should not be disseminated. This means that if a particular platform does not provide an opportunity to make clear and conspicuous disclosures, then that platform should not be used to disseminate advertisements that require disclosures.” (GX316 (Complaint Counsel) at CC-00006728).

333. Intuit executives explained that “[c]onsumers don’t really understand tax speak” (Johnson (Intuit) Tr. 599), and consequently detailing the tax forms covered by free TurboTax SKUs in ads with limited space and duration would be “ (Ryan (Intuit) Tr. 777); Rubin (Intuit) Tr. 1543-1544 (testifying that it would be “confusing for consumers” to list tax forms in ads)).

Response to Finding No. 333:

Complaint Counsel disputes the Proposed Finding. The testimony offered on this is speculative and not based on scientific study of consumer perceptions. Complaint Counsel further disputes this Proposed Finding because it partially relies on unreliable and self-serving lay opinions of Intuit business executives who lack the expertise and have not done the work necessary to understand the perceptions of reasonable consumers. They did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers let alone additional disclaimers that may or may not be required pursuant to a potential cease and desist order in this matter. (FF-683—FF-685; FF-687; FF-693—FF-694). Moreover, this Proposed Finding ignores the following guidance contained in the FTC’s .com Disclosures: How to Make Effective Disclosures in Digital Advertising: “If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violated of a Commission rule, and it is not possible to make the disclosure clearly and conspicuously, then that ad should not be disseminated. This means that if a particular platform does not provide an opportunity to make clear and conspicuous disclosures, then that platform should not be used to disseminate advertisements that require disclosures.” (GX316 (Complaint Counsel) at CC-00006728).

334. Looking at the challenged advertisements as a whole, reasonable consumers understand that not all TurboTax SKUs are free and that TurboTax is not necessarily free for them. (Golder (Intuit) Tr. 1095-1097; Rubin (Intuit) Tr. 1524; Johnson (Intuit) Tr. 605; RX1018 (Golder Expert Report) ¶167).

Response to Finding No. 334:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-

987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Survey evidence from Professor Novemsky shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486—FF-487). What is more, consumer testimony (FF-664) and consumer complaints and customer reviews received by Intuit (FF-619; FF-620; FF-623; FF-635—FF-662) also show that many consumers had the expectation that they could use TurboTax for free when that was not the case. (*See, e.g.*, FF-642 (“Your TV commercials are a big lie, this company should be put out of

business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”).

E. Current TurboTax Advertisements

335. Intuit’s current (i.e., Tax Year 2022) ads for free TurboTax SKUs all clearly and prominently disclose qualifications to file for free and invite consumers to see if they qualify at the TurboTax website. Nearly all of the ads, for example, specify that the free offer is for “simple tax returns only.” (*Infra* ¶¶337-338, 340-347, 350, 362). And all of the ads invite consumers to “see if you qualify” on the TurboTax website. (*Infra* ¶¶337-338, 340-347, 349-350, 362).

Response to Finding No. 335:

Complaint Counsel disputes this Proposed Finding. Intuit’s current free TurboTax ads make free claims substantially similar to the free claims in the challenged ads. While Intuit’s current TurboTax ads repeat the word “free” fewer times than the ads that aired in March 2022 when this case commenced, Intuit’s current TurboTax ads include multiple “free” claims. For example, the TY22 “Lasso” 15 second TurboTax video ad (RX1444 (Intuit)) includes two free claims: (1) a voiceover that states: “Filing a simple return for free with the help of a TurboTax expert. See if you qualify at turbotax.com” (RX1444 (Intuit) at 00:05); and (2) a prominent written claim that appears on the screen in bright yellow cursive and states: “File Free with Expert Help.” (RX1444 (Intuit) at 00:11). The TY22 “Roller Boogie” 15 second TurboTax video ad (RX1449 (Intuit)) and the TY22 “Taxbourine” 15 second TurboTax video ad (RX1470 (Intuit)) contain the same repeated free claims. Similarly, the TY22 TurboTax website (RX1500 (Intuit)) includes multiple free claims including: (1) a large \$0 behind Tax expert Claudell in the middle of the page; (2) the claim “Fill 100% FREE with expert help” in the middle of the page next to Claudell; (3) and the claim: “Get live help from tax experts, plus a final review before you file – all free” also in the middle of the page next to Claudell. So, a consumer that watched the TY22 Lasso video ad and then went to the TY22 TurboTax homepage would have been exposed to at least five free claims. (RX1444 (Intuit); RX1500 (Intuit)).

Intuit’s current free TurboTax ads also contain qualifying phrases similar to those in the more recent (TY 2021) challenged ads. The evidence shows that Intuit’s purported disclaimers

and qualifying phrases, including “see if you qualify” and “see details at TurboTax.com,” were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims in the challenged ads. (*See, e.g.*, FF-471, FF-480, FF-491—FF-503; FF-669—FF-670). Based on his consumer perception survey, Professor Novemsky opined that consumers not eligible for the TurboTax Free Edition have the misimpression that they can file their taxes for free with TurboTax. (FF-480). According to the perception survey, ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (FF-481). The results of the consumer perception survey measured all of the information in the marketplace in mid to late March 2022 when the survey was in the field. (Novemsky (Complaint Counsel) Tr. 1826). This included measurement of any curative effect of the “see if you qualify” disclaimer language used in the challenged ads. (Novemsky (Complaint Counsel) Tr. 1826). And would have included measurement of any curative effect of the “see details at TurboTax.com” disclaimer language used in the challenged ads. ((Novemsky (Complaint Counsel) Tr. 1826-27 (testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey)).

Furthermore, Professor Hauser’s disclosure efficacy survey is consistent with the results of the consumer perception survey in terms of the inadequacy of the “see if you qualify” disclaimer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Even making purported “enhancements” to ads and website pages intended to mimic TurboTax’s, where the phrase “see if you qualify” was used more prominently (though still not very prominently, *see, e.g.*, FF-759), similar to the way Intuit uses the phrase now, survey respondents showed no change in their consideration of the fictional Vertax brand and showed an *increase* in considering using the free Vertax option. (FF-765—FF-766; GX749 (Novemsky Rebuttal Expert Report) ¶ 136 (referring to Hauser disclosure efficacy survey results reported in RX1017 (Hauser Expert Report) ¶85, p. 60 Table 5 & Appendix C at C-1-6 Table 2, C-1-9 Table 3, C-1-19 Table 4)). Professor Novemsky opined: “Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive

impression left by the “free” claims left in both stimuli.” (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Thus, Intuit’s recent changed use of the qualifying phrase “see if you qualify” in its TurboTax advertising is unlikely to have a material impact on consumers.

Based on the foregoing evidence regarding the challenged TurboTax free ads, it is likely that Intuit’s current free TurboTax ads are also deceptive.

336. Complaint Counsel concedes that current ads are not “at issue” for purposes of determining Intuit’s liability. (Anguizola (FTC) Tr. 1002, 1838-1839). Neither of Complaint Counsel’s fact witnesses—Ms. Shiller and Ms. Baburek—testified about Intuit’s current advertising for free TurboTax SKUs.

Response to Finding No. 336:

Complaint Counsel agrees that the current ads are not “at issue” for purposes of determining Intuit’s liability. Complaint Counsel has no specific response regarding the remainder of the Proposed Finding.

1. Brand Video Advertisements

337. Tax Year 2022 brand video ads for free TurboTax SKUs include prominent written disclosures stating, “Simple returns only. See if you qualify at TurboTax.com.” The ads also identify the specific SKU being advertised as free. (RX1444 (Intuit); RX1445 (Intuit); RX1446 (Intuit); RX1447 (Intuit); RX1449 (Intuit); RX1451 (Intuit); RX1452 (Intuit); RX1453 (Intuit); RX1547 (Intuit)).

Response to Finding No. 337:

Complaint Counsel agrees Tax Year 2022 brand video ads for free TurboTax include written disclosures stating “Simple returns only. See if you qualify at TurboTax.com.” The ads also contain the name of a specific SKU or TurboTax sub brand and include free claims. Complaint Counsel disputes the remainder of the Proposed Finding. Intuit’s disclaimers are not “prominent” in the context of the more prominent and more powerful free claims in the advertising. Free claims are powerful, *see Book-of-the-Month Club*, 48 F.T.C. at 1312 (“the meaning of the word ‘free’ ... can never be completely eradicated’ from the consumer’s mind.”), and are likely to distract from and overshadow the qualifying phrases contained in the ads.

(RX1444 (Intuit); RX1445 (Intuit); RX1446 (Intuit); RX1447 (Intuit); RX1449 (Intuit); RX1451 (Intuit); RX1452 (Intuit); RX1453 (Intuit); RX1547 (Intuit)).

The evidence also shows that Intuit’s purported disclaimers, including “see if you qualify” and “see details at TurboTax.com,” were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-471, FF-480, FF-491—FF-503; FF-669—FF-670). Based on his consumer perception survey, Professor Novemsky opined that consumers not eligible for the TurboTax Free Edition have the misimpression that they can file their taxes for free with TurboTax. (FF-480). According to the perception survey, ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (FF-481). The results of the consumer perception survey measured all of the information in the marketplace in mid to late March 2022 when the survey was in the field. (Novemsky (Complaint Counsel) Tr. 1826). This included measurement of any curative effect of the “see if you qualify” disclaimer language used in the challenged ads. (Novemsky (Complaint Counsel) Tr. 1826). And would have included measurement of any curative effect of the “see details at TurboTax.com” disclaimer language used in the challenged ads. ((Novemsky (Complaint Counsel) Tr. 1826-27 (testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey)).

Furthermore, Professor Hauser’s disclosure efficacy survey is consistent with the results of the consumer perception survey in terms of the inadequacy of the “see if you qualify” disclaimer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Even making purported “enhancements” to ads and website pages intended to mimic TurboTax’s, where the phrase “see if you qualify” was used more prominently (though still not very prominently, *see, e.g.*, FF-759), similar to the way Intuit uses the phrase now, survey respondents showed no change in their consideration of the fictional Vertax brand and showed an *increase* in considering using the free Vertax option. (FF-765—FF-766; GX749 (Novemsky Rebuttal Expert Report) ¶ 136 (referring to Hauser disclosure efficacy survey results reported in RX1017 (Hauser Expert Report) ¶85, p. 60 Table 5 & Appendix C at C-1-6 Table 2, C-1-9 Table 3, C-1-19 Table 4)). Professor Novemsky

opined: “Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims left in both stimuli.” (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Thus, Intuit’s recent changed use of the qualifying phrase “see if you qualify” in its TurboTax advertising is unlikely to have a material impact on consumers.

Moreover, specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (See e.g. RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

338. Tax Year 2022 TurboTax brand video ads that include verbal “free” claims also include spoken voiceovers stating that free filing is available only to consumers “filing a simple return” and inviting consumers to “see if you qualify at turbotax.com.” (RX1444 (Intuit); RX1445 (Intuit); RX1449 (Intuit); RX1452 (Intuit); RX1547 (Intuit)).

Response to Finding No. 338:

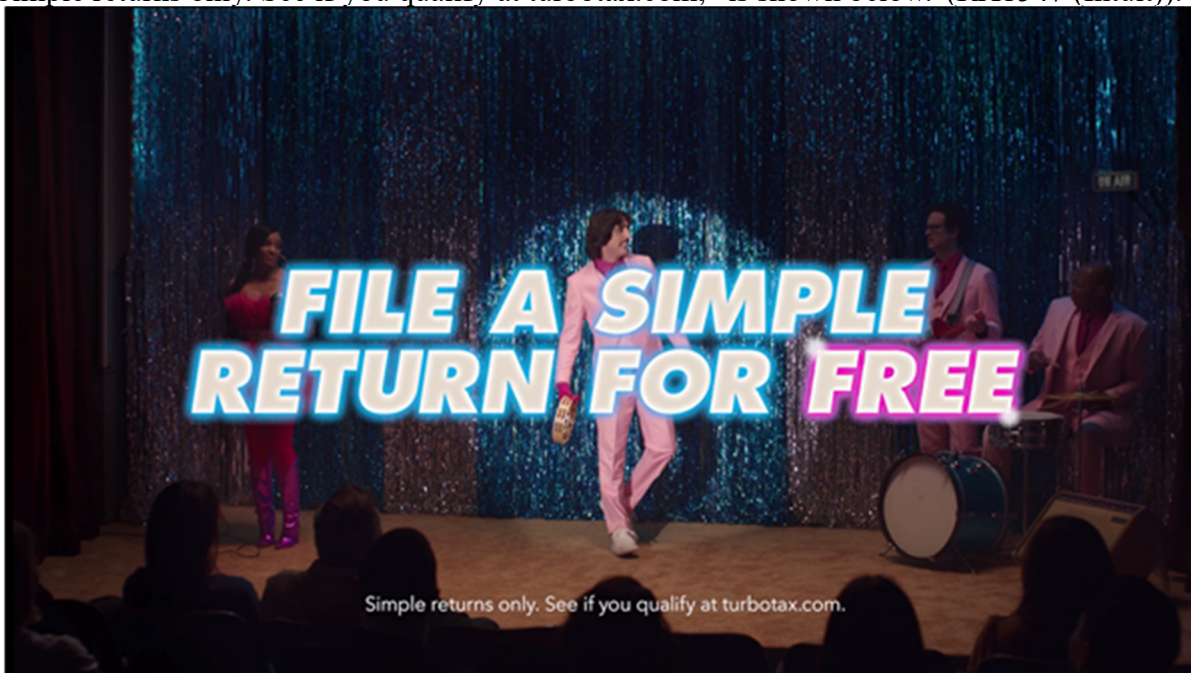
Complaint Counsel has no specific response.

339. Tax Year 2022 brand video ads for TurboTax Free Edition also include prominent text stating, “File A Simple Return For Free.” (RX1547 (Intuit)).

Response to Finding No. 339:

Complaint Counsel has no specific response.

340. A screenshot of the Tax Year 2022 TurboTax Free Edition brand video ad (“Taxbourine”) with the text “File A Simple Return For Free” and a written disclosure that reads, “Simple returns only. See if you qualify at turbotax.com,” is shown below. (RX1547 (Intuit)).

**Response to Finding No. 340:**

Complaint Counsel has no specific response.

341. A screenshot of the title card from the “Taxbourine” Tax Year 2022 TurboTax brand video ad showing both the name of the advertised SKU, TurboTax Free Edition, and a disclosure that reads “Simple tax returns only. See if you qualify at turbotax.com,” is provided below. (RX1547 (Intuit)).



Response to Finding No. 341:

Complaint Counsel has no specific response.

2. Display Advertisements

342. Intuit’s Tax Year 2022 video display ads for free TurboTax SKUs all include prominent written disclosures stating both “Simple tax returns only” and “See if you qualify.” They also all identify the product being advertised—TurboTax Free Edition or TurboTax Live Basic—by displaying the Free Edition logo on-screen during the ad. (GX730 (FTC); GX731 (FTC); GX732 (FTC); GX733 (FTC); GX734 (FTC); GX735 (FTC); GX736 (FTC); GX737 (FTC); GX738 (FTC); GX739 (FTC); GX740 (FTC); GX741 (FTC); RX1421 (Intuit); RX1423 (Intuit); RX1428 (Intuit); RX1429 (Intuit); RX1430 (Intuit); RX1454 (Intuit); RX1455 (Intuit); RX1456 (Intuit); RX1457 (Intuit); RX1458 (Intuit); RX1459 (Intuit); RX1460 (Intuit); RX1461 (Intuit); RX1462 (Intuit); RX1463 (Intuit); RX1464 (Intuit); RX1465 (Intuit); RX1466 (Intuit); RX1467 (Intuit); RX1468 (Intuit); RX1469 (Intuit); RX1470 (Intuit); RX1471 (Intuit); RX1472 (Intuit); RX1473 (Intuit); RX1474 (Intuit); RX1475 (Intuit); RX1476 (Intuit); RX1477 (Intuit); RX1478 (Intuit); RX1479 (Intuit); RX1480 (Intuit); RX1481 (Intuit); RX1482 (Intuit); RX1483 (Intuit); RX1484 (Intuit); RX1485 (Intuit); RX1486 (Intuit); RX1487 (Intuit); RX1488 (Intuit); RX1489 (Intuit); RX1480 (Intuit); RX1481 (Intuit); RX1482 (Intuit); RX1483 (Intuit); RX1484 (Intuit); RX1485 (Intuit); RX1486 (Intuit); RX1487 (Intuit); RX1488 (Intuit); RX1489 (Intuit)).

Response to Finding No. 342:

Complaint Counsel agrees Tax Year 2022 video display ads for free TurboTax include written disclosures stating, “Simple tax returns only” and “See if you qualify.” The ads also

contain the name and/or logo of a specific SKU or TurboTax sub brand and include free claims.

Complaint Counsel disputes the remainder of the Proposed Finding. Intuit's disclaimers are not

"prominent" in the context of the more prominent and more powerful free claims in the

advertising. Free claims are powerful, *see Book-of-the-Month Club*, 48 F.T.C. at 1312 ("the

meaning of the word 'free'... can never be completely eradicated' from the consumer's mind."),

and are likely to distract from and overshadow the qualifying phrases contained in the ads.

(RX1444 (Intuit); RX1445 (Intuit); RX1446 (Intuit); RX1447 (Intuit); RX1449 (Intuit); RX1451

(Intuit); RX1452 (Intuit); RX1453 (Intuit); RX1547 (Intuit)). Moreover, specific TurboTax SKUs

or sub brands such as TurboTax Free Edition or TurboTax Live don't resonate with consumers

beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in

the ordinary course of business shows that Intuit's ads "communicate the parent brand, TurboTax

well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live)." (FF-

609). According to its own copy testing "[m]ost viewers can recall TurboTax, but only a handful

mention the specific product name" when asked "Which brand do you think this ad was for?"

(FF-610). In other words, consumers remember and think of the product as "TurboTax" and

don't distinguish between SKUs. This reality is also reflected in testimonials and many customer

reviews where consumers typically refer to "TurboTax" as the product without referencing a

particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating "I have been

using TurboTax for years..." without specifying a SKU and third consumer testimonial stating:

"TurboTax is way better than HR Block" without specifying a SKU; GX183A (two out of three

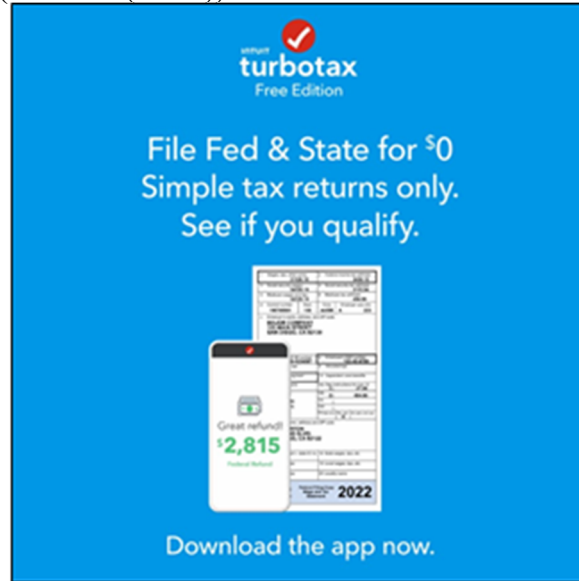
customer testimonials featured refer to "TurboTax" without specifying a SKU or version).

343. The Tax Year 2022 video display ads for free TurboTax SKUs that include verbal free claims also include a spoken voiceover stating that consumers can file "a simple return for free" or that free filing is available for "simple returns only." All video display ads with verbal free claims also invite consumers to "see if you qualify" at the TurboTax website. (RX1421 (Intuit); RX1423 (Intuit); RX1428 (Intuit); RX1429 (Intuit); RX1430 (Intuit); RX1454 (Intuit); RX1455 (Intuit); RX1456 (Intuit); RX1457 (Intuit); RX1462 (Intuit); RX1463 (Intuit); RX1464 (Intuit); RX1465 (Intuit); RX1470 (Intuit); RX1471 (Intuit); RX1472 (Intuit); RX1473 (Intuit)).

Response to Finding No. 343:

Complaint Counsel has no specific response.

344. A screenshot from an example Tax Year 2022 video display ad for a free TurboTax SKU is provided below. (RX1421 (Intuit)).

**Response to Finding No. 344:**

Complaint Counsel has no specific response.

345. TurboTax’s Tax Year 2022 static display ads for free TurboTax SKUs all include prominent written disclosures stating “Simple tax returns only. See if you qualify,” and identify the product being advertised—TurboTax Free Edition or TurboTax Live Basic—by displaying the Free Edition or Live Basic logo. (GX730 (FTC); GX731 (FTC); GX732 (FTC); GX733 (FTC); GX734 (FTC); GX735 (FTC); GX736 (FTC); GX737 (FTC); GX738 (FTC); GX739 (FTC); GX740 (FTC); GX741 (FTC); RX1419 (Intuit); RX1420 (Intuit); RX1422 (Intuit); RX1424 (Intuit); RX1425 (Intuit); RX1426 (Intuit); RX1427 (Intuit); RX1431 (Intuit); RX1432 (Intuit); RX1433 (Intuit); RX1434 (Intuit); RX1435 (Intuit)). Consumers who click on any Tax Year 2022 display ad are taken to a TurboTax Free Edition or TurboTax Live Basic landing page, where they see detailed information about the SKU’s qualifications. (Ryan (Intuit) Tr. 757; Johnson (Intuit) 595-596; Rubin (Intuit) 1563-1565; *infra* ¶¶385-498; *see also* JX1 ¶61).

Response to Finding No. 345:

Complaint Counsel agrees Tax Year 2022 static display ads for free TurboTax include written disclosures stating, “Simple tax returns only” and “See if you qualify.” The ads also contain the name and/or logo of a specific SKU or TurboTax sub brand and include free claims. Complaint Counsel disputes the remainder of the Proposed Finding. Intuit’s disclaimers are not

“prominent” in the context of the more prominent and more powerful free claims in the advertising. Free claims are powerful, *see Book-of-the-Month Club*, 48 F.T.C. at 1312 (“the meaning of the word ‘free’... can never be completely eradicated’ from the consumer’s mind.”), and are likely to distract from and overshadow the qualifying phrases contained in the ads. (RX1444 (Intuit); RX1445 (Intuit); RX1446 (Intuit); RX1447 (Intuit); RX1449 (Intuit); RX1451 (Intuit); RX1452 (Intuit); RX1453 (Intuit); RX1547 (Intuit)). Moreover, specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

346. A screenshot of an exemplary Tax Year 2022 static display ad for a free TurboTax SKUs is provided below. (GX734 (FTC)).



Response to Finding No. 346:

Complaint Counsel has no specific response.

3. Paid-Search Advertisements

347. Intuit’s Tax Year 2022 paid-search ads for free TurboTax SKUs include prominent written disclosures stating, for example, “See if you qualify today” and “Free for Simple Tax Returns Only With TurboTax Free Edition.” They also indicate that the ad is for a specific SKU. (GX723 (FTC); GX724 (FTC); GX725 (FTC); GX726 (FTC); GX727 (FTC); GX728 (FTC); GX729 (Intuit); RX1436 (Intuit); RX1437 (Intuit); RX1438 (Intuit); RX1439 (Intuit); RX1440 (Intuit); RX1442 (Intuit); RX1443 (Intuit)).

Response to Finding No. 347:

Complaint Counsel agrees Tax Year 2022 static display ads for free TurboTax include written disclosures stating, “Simple tax returns only” and “See if you qualify.” The ads also contain the name and/or logo of a specific SKU or TurboTax sub brand and include free claims.

Complaint Counsel disputes the remainder of the Proposed Finding. Intuit's disclaimers are not "prominent" in the context of the more prominent and more powerful free claims in the advertising. Free claims are powerful, *see Book-of-the-Month Club*, 48 F.T.C. at 1312 ("the meaning of the word 'free'... can never be completely eradicated' from the consumer's mind."), and are likely to distract from and overshadow the qualifying phrases contained in the ads. (RX1444 (Intuit); RX1445 (Intuit); RX1446 (Intuit); RX1447 (Intuit); RX1449 (Intuit); RX1451 (Intuit); RX1452 (Intuit); RX1453 (Intuit); RX1547 (Intuit)). Moreover, specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don't resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit's ads "communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live)." (FF-609). According to its own copy testing "[m]ost viewers can recall TurboTax, but only a handful mention the specific product name" when asked "Which brand do you think this ad was for?" (FF-610). In other words, consumers remember and think of the product as "TurboTax" and don't distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to "TurboTax" as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating "I have been using TurboTax for years..." without specifying a SKU and third consumer testimonial stating: "TurboTax is way better than HR Block" without specifying a SKU; GX183A (two out of three customer testimonials featured refer to "TurboTax" without specifying a SKU or version).

348. Consumers who click on any of the Tax Year 2022 paid-search ads for free TurboTax SKUs are taken directly to a TurboTax Free Edition or TurboTax Live Basic landing page, where they see detailed information about Free Edition's qualifications. (Johnson (Intuit) 595-596; Ryan (Intuit) Tr. 697; Rubin (Intuit) 1563-1565; *infra* ¶¶385-398).

Response to Finding No. 348:

Complaint Counsel agrees that, in many instances, consumers who click on the Tax Year 2022 paid-search ads containing free claims are taken directly to webpages on the TurboTax website and disputes the remainder of this Proposed Finding. Even though the TurboTax website

contains qualifying information, it is not clear that consumers see it, read it, or understand it. In fact, the evidence shows that Intuit's purported disclaimers in the challenged ads and websites were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Like the challenged ads and websites, the Tax Year 2022 website contains prominent and powerful free claims and similar disclaimer language that is likely to be ineffective.

In analyzing the effectiveness of any qualifications on the TurboTax website, it is critical to first understand that the website repeats the express false "free" claims contained in the display ads and other TurboTax ads consumers are exposed to. (RX944 (Intuit) at INTUIT-FTC-PART3-000612557 ("File 100% FREE with expert help: Get live help from tax experts, plus a final review before you file—all free.") & INTUIT-FTC-PART3-000612559 ("FREE \$0 Fed \$0 State \$0 To File;" "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."); RX1500 (Intuit) (featuring a large, prominent neon blue \$0 behind tax expert "Claudell" next to the following free claim: "File 100% FREE with expert help: Get live help from tax experts, plus a final review before you file—all free" appearing at the top of the fold on the TY2022 TurboTax homepage). Those claims are enticing to consumers and likely distract them from any qualifications found on the TurboTax website. When consumers click on Intuit's advertisements and arrive at the TurboTax website, the website contains additional false and deceptive "free" claims.

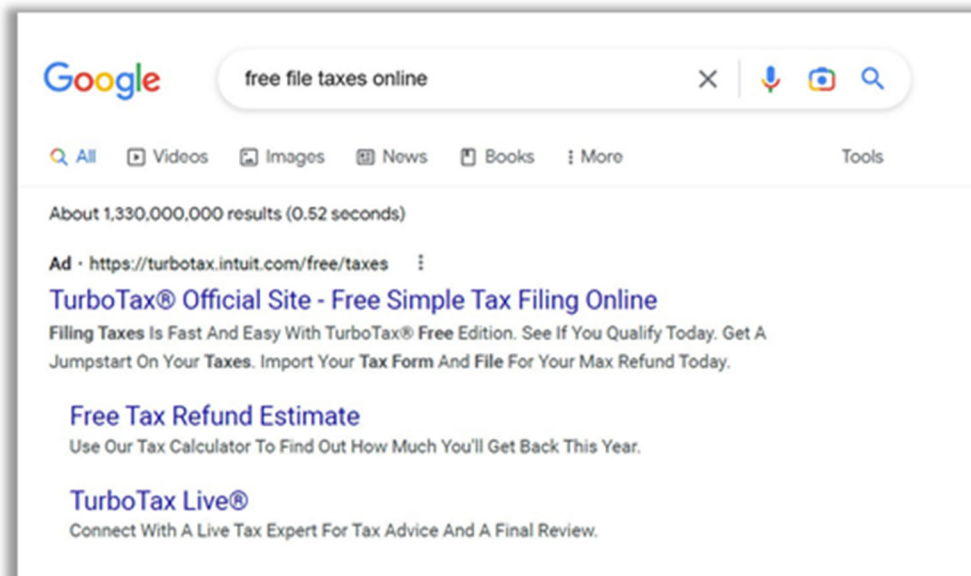
For example, Intuit's TY2022 TurboTax website homepage features a large, prominent neon blue \$0 behind tax expert "Claudell." (RX1500 (Intuit)). The following free claim appears next to "Claudell" and the neon blue \$0: "File 100% FREE with expert help: Get live help from tax experts, plus a final review before you file—all free." (RX1500 (Intuit)). These free claims appear at the top of the fold on the TY2022 TurboTax homepage. (RX1500 (Intuit)). They are more prominent and powerful than any qualifying information contained on the TY2022 TurboTax homepage and they reinforce the free claims consumers would have seen in the other advertisements that enticed them to navigate to the website or that bring them directly to it.

Any purported disclaimers on the TurboTax TY2022 website are inadequate to correct the express false claims and deceptive net impression made by its “free” advertising. The TurboTax TY 2022 homepage website disclaimers include the words “Simple tax returns only” preceding a hyperlink on the words “See if you qualify.” (RX1500 (Intuit) at 1). When Professor Hauser tested a substantially similar disclaimer in his disclosure efficacy survey, he found that it had no effect when compared to the previous version of the disclaimer which was found to be inadequate and ineffective in Professor Novemsky’s consumer perception survey. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136) (“Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims left in both stimuli.”)). The mouse print disclaimers that appear if a consumer scrolls several screens down to the bottom of the TY 2022 TurboTax homepage are equally ineffective. *See FTC v. US Sales Corp.*, 785 F. Supp. 737, 751 (N.D. Ill. 1992) (holding that fine print disclaimers at the bottom of the screen in TV ads were “simply not readable and [have] no effect on the overall impression of the advertisement”); *see also Fleetcor*, 2022 WL 3273286, at *9 & n.6 (“Courts ... across the country have determined that, where a disclaimer is buried in fine print and is without accentuation, it is insufficient to alter the net impression.”) (citing cases); *Cyberspace.com*, 453 F.3d at 1200 (fine print disclaimer no defense if net impression is still misleading); *Grant Connect*, 827 F. Supp. 2d at 1214, 1220-21.

The purported website disclaimers appearing behind the “See if you qualify” hyperlink on the TY 2022 TurboTax website are wholly inadequate to correct the express false claim and deceptive net impression made by Intuit’s ads and the prominent “100% Free” and “\$0” claim on the website. Such hyperlink disclaimers are inadequate where, as here, the eligibility requirements of the “free” offer are integral to the “free” claim—consumers had to decide to click on the hyperlink to trigger a pop-up explaining the limitations, which is insufficient. (*See .com Disclosures: How to Make Effective Disclosures in Digital Advertising* (Mar. 2013) (marked GX316 (Complaint Counsel)), at 10 (“Disclosures that are an *integral part of a claim* or

inseparable from it should not be communicated through a hyperlink. Instead, they should be placed on the same page and immediately next to the claim, and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information. This is *particularly true for cost information* or certain health and safety disclosures.” (emphasis added)) As Professor Novemsky opines, consumers are unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-503; *see also* GX316 (Complaint Counsel) at 14 (“Some consumers may not read information in pop-up windows or interstitials because they immediately close the pop-ups or move to the next page in pursuit of completing their intended tasks, or because they don’t associate information in a pop-up window or on an interstitial page to a claim or product they haven’t encountered yet.”)). These hyperlinked disclaimers are dramatically less prominent than the advertising claims on the page, e.g., “100% FREE.” *See* Deception Policy Statement, at 180 (“Other practices of the company may direct consumers’ attention away from the qualifying disclosures.”).

349. A screenshot of an exemplary Tax Year 2022 paid-search ad for a free TurboTax SKU is provided below. (RX1440 (Intuit)).



Response to Finding No. 349:

Complaint Counsel has no specific response.

4. Email Advertisements

350. Intuit's Tax Year 2022 email ads for free TurboTax SKUs include prominent written disclosures directly underneath the offer to file for free, stating "TurboTax Free Edition, for simple returns only. See if you qualify." (RX1431 (Intuit); RX1432 (Intuit); RX1433 (Intuit); RX1434 (Intuit); RX1435 (Intuit)). The ads also include written disclosures stating that "Not all taxpayers" qualify and enumerating the eligibility qualifications for simple tax returns. (RX1431 (Intuit); RX1432 (Intuit); RX1433 (Intuit); RX1434 (Intuit); RX1435 (Intuit)).

Response to Finding No. 350:

Complaint Counsel agrees Tax Year 2022 email ads for free TurboTax include written disclosures stating "TurboTax Free Edition, for simple returns only. See if you qualify." The ads also contain written disclosures stating that "Not all taxpayers" qualify and enumerating certain eligibility qualifications for simple tax returns. Complaint Counsel disputes the remainder of the Proposed Finding. Intuit's disclaimers are not "prominent" especially in the context of the more prominent and more powerful free claims in the email advertising. Free claims are powerful, *see Book-of-the-Month Club*, 48 F.T.C. at 1312 ("the meaning of the word 'free'... can never be completely eradicated' from the consumer's mind."), and are likely to distract from and overshadow the qualifying phrases contained in the ads. (RX1444 (Intuit); RX1445 (Intuit); RX1446 (Intuit); RX1447 (Intuit); RX1449 (Intuit); RX1451 (Intuit); RX1452 (Intuit); RX1453 (Intuit); RX1547 (Intuit)). Moreover, specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don't resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit's ads "communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live)." (FF-609). According to its own copy testing "[m]ost viewers can recall TurboTax, but only a handful mention the specific product name" when asked "Which brand do you think this ad was for?" (FF-610). In other words, consumers remember and think of the product as "TurboTax" and don't distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where

consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (See e.g. RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

351. The Tax Year 2022 email ads for free TurboTax SKUs also include hyperlinks, and consumers who click on the hyperlinks are taken to the TurboTax homepage, where they can find detailed information about TurboTax Free Edition qualifications. (JX1 ¶¶63; RX1431 (Intuit); RX1432 (Intuit); RX1433 (Intuit); RX1434 (Intuit); RX1435 (Intuit); *infra* ¶¶364-441).

Response to Finding No. 351:

Complaint Counsel agrees that, in many instances, consumers who click on the Tax Year 2022 email ads containing free claims are taken to the TurboTax homepage and disputes the remainder of this Proposed Finding. Even though the TurboTax website contains qualifying information, it is not clear that consumers see it, read it, or understand it. In fact, the evidence shows that Intuit’s purported disclaimers in the challenged ads and websites were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (See, e.g., FF-491—FF-503; FF-669—FF-670). Like the challenged ads and websites, the Tax Year 2022 website contains prominent and powerful free claims and similar disclaimer language that is likely to be ineffective.

In analyzing the effectiveness of any qualifications on the TurboTax website, it is critical to first understand that the website repeats the express false “free” claims contained in the display ads and other TurboTax ads consumers are exposed to. (RX944 (Intuit) at INTUIT-FTC-PART3-000612557 (“File 100% FREE with expert help: Get live help from tax experts, plus a final review before you file—all free.”) & INTUIT-FTC-PART3-000612559 (“FREE \$0 Fed \$0 State \$0 To File;” “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.”); RX1500 (Intuit) (featuring a large, prominent neon blue \$0 behind tax expert “Claudell” next to the following free claim: “File 100% FREE with expert help: Get live help from tax experts, plus a final review before you

file—all free” appearing at the top of the fold on the TY2022 TurboTax homepage). Those claims are enticing to consumers and likely distract them from any qualifications found on the TurboTax website. When consumers click on Intuit’s advertisements and arrive at the TurboTax website, the website contains additional false and deceptive “free” claims.

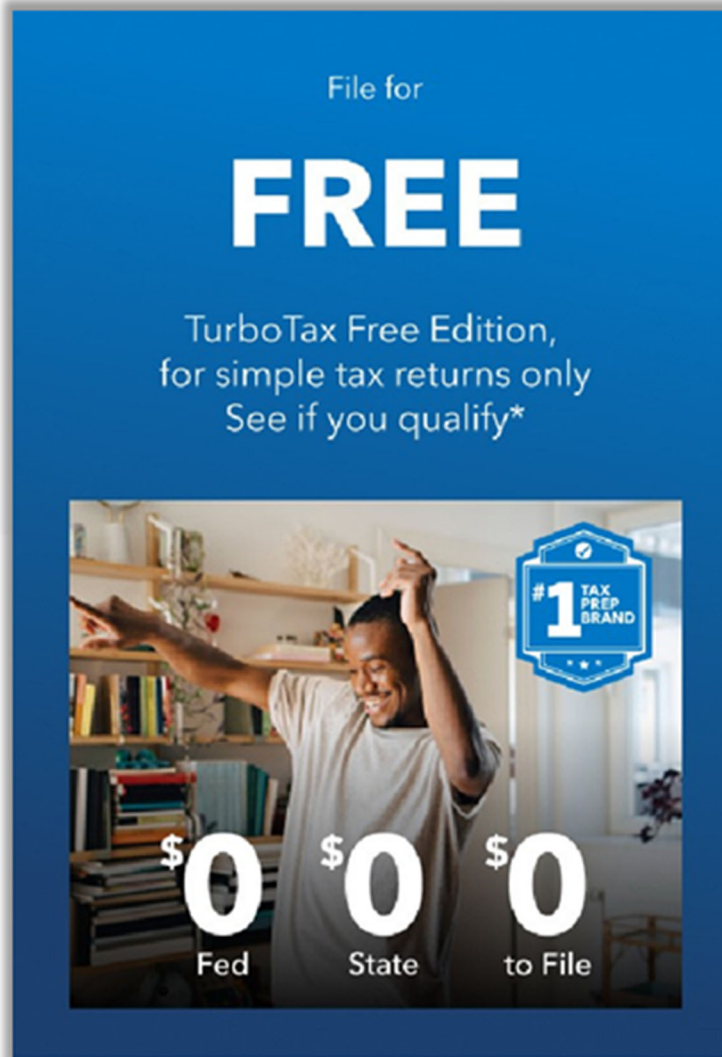
For example, Intuit’s TY2022 TurboTax website homepage features a large, prominent neon blue \$0 behind tax expert “Claudell.” (RX1500 (Intuit)). The following free claim appears next to “Claudell” and the neon blue \$0: “File 100% FREE with expert help: Get live help from tax experts, plus a final review before you file—all free.” (RX1500 (Intuit)). These free claims appear at the top of the fold on the TY2022 TurboTax homepage. (RX1500 (Intuit)). They are more prominent and powerful than any qualifying information contained on the TY2022 TurboTax homepage and they reinforce the free claims consumers would have seen in the other advertisements that enticed them to navigate to the website or that bring them directly to it.





Any purported disclaimers on the TurboTax TY2022 website are inadequate to correct the express false claims and deceptive net impression made by its “free” advertising. The TurboTax TY 2022 homepage website disclaimers include the words “Simple tax returns only” preceding a hyperlink on the words “See if you qualify.” (RX1500 (Intuit) at 1). When Professor Hauser tested a substantially similar disclaimer in his disclosure efficacy survey, he found that it had no effect when compared to the previous version of the disclaimer which was found to be inadequate and ineffective in Professor Novemsky’s consumer perception survey. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136) (“Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims left in both stimuli.”)). The mouse print disclaimers that appear if a consumer scrolls several screens down to the bottom of the TY 2022 TurboTax homepage are equally ineffective. *See FTC v. US Sales Corp.*, 785 F. Supp. 737, 751 (N.D. Ill. 1992) (holding that fine print disclaimers at the bottom of the screen in TV ads were “simply not readable and [have] no effect on the overall impression of the advertisement”); *see also Fleetcor*, 2022 WL 3273286, at *9 & n.6 (“Courts ... across the

country have determined that, where a disclaimer is buried in fine print and is without accentuation, it is insufficient to alter the net impression.”) (citing cases); *Cyberspace.com*, 453 F.3d at 1200 (fine print disclaimer no defense if net impression is still misleading); *Grant Connect*, 827 F. Supp. 2d at 1214, 1220-21.

The purported website disclaimers appearing behind the “See if you qualify” hyperlink on the TY 2022 TurboTax website are wholly inadequate to correct the express false claim and deceptive net impression made by Intuit’s ads and the prominent “100% Free” and “\$0” claim on the website. Such hyperlink disclaimers are inadequate where, as here, the eligibility requirements of the “free” offer are integral to the “free” claim—consumers had to decide to click on the hyperlink to trigger a pop-up explaining the limitations, which is insufficient. (*See .com Disclosures: How to Make Effective Disclosures in Digital Advertising* (Mar. 2013) (marked GX316 (Complaint Counsel)), at 10 (“Disclosures that are an *integral part of a claim* or inseparable from it should not be communicated through a hyperlink. Instead, they should be placed on the same page and immediately next to the claim, and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information. This is *particularly true for cost information* or certain health and safety disclosures.” (emphasis added)) As Professor Novemsky opines, consumers are unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-503; *see also* GX316 (Complaint Counsel) at 14 (“Some consumers may not read information in pop-up windows or interstitials because they immediately close the pop-ups or move to the next page in pursuit of completing their intended tasks, or because they don’t associate information in a pop-up window or on an interstitial page to a claim or product they haven’t encountered yet.”)). These hyperlinked disclaimers are dramatically less prominent than the advertising claims on the page, e.g., “100% FREE.” *See* Deception Policy Statement, at 180 (“Other practices of the company may direct consumers’ attention away from the qualifying disclosures.”).

352. Screenshots of an exemplary Tax Year 2022 email ad for a free TurboTax SKU are provided below. (RX1431 (Intuit)).



INTUIT    

🔒 We're looking out for you
We'll never ask for personal information in an email. When you click on a link, the address should always contain "intuit.com".

**For simple tax returns only. Not all taxpayers qualify.
A simple tax return is Form 1040 only. Situations covered by TurboTax Free Edition, TurboTax Live Basic, and TurboTax Live Full Service Basic:*

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

Prices ultimately determined at time of print or e-file. Terms, conditions, features, availability, pricing, fees, service and support options subject to change without notice.

Response to Finding No. 352:

Complaint Counsel has no specific response.

F. Improvements In TurboTax Ads Over Time

353. Intuit always endeavors to improve the clarity of the disclosures in its ads for free TurboTax SKUs. (Ryan (Intuit) Tr. 706, 798, 810, 834; Rubin (Intuit) Tr. 1562; GX159 (Ryan (Intuit) Dep.) at 47, 50-51). Each year, Intuit evaluates new ways to do so. (Ryan (Intuit) Tr. 706, 798, 810, 834; Rubin (Intuit) Tr. 1562; GX159 (Ryan (Intuit) Dep.) at 50-51).

Response to Finding No. 353:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))

- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).
- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

354. Intuit has revised its advertisements for free TurboTax SKUs to lessen the strength of the “free” claims in those advertisements. (Rubin (Intuit) Tr. 1562-1563; Ryan (Intuit) Tr. 726-727, 734-735).

Response to Finding No. 354:

Complaint Counsel disputes this Proposed Finding. Intuit’s current free TurboTax ads make free claims substantially similar to the free claims in the challenged ads. While Intuit’s current TurboTax ads repeat the word “free” fewer times than the ads that aired in March 2022 when this case commenced, Intuit’s current TurboTax ads include multiple “free” claims. For example, the TY22 “Lasso” 15 second TurboTax video ad (RX1444 (Intuit)) includes two free claims: (1) a voiceover that states: “Filing a simple return for free with the help of a TurboTax expert. See if you qualify at turbotax.com” (RX1444 (Intuit) at 00:05); and (2) a prominent written claim that appears on the screen in bright yellow cursive and states: “File Free with Expert Help.” (RX1444 (Intuit) at 00:11). The TY22 “Roller Boogie” 15 second TurboTax video ad (RX1449 (Intuit)) and the TY22 “Taxbourine” 15 second TurboTax video ad (RX1470 (Intuit)) contain the same repeated free claims. Similarly, the TY22 TurboTax website (RX1500 (Intuit)) includes multiple free claims including: (1) a large \$0 behind Tax expert Claudell in the middle of the page; (2) the claim “Fill 100% FREE with expert help” in the middle of the page next to Claudell; (3) and the claim: “Get live help from tax experts, plus a final review before you file – all free” also in the middle of the page next to Claudell. So, a consumer that watched the TY22 Lasso video ad and then went to the TY22 TurboTax homepage would have been exposed to at least five free claims. (RX1444 (Intuit); RX1500 (Intuit)). Moreover, free claims are powerful and repetition of the word “free” in an ad is not necessarily required to convey a convincing free message to consumers. *See Book-of-the-Month Club*, 48 F.T.C. at 1312 (“the meaning of the word ‘free’... can never be completely eradicated’ from the consumer’s mind.”).

Intuit’s current free TurboTax ads also contain qualifying phrases similar to those in the more recent (TY 2021) challenged ads. The evidence shows that Intuit’s purported disclaimers and qualifying phrases, including “see if you qualify” and “see details at TurboTax.com,” were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims

in the challenged ads. (*See, e.g.*, FF-471, FF-480, FF-491—FF-503; FF-669—FF-670). Based on his consumer perception survey, Professor Novemsky opined that consumers not eligible for the TurboTax Free Edition have the misimpression that they can file their taxes for free with TurboTax. (FF-480). According to the perception survey, ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (FF-481). The results of the consumer perception survey measured all of the information in the marketplace in mid to late March 2022 when the survey was in the field. (Novemsky (Complaint Counsel) Tr. 1826). This included measurement of any curative effect of the “see if you qualify” disclaimer language used in the challenged ads. (Novemsky (Complaint Counsel) Tr. 1826). And would have included measurement of any curative effect of the “see details at TurboTax.com” disclaimer language used in the challenged ads. ((Novemsky (Complaint Counsel) Tr. 1826-27 (testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey)).

Furthermore, Professor Hauser’s disclosure efficacy survey is consistent with the results of the consumer perception survey in terms of the inadequacy of the “see if you qualify” disclaimer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Even making purported “enhancements” to ads and website pages intended to mimic TurboTax’s, where the phrase “see if you qualify” was used more prominently (though still not very prominently, *see, e.g.*, FF-759), similar to the way Intuit uses the phrase now, survey respondents showed no change in their consideration of the fictional Vertax brand and showed an *increase* in considering using the free Vertax option. (FF-765—FF-766; GX749 (Novemsky Rebuttal Expert Report) ¶ 136 (referring to Hauser disclosure efficacy survey results reported in RX1017 (Hauser Expert Report) ¶85, p. 60 Table 5 & Appendix C at C-1-6 Table 2, C-1-9 Table 3, C-1-19 Table 4)). Professor Novemsky opined: “Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims left in both stimuli.” (GX749 (Novemsky Rebuttal Expert

Report) ¶ 136). Thus, Intuit's recent changed use of the qualifying phrase "see if you qualify" in its TurboTax advertising is unlikely to have a material impact on consumers.

Based on the foregoing evidence regarding the challenged TurboTax free ads, it is likely that Intuit's current free TurboTax ads are also deceptive.

355. Intuit has also revised its ads over the years to make the qualifications for the TurboTax free SKUs being advertised even clearer. (Johnson (Intuit) Tr. 620-621; Ryan (Intuit) Tr. 706, 712, 716, 721-722, 726-727, 734-735; Rubin (Intuit) Tr. 1562-1563). As part of those revisions, Intuit has made changes to the disclosures in advertisements for free TurboTax SKUs over time, including increasing the font size and contrast of written disclosures by using-high contrast colors, and adding spoken disclosures about qualifications to video ads. (Ryan (Intuit) Tr. 726-727, 735, 754, 758; Rubin (Intuit) Tr. 1562).

Response to Finding No. 355:

Complaint Counsel agrees Intuit has revised the qualifications in the TurboTax free ads over the years. Complaint Counsel further agrees that, as part of those revisions, Intuit has made changes to the disclosures in advertisements for free TurboTax SKUs over time, including increasing the font size and contrast of written disclosures by using-high contrast colors, and adding spoken disclosures about qualifications to video ads. Complaint Counsel disputes the remainder of the Proposed Finding. Intuit's disclaimers are not "clear" nor "clearer" in the context of the more prominent and more powerful free claims in the advertising. Free claims are powerful, *see Book-of-the-Month Club*, 48 F.T.C. at 1312 ("the meaning of the word 'free' ... can never be completely eradicated' from the consumer's mind."), and are likely to distract from and overshadow the qualifying phrases contained in the ads. (RX1444 (Intuit); RX1445 (Intuit); RX1446 (Intuit); RX1447 (Intuit); RX1449 (Intuit); RX1451 (Intuit); RX1452 (Intuit); RX1453 (Intuit); RX1547 (Intuit)).

The evidence also shows that Intuit's purported disclaimers, including "see if you qualify" and "see details at TurboTax.com," were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-471, FF-480, FF-491—FF-503; FF-669—FF-670). Based on his consumer perception survey, Professor Novemsky opined that consumers not eligible for the TurboTax Free Edition have the misimpression that they can file

their taxes for free with TurboTax. (FF-480). According to the perception survey, ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (FF-481). The results of the consumer perception survey measured all of the information in the marketplace in mid to late March 2022 when the survey was in the field. (Novemsky (Complaint Counsel) Tr. 1826). This included measurement of any curative effect of the “see if you qualify” disclaimer language used in the challenged ads. (Novemsky (Complaint Counsel) Tr. 1826). And would have included measurement of any curative effect of the “see details at TurboTax.com” disclaimer language used in the challenged ads. ((Novemsky (Complaint Counsel) Tr. 1826-27 (testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey)).

Furthermore, Professor Hauser’s disclosure efficacy survey is consistent with the results of the consumer perception survey in terms of the inadequacy of the “see if you qualify” disclaimer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Even making purported “enhancements” to ads and website pages intended to mimic TurboTax’s, where the phrase “see if you qualify” was used more prominently (though still not very prominently, *see, e.g.*, FF-759), similar to the way Intuit uses the phrase now, survey respondents showed no change in their consideration of the fictional Vertax brand and showed an *increase* in considering using the free Vertax option. (FF-765—FF-766; GX749 (Novemsky Rebuttal Expert Report) ¶ 136 (referring to Hauser disclosure efficacy survey results reported in RX1017 (Hauser Expert Report) ¶85, p. 60 Table 5 & Appendix C at C-1-6 Table 2, C-1-9 Table 3, C-1-19 Table 4)). Professor Novemsky opined: “Professor Hauser’s results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims left in both stimuli.” (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Thus, Intuit’s recent changed use of the qualifying phrase “see if you qualify” in its TurboTax advertising is unlikely to have a material impact on consumers.

Moreover, specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609).

They are therefore not effective qualifiers. In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit's ads "communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live)." (FF-609). According to its own copy testing "[m]ost viewers can recall TurboTax, but only a handful mention the specific product name" when asked "Which brand do you think this ad was for?" (FF-610). In other words, consumers remember and think of the product as "TurboTax" and don't distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to "TurboTax" as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating "I have been using TurboTax for years..." without specifying a SKU and third consumer testimonial stating: "TurboTax is way better than HR Block" without specifying a SKU; GX183A (two out of three customer testimonials featured refer to "TurboTax" without specifying a SKU or version).

356. For example, in Tax Year 2018, Intuit's brand video advertisements for free TurboTax SKUs began consistently using a title card that included qualifying language in a white font that contrasted against a blue screen. (RX1102 (Intuit); RX1103 (Intuit); RX1104 (Intuit); RX1105 (Intuit); RX1106 (Intuit); RX1107 (Intuit); RX1108 (Intuit); RX1109 (Intuit); RX1110 (Intuit); RX1111 (Intuit); RX1113 (Intuit); RX1116 (Intuit); RX1117 (Intuit); RX1118 (Intuit); GX356 (Intuit)). Its video advertisements also began including a logo on the title card that identified the TurboTax SKU being advertised. (RX1102 (Intuit); RX1103 (Intuit); RX1104 (Intuit); RX1105 (Intuit); RX1106 (Intuit); RX1107 (Intuit); RX1108 (Intuit); RX1109 (Intuit); RX1110 (Intuit); RX1111 (Intuit); RX1113 (Intuit); RX1116 (Intuit); RX1117 (Intuit); RX1118 (Intuit); GX356 (Intuit)).

Response to Finding No. 356:

Complaint Counsel has no specific response.

357. In Tax Year 2019, after a single year of using "TurboTax Free," Intuit made further improvements to the disclosures in its video advertisements for TurboTax Free Edition by updating the logo on the title card to display "TurboTax Free Edition," and by increasing the font size and contrast of the written disclosure. (Ryan (Intuit) Tr. 727; RX1112 (Intuit); RX1115 (Intuit); RX1398 (Intuit); RX1399 (Intuit); RX1400 (Intuit)). Intuit updated the video advertisements to have the logo say "TurboTax Free *Edition*" instead of "TurboTax Free" to make the ads even clearer. (Rubin (Intuit) Tr. 1562 (emphasis added)).

Response to Finding No. 357:

Complaint Counsel agrees that, in Tax Year 2019, after a single year of using “TurboTax Free,” Intuit made further changes to the disclosures in its video advertisements for TurboTax Free Edition by updating the logo on the title card to display “TurboTax Free Edition,” and by increasing the font size and contrast of the written disclosure. Complaint Counsel further agrees that Intuit updated the video advertisements to have the logo say “TurboTax Free *Edition*” instead of “TurboTax Free.”

Complaint Counsel disputes the remainder of the Proposed Finding. Intuit’s disclaimers are not “clear” nor “clearer” in the context of the more prominent and more powerful free claims in the advertising. Free claims are powerful, *see Book-of-the-Month Club*, 48 F.T.C. at 1312 (“the meaning of the word ‘free’... can never be completely eradicated’ from the consumer’s mind.”), and are likely to distract from and overshadow the qualifying phrases contained in the ads. (RX1444 (Intuit); RX1445 (Intuit); RX1446 (Intuit); RX1447 (Intuit); RX1449 (Intuit); RX1451 (Intuit); RX1452 (Intuit); RX1453 (Intuit); RX1547 (Intuit)).

The evidence also shows that Intuit’s purported disclaimers, including “see if you qualify” and “see details at TurboTax.com,” were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-471, FF-480, FF-491—FF-503; FF-669—FF-670). Based on his consumer perception survey, Professor Novemsky opined that consumers not eligible for the TurboTax Free Edition have the misimpression that they can file their taxes for free with TurboTax. (FF-480). According to the perception survey, ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (FF-481). The results of the consumer perception survey measured all of the information in the marketplace in mid to late March 2022 when the survey was in the field. (Novemsky (Complaint Counsel) Tr. 1826). This included measurement of any curative effect of the “see if you qualify” disclaimer language used in the challenged ads. (Novemsky (Complaint Counsel) Tr. 1826). And would have included measurement of any curative effect of the “see details at TurboTax.com” disclaimer language used in the challenged

ads. ((Novemsky (Complaint Counsel) Tr. 1826-27 (testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey)).

Furthermore, Professor Hauser's disclosure efficacy survey is consistent with the results of the consumer perception survey in terms of the inadequacy of the "see if you qualify" disclaimer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Even making purported "enhancements" to ads and website pages intended to mimic TurboTax's, where the phrase "see if you qualify" was used more prominently (though still not very prominently, *see, e.g.*, FF-759), similar to the way Intuit uses the phrase now, survey respondents showed no change in their consideration of the fictional Vertax brand and showed an *increase* in considering using the free Vertax option. (FF-765—FF-766; GX749 (Novemsky Rebuttal Expert Report) ¶ 136 (referring to Hauser disclosure efficacy survey results reported in RX1017 (Hauser Expert Report) ¶85, p. 60 Table 5 & Appendix C at C-1-6 Table 2, C-1-9 Table 3, C-1-19 Table 4)). Professor Novemsky opined: "Professor Hauser's results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the "free" claims left in both stimuli." (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Thus, Intuit's recent changed use of the qualifying phrase "see if you qualify" in its TurboTax advertising is unlikely to have a material impact on consumers.

Moreover, specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don't resonate with consumers beyond the TurboTax parent brand. (FF-609). They are therefore not effective qualifiers. In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit's ads "communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live)." (FF-609). According to its own copy testing "[m]ost viewers can recall TurboTax, but only a handful mention the specific product name" when asked "Which brand do you think this ad was for?" (FF-610). In other words, consumers remember and think of the product as "TurboTax" and don't distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to "TurboTax" as the product without referencing a

particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

358. The next tax year, Tax Year 2020, Intuit revised the audio disclosures in video ads for free products to specify that a particular SKU—“TurboTax Free Edition” or “TurboTax Live Basic”—was free. (Ryan (Intuit) Tr. 735; GX204 (Intuit); RX598 (Intuit); RX1120 (Intuit); RX1122 (Intuit); RX1123 (Intuit); RX1124 (Intuit); RX1403 (Intuit); RX1404 (Intuit); RX1405 (Intuit); RX1407 (Intuit); RX1408 (Intuit); RX1409 (Intuit); RX1410 (Intuit); RX1412 (Intuit)).

Response to Finding No. 358:

Complaint Counsel has no specific response.

359. In Tax Year 2020, Intuit also added spoken voiceovers to video display ads for free products, disclosing that consumers could “file a simple return for free” or that the offer applied to “simple returns only.” (Ryan (Intuit) Tr. 744; GX838 (Intuit); RX1125 (Intuit); RX1126 (Intuit); RX1401 (Intuit); RX1402 (Intuit); RX1406 (Intuit); RX1411 (Intuit); GX510 (Intuit); GX511 (Intuit); GX512 (Intuit); GX513 (Intuit); GX514 (Intuit); GX515 (Intuit); GX516 (Intuit); GX517 (Intuit); GX518 (Intuit); GX519 (Intuit); GX523 (Intuit); GX524 (Intuit); GX525 (Intuit); GX526 (Intuit); GX528 (Intuit); GX529 (Intuit); GX530 (Intuit); GX531 (Intuit); GX532 (Intuit); GX540 (Intuit); GX541 (Intuit); GX542 (Intuit); GX544 (Intuit); GX546 (Intuit); GX547 (Intuit)).

Response to Finding No. 359:

Complaint Counsel has no specific response.

360. Also in Tax Year 2020, Intuit updated its TurboTax paid-search advertisements for TurboTax Free Edition to state that such offers were “Free for Simple Tax Returns Only With TurboTax Free Edition.” (GX178 (FTC); GX179 (FTC); GX180 (FTC)).

Response to Finding No. 360:

Complaint Counsel has no specific response.

361. In Tax Year 2021, Intuit incorporated additional audio disclosures to video ads for free products, including a spoken voiceover inviting consumers to “see details at turbotax.com,” as well as multiple audio disclosures in certain video ads stating that offers to file for free were for “simple returns.” (Ryan (Intuit) Tr. 754; RX584 (Intuit); RX590 (Intuit); RX1414 (Intuit); RX1415 (Intuit); RX1416 (Intuit); RX1417 (Intuit); RX1418 (Intuit); RX1119 (Intuit); RX1121 (Intuit)). These audio disclosures further enhanced consumer awareness of the free SKU’s qualifications. (GX159 (Ryan (Intuit) Dep.) at 49-51).

Response to Finding No. 361:

Complaint Counsel agrees that, in Tax Year 2021, Intuit incorporated additional audio disclosures to video ads for free products, including a spoken voiceover inviting consumers to “see details at turbotax.com,” as well as multiple audio disclosures in certain video ads stating that offers to file for free were for “simple returns.”

Complaint Counsel disputes the remainder of the Proposed Finding. Intuit’s disclaimers did not enhance “consumer awareness of the free SKU’s qualifications,” especially in the context of the more prominent and more powerful free claims in the advertising. Free claims are powerful, *see Book-of-the-Month Club*, 48 F.T.C. at 1312 (“the meaning of the word ‘free’... can never be completely eradicated’ from the consumer’s mind.”), and are likely to distract from and overshadow the qualifying phrases contained in the ads. (RX1444 (Intuit); RX1445 (Intuit); RX1446 (Intuit); RX1447 (Intuit); RX1449 (Intuit); RX1451 (Intuit); RX1452 (Intuit); RX1453 (Intuit); RX1547 (Intuit)).

The evidence also shows that Intuit’s purported disclaimers, including “see if you qualify” and “see details at TurboTax.com,” were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-471, FF-480, FF-491—FF-503; FF-669—FF-670). Based on his consumer perception survey, Professor Novemsky opined that consumers not eligible for the TurboTax Free Edition have the misimpression that they can file their taxes for free with TurboTax. (FF-480). According to the perception survey, ineligible consumers who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free. (FF-481). The results of the consumer perception survey measured all of the information in the marketplace in mid to late March 2022 when the survey was in the field. (Novemsky (Complaint Counsel) Tr. 1826). This included measurement of any curative effect of the “see if you qualify” disclaimer language used in the challenged ads. (Novemsky (Complaint Counsel) Tr. 1826). And would have included measurement of any curative effect of the “see details at TurboTax.com” disclaimer language used in the challenged

ads. ((Novemsky (Complaint Counsel) Tr. 1826-27 (testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey)).

Furthermore, Professor Hauser's disclosure efficacy survey is consistent with the results of the consumer perception survey in terms of the inadequacy of the "see if you qualify" disclaimer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Even making purported "enhancements" to ads and website pages intended to mimic TurboTax's, where the phrase "see if you qualify" was used more prominently (though still not very prominently, *see, e.g.*, FF-759), similar to the way Intuit uses the phrase now, survey respondents showed no change in their consideration of the fictional Vertax brand and showed an *increase* in considering using the free Vertax option. (FF-765—FF-766; GX749 (Novemsky Rebuttal Expert Report) ¶ 136 (referring to Hauser disclosure efficacy survey results reported in RX1017 (Hauser Expert Report) ¶85, p. 60 Table 5 & Appendix C at C-1-6 Table 2, C-1-9 Table 3, C-1-19 Table 4)). Professor Novemsky opined: "Professor Hauser's results are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the "free" claims left in both stimuli." (GX749 (Novemsky Rebuttal Expert Report) ¶ 136). Thus, Intuit's recent changed use of the qualifying phrase "see if you qualify" in its TurboTax advertising is unlikely to have a material impact on consumers.

Moreover, specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don't resonate with consumers beyond the TurboTax parent brand. (FF-609). They are therefore not effective qualifiers. In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit's ads "communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live)." (FF-609). According to its own copy testing "[m]ost viewers can recall TurboTax, but only a handful mention the specific product name" when asked "Which brand do you think this ad was for?" (FF-610). In other words, consumers remember and think of the product as "TurboTax" and don't distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to "TurboTax" as the product without referencing a

particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

362. This tax year, Tax Year 2022, Intuit further expanded the audio disclosures in ads for free products, adding voiceovers in both video and display ads stating that offers for free filing were for “simple tax returns only” and inviting consumers to “see if you qualify.” (RX1444 (Intuit); RX1445 (Intuit); RX1446 (Intuit); RX1447 (Intuit); RX1449 (Intuit); RX1451 (Intuit); RX1452 (Intuit); RX1453 (Intuit); RX1454 (Intuit); RX1455 (Intuit); RX1456 (Intuit); RX1457 (Intuit); RX1458 (Intuit); RX1459 (Intuit); RX1460 (Intuit); RX1461 (Intuit); RX1462 (Intuit); RX1463 (Intuit); RX1464 (Intuit); RX1465 (Intuit); RX1466 (Intuit); RX1467 (Intuit); RX1468 (Intuit); RX1469 (Intuit); RX1470 (Intuit); RX1471 (Intuit); RX1472 (Intuit); RX1473 (Intuit); RX1474 (Intuit); RX1475 (Intuit); RX1476 (Intuit); RX1477 (Intuit); RX1478 (Intuit); RX1479 (Intuit); RX1480 (Intuit); RX1481 (Intuit); RX1482 (Intuit); RX1483 (Intuit); RX1484 (Intuit); RX1485 (Intuit); RX1486 (Intuit); RX1487 (Intuit); RX1488 (Intuit); RX1547 (Intuit)).

Response to Finding No. 362:

Complaint Counsel has no specific response.

363. Intuit’s efforts over the years to improve the clarity of its advertisements exemplify and reinforce the company’s stated intent to be clear with consumers. (Ryan (Intuit) Tr. 727, 735, 754). Those improvements cut against any suggestion that Intuit’s goal in advertising its free TurboTax offers was to convey to consumers who did not qualify for those free offers that all TurboTax SKUs were free or that TurboTax necessarily would be free for them. (Ryan (Intuit) Tr. 727, 735, 754).

Response to Finding No. 363:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F.

- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

VII. The TurboTax Website Provides Detailed Information About Qualifications For Free TurboTax SKUs And All Other SKUs

364. Any consumer “interested in trying to use TurboTax,” including TurboTax Free Edition, must “access the product through” the TurboTax website (or its mobile app equivalent). (Johnson (Intuit) Tr. 593; GX439 (Ryan (Intuit) Decl.) ¶28).

Response to Finding No. 364:

Complaint Counsel has no specific response.

365. Intuit designed the TurboTax website to further its strategy of starting customers in the right SKU for them. (Johnson (Intuit) Tr. 567-568, 599; Rubin (Intuit) Tr. 1580-1581, 1583-1585; Ryan (Intuit) Tr. 705, 747-748; RX810 (Intuit) at -6751, -6772; RX42 (Intuit) at 11; GX152 (Johnson (Intuit) IHT) at 66-67, 128-129).

Response to Finding No. 365:

Complaint Counsel further disputes this Proposed Finding. As an initial matter, it is irrelevant. This case is centered on Intuit’s deceptive advertising of TurboTax for free, which often occur prior to consumers seeing the claims on TurboTax’s website. (FF-66—FF-454 (setting out Intuit’s television, video, radio, social media, and email advertisements)). Regardless of what happened on the website, Intuit’s advertisements could have been deceptive with the goal of bringing consumers to the site in the first place. (GX743 (Yoeli Expert Report) ¶73). Moreover, Intuit’s executives’ testimony regarding the purpose of the website is contradicted by the evidentiary record, which shows that the website itself is a source of additional deception.

For example, the TurboTax website has prominently advertised, for example, “That’s right. TurboTax Free is free. Free, free free free. with smaller text reading “Easily and accurately file your simple tax returns for FREE, guaranteed. See what it’s free,” and an orange button “File for \$0,” (FF-456) and version reading “FREE Guaranteed. \$0 Fed. \$0 State. \$0 To File,” with smaller text reading “Easily and accurately file your simple tax returns for FREE. See what it’s free.” (FF-457; *see also* (FF-456—FF-456 (setting out additional free advertisements located on the TurboTax website).

Complaint Counsel additionally disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my taxe s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))

- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).
- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

366. Consistent with its goal of starting consumers in the right SKU, the TurboTax website’s disclosures related to the qualifications for its free SKUs were designed to be “direct and clear,” “unavoidable’ to consumers,” and “link[ed] to eligibility criteria so it’s easy to see if [consumers] qualify for Free Edition.” (RX62 (Intuit) at 7-8; *see also* RX300-A (Intuit) at 17).

Response to Finding No. 366:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit's false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers' detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter "Deception Policy Statement").

The record shows, for example, the Intuit's hyperlinks are not effective. As Professor Novemsky opined, Intuit's placement of a fuller disclaimer behind a "simple returns" hyperlink made it unlikely that consumers would reach the disclaimer because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a "simple return" is and are under a preexisting misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of "simple returns" on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not "obvious." (FF-674), while another consumer said that "it is highly unlikely that people will click through to an external link." (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

367. And in fact, the TurboTax website clearly, conspicuously, and repeatedly disclosed the qualifications of free TurboTax SKUs throughout the website (and the mobile application), before consumers entered any personal information. (Rubin (Intuit) Tr. 1565-1569, 1579-1581, 1583; Golder (Intuit) Tr. 1127-1128; RX1018 (Golder Expert Report) ¶¶179-180,

203, 210; RX62 (Intuit) at 7-8; *infra* ¶¶369-370, 374-377, 379-382, 388-389, 391-395, 397-398, 400-403, 414-416, 418, 437-438).

Response to Finding No. 367:

Complaint Counsel disputes this Proposed Finding to the extent it improperly calls for a legal conclusion and suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

The record shows, for example, the Intuit’s hyperlinks are not effective. As Professor Novemsky opined, Intuit’s placement of a fuller disclaimer behind a “simple returns” hyperlink made it unlikely that consumers would reach the disclaimer because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of “simple returns” on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674), while another consumer said that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

368. Complaint Counsel did not offer any trial testimony or other evidence that consumers were not informed of TurboTax Free Edition’s qualifications on the TurboTax website

nor any evidence that reasonable consumers would be unable to assess their qualifications for the free product before beginning their taxes.

Response to Finding No. 368:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

369. Complaint Counsel and their witnesses instead recognized that the TurboTax website repeatedly disclosed TurboTax Free Edition’s qualifications. (Novemsky (FTC) Tr. 406; RX1392 (Novemsky (FTC) Dep.) at 22, 43-44; RX1396 (Yoeli (FTC) Dep.) at 193-196; GX161 (Maxson (FTC) Dep.) at 128-129, 211-212). For example, Complaint Counsel expert Erez Yoeli acknowledged that it takes only seconds to locate the qualifications for TurboTax Free Edition and other free offers on the TurboTax website. (RX1396 (Yoeli (FTC) Dep.) at 33-35). Dr. Yoeli also recognized that the Tax Year 2022 landing page for TurboTax Free Edition includes the language “see if you qualify” in three locations and that two were clearly hyperlinks to further information. (RX1396 (Yoeli (FTC) Dep.) at 194-196). The official designee from the FTC Bureau of Consumer Protection, Will Maxson, likewise recognized that the eligibility qualifications for free TurboTax SKUs are readily available to consumers on the TurboTax website. (GX161 (Maxson (FTC) Dep.) at 128-129, 211-212).

Response to Finding No. 369:

Complaint Counsel disputes this Proposed Finding because the testimony cited does not support the fact asserted. For example, Intuit misstates the deposition testimony of Bureau of Consumer Protection designee William T. Maxson. Mr. Maxson does not testify “eligibility qualifications for free TurboTax SKUs are *readily available* to consumers on the TurboTax website.” Instead, Mr. Maxson testified on relevant part that the terms and conditions to file for free with TurboTax were “somewhere within the -- the Intuit or TurboTax website,” (GX161 (Maxson (Bureau of Consumer Protection) Dep. at 128-129), and “within the website somewhere.” (GX161 (Maxson (Bureau of Consumer Protection) Dep. at 211-212).

Intuit also misrepresents the testimony it obtained from Dr. Yoeli. Specifically, during Dr. Yoeli’s deposition, Intuit’s counsel handed Dr. Yoeli counsel’s personal cell phone. Intuit’s counsel then instructed Dr. Yoeli to navigate to the TurboTax website, where Dr. Yoeli was further instructed what to click and read. (RX1396 (Yoeli (FTC) Dep.) at 33-34). Dr. Yoeli did

not “acknowledge that it takes only seconds to locate the qualifications for TurboTax Free Edition and other free offers on the TurboTax website.” Instead, he testified that it took “five to ten seconds, assuming somebody actually does click on ‘See if you qualify’ and notices it, because until you asked me, I didn’t see it,” and states his answer is “[a]ssuming you are directed by somebody who knows what they are doing on where to click.” (RX1396 (Yoeli (FTC) Dep.) at 34-35)(emphasis added). Similarly, Dr. Yoeli did not “recognize[] that the Tax Year 2022 landing page for TurboTax Free Edition includes the language ‘see if you qualify’ in three locations,” including two hyperlinks, until Intuit’s lawyer pointed out those aspects of the website to Dr. Yoeli. . (RX1396 (Yoeli (FTC) Dep.) at 194-195).

370. Both Professor Novemsky and Dr. Yoeli also acknowledged that consumers could find details about qualifications on the website. (Novemsky (FTC) Tr. 406-407; RX1392 (Novemsky (FTC) Dep.) at 43-44; RX1396 (Yoeli (FTC) Dep.) at 256). Professor Novemsky conceded that consumers had ample opportunity to learn about the qualifications for free TurboTax SKUs on the TurboTax website before they prepared their return. (Novemsky (FTC) Tr. 406-407). Professor Novemsky even determined the qualifications for TurboTax Free Edition as used in his survey by visiting the TurboTax website. (Novemsky (FTC) Tr. 399, 408-410; RX1392 (Novemsky (FTC) Dep.) at 22).

Response to Finding No. 370:

Complaint Counsel disputes this Proposed Finding,

Professor Novemsky did not testify that “consumers had ample opportunity to learn about the qualifications for free TurboTax SKUs on the TurboTax website before they prepared their return.” Instead, he stated that consumer “could encounter information setting forth the eligibility requirements” on the website, and, while being directed to read specific portions of the products and pricing page read or directed him to by Intuit’s counsel, he acknowledged the existence of certain language on the website. (Novemsky (FTC) Tr. 406-407).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that the information available to consumers behind a hyperlink cured the deception caused by its ads. As Professor Novemsky opined, Intuit’s placement of a fuller disclaimer behind a “simple returns” hyperlink made it unlikely that consumers would reach the disclaimer

because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of “simple returns” on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674), while another consumer said that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

371. Specific pages on the TurboTax website are discussed in the following subsections.

Response to Finding No. 371:

Complaint Counsel disputes the Proposed Finding, which appears to be header, rather than a fact for the Court to consider, and further disputes the finding because it does not cite to any portion of the record and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

A. TurboTax Homepage

372. The TurboTax homepage is <https://turbotax.intuit.com>. (GX439 (Ryan (Intuit) Decl.) ¶30; *see also* Johnson (Intuit) Tr. 593).

Response to Finding No. 372:

Complaint Counsel has no specific response.

373. Consumers can arrive at the TurboTax homepage in various ways, including by clicking on (1) links in online search results; (2) certain TurboTax display ads; (3) links on third-party websites, blogs, or media articles; or (4) links to the homepage on the TurboTax website, blogs, or press releases. (Ryan (Intuit) Tr. 697, 757; GX178 (Intuit); RX505 (Intuit) at 2, 4; RX93 (Intuit) at 1; RX64 (Intuit) at 3; *see also* Rubin (Intuit) Tr. 1564-1565).

Response to Finding No. 373:

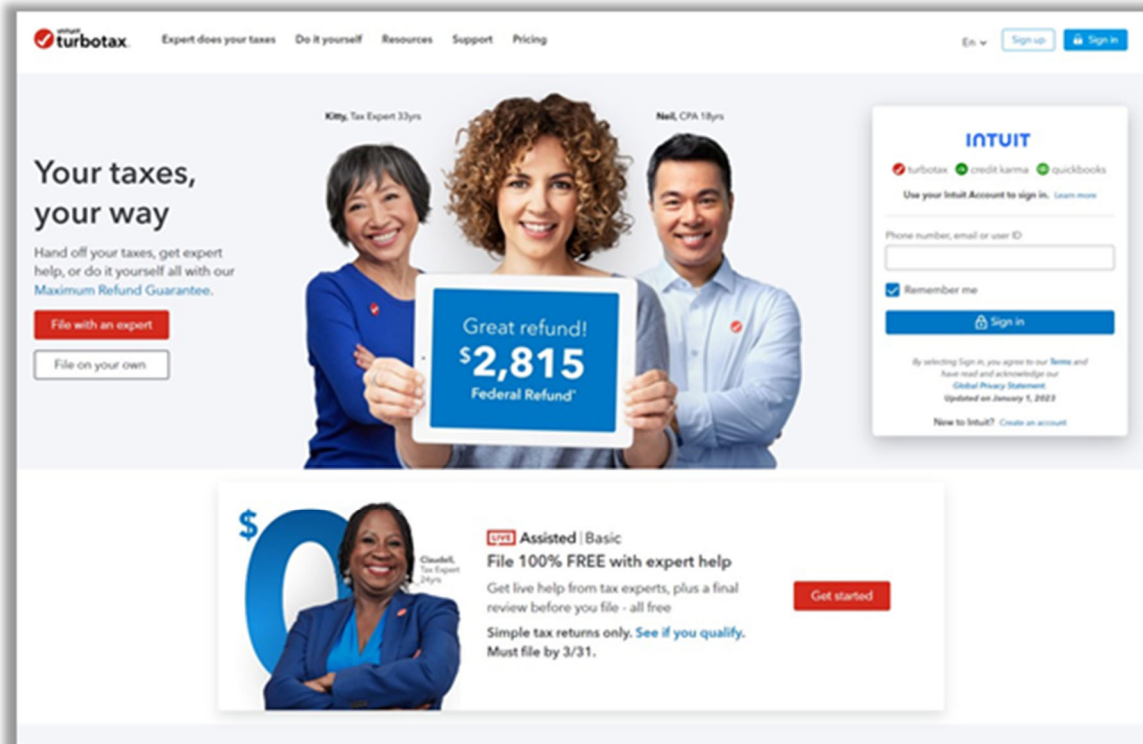
Complaint Counsel has no specific response.

374. Promotions for free TurboTax SKUs or offers on the Tax Year 2022 TurboTax homepage include disclosures stating that the product or offer is for “simple tax returns only” immediately followed by a color-contrasted hyperlink stating “see if you qualify.” (Johnson (Intuit) Tr. 593-594; RX367 (Intuit); RX1263-A; GX439 (Ryan (Intuit) Decl.) ¶30; RX260 (FTC) ¶42; RX19 (Intuit); RX20 (Intuit); RX21 (Intuit); RX22 (Intuit); RX23 (Intuit); RX24 (Intuit)).

Response to Finding No. 374:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that the TurboTax advertisements and website are not deceptive. As Professor Novemsky opined, Intuit’s placement of a fuller disclaimer behind a “simple returns” hyperlink made it unlikely that consumers would reach the disclaimer because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of “simple returns” on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674), while another consumer said that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

375. RX1500, shown in part below, is a screenshot of the TurboTax homepage from Tax Year 2022. (RX1500 (Intuit)).



Response to Finding No. 375:

Complaint Counsel has no specific response.

376. Prior to Tax Year 2022, the TurboTax homepage included similar disclosures stating free TurboTax SKUs or offers were for “simple tax returns only,” “simple tax returns,” or “Forms 1040EZ/1040A” that were either color-contrasted hyperlinks themselves or next to hyperlinked text stating “See why it’s free.” (RX1263-A (Intuit); RX1215 (Intuit); RX1214 (Intuit); RX1213 (Intuit); RX1212 (Intuit); RX1211 (Intuit); RX1210 (Intuit)).

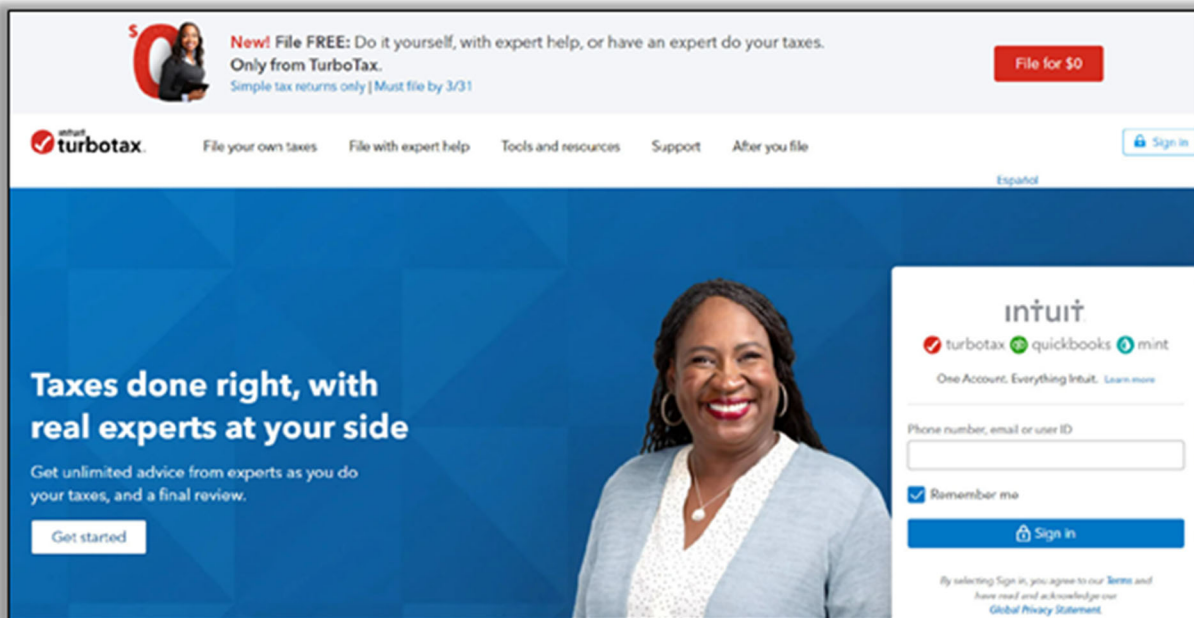
Response to Finding No. 376:

Complaint Counsel disputes the Proposed Finding.

As Professor Novemsky opined, Intuit’s placement of a fuller disclaimer behind a “simple returns” hyperlink made it unlikely that consumers would reach the disclaimer because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of “simple returns” on the current webpage, and

consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674), while another consumer said that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

377. RX367, shown in part below, is a screenshot of the TurboTax homepage from Tax Year 2021. (RX367 (Intuit) at 2; Johnson (Intuit) Tr. 593).



Response to Finding No. 377:

Complaint Counsel has no specific response.

378. Intuit uses blue hyperlinked text on the TurboTax website for disclosures such as “simple tax returns only” to “draw [consumers’] attention to that term.” (Johnson (Intuit) Tr. 594).

Response to Finding No. 378:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that it did not intend to deceive consumers.

379. Consumers who click the hyperlinked disclosure see a pop-up screen stating, “A simple tax return is Form 1040 only” and listing the situations covered (and not covered) by TurboTax Free Edition. (Johnson (Intuit) Tr. 594-595; RX3 (Intuit)). Complaint Counsel conceded that the pop-up screen provided consumers with “detailed information about the tax situations covered by Free Edition.” (Complaint Counsel’s Responses and Objections to Intuit Inc.’s Statement of Material Facts ¶40 (Sept. 8, 2022)). Providing detailed qualification information through the hyperlink allows “consumers [to] control the pace at which they see that information,” making it less likely that they “tune out and not try to process something that’s an overwhelming message.” (Golder (Intuit) Tr. 1174, 1176).

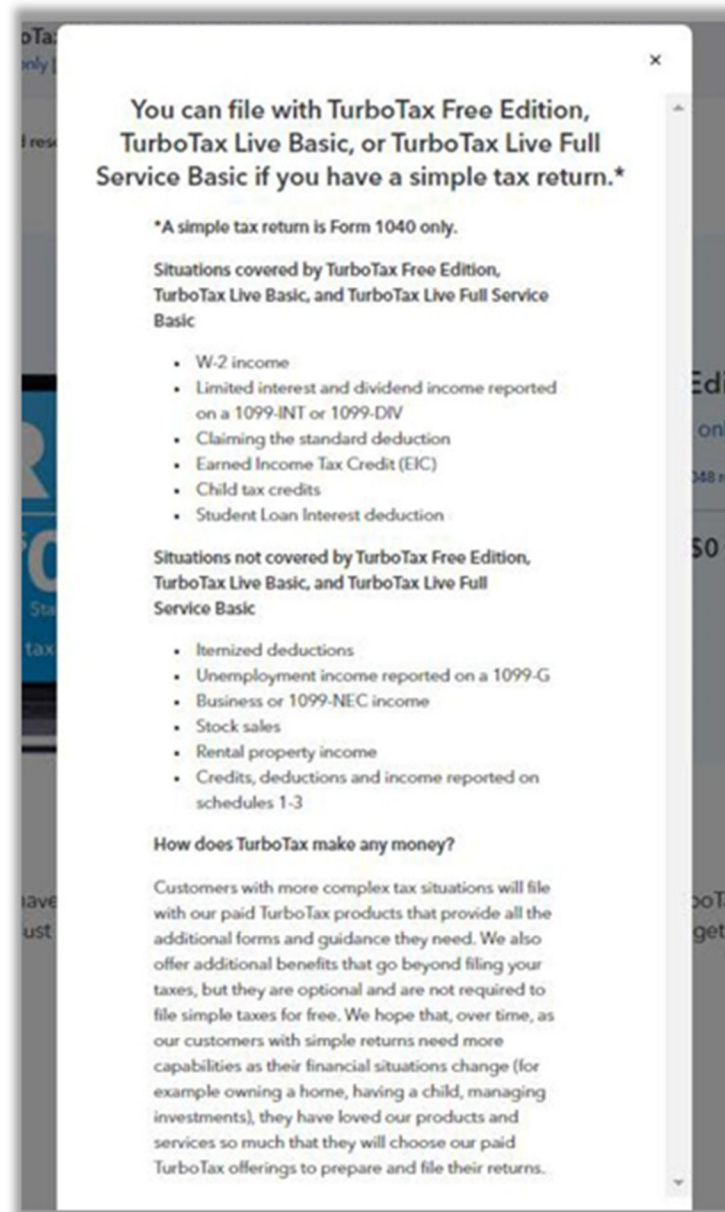
Response to Finding No. 379:

Complaint Counsel disputes this Proposed Finding.

While Complaint Counsel does not disagree with the general mechanics of how Intuit’s pop-up screen works, the language of these pop-up screens was not the same from year to year. (*See, e.g.*, RFF-147).

Complaint Counsel further disputes that “providing detailed qualification information through the hyperlink allows ‘consumers [to] control the pace at which they see that information,’ making it less likely that they ‘tune out and not try to process something that’s an overwhelming message,’” a proposition supported only by citation to Professor Golder’s trial testimony. This Proposed Finding is not contained in Professor Golder’s report, however, and should therefore be disregarded. (*See* Chappell (ALJ) Tr. 889 (admonishing the parties that “anything that’s in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.”).

380. RX3, shown in part below, is a screenshot of the pop-up screen from Tax Year 2021. (RX3 (Intuit)). Since Tax Year 2018, the pop-up has contained substantially the same content as RX3 (Intuit). (RX4 (Intuit); RX20 (Intuit); RX21 (Intuit); RX390 (Intuit)).



Response to Finding No. 380:

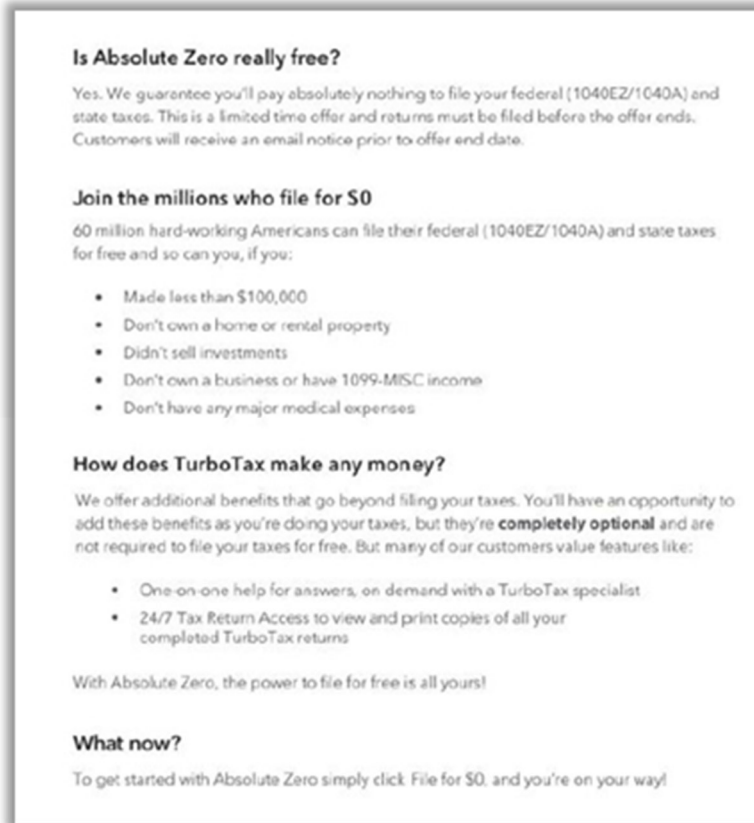
Complaint Counsel disputes this Proposed Finding. Intuit’s definition of “simple tax return” has changed over time, (*see* FF-13 (*citing* Compl. ¶¶ 15–17; Answer ¶¶ 15–17; GX342 (Complaint Counsel) ¶¶ 127, 197); FF-15—FF-18 (describing the changes in Intuit’s eligibility requirements for Free Edition between 2016 and 2022)).

381. Prior to Tax Year 2017, the pop-up similarly disclosed that the Absolute Zero offer for TurboTax Free Edition covered tax forms “1040EZ/A.” (RX25 (Intuit); RX389 (Intuit); RX1271-A (Intuit)).

Response to Finding No. 381:

Complaint Counsel has no specific response.

382. RX25, shown in part below, is a screenshot of the pop-up screen from Tax Year 2017. (RX25 (Intuit)).

**Response to Finding No. 382:**

Complaint Counsel has no specific response.

383. Intuit uses links to a pop-up screen with additional qualification details because putting all the qualification details next to the TurboTax Free Edition offer would likely overload consumers with “too much information to really read and comprehend.” (Johnson (Intuit) Tr. 595). The pop-up is also “a way of disrupting the consumer’s viewing pattern to draw their attention to something that’s really important.” (Johnson (Intuit) Tr. 609).

Response to Finding No. 383:

Complaint Counsel disputes this Proposed Finding, which is based solely on Mr. Johnson’s speculative lay-opinion about how consumers would behave when encountering a pop up screen is irrelevant since Mr. Johnson is not qualified as an expert in this matter.

384. Reasonable consumers who wished to understand whether they qualified to use TurboTax Free Edition or another free TurboTax SKU could do so easily on the TurboTax website *before* beginning their tax returns. Just as the ads promised, consumers were able to “see if they qualify” on TurboTax.com.

Response to Finding No. 384:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

B. TurboTax Free Edition Landing Page

385. When consumers click on an online ad for a free TurboTax SKU, including display ads and paid-search ads, they are taken to that SKU’s landing page. (Rubin (Intuit) Tr. 1563-1564; Ryan (Intuit) Tr. 697; RX1420 (Intuit); RX1531 (Intuit)). Consumers can also access those SKUs’ landing pages by clicking on organic search results. (Ryan (Intuit) Tr. 697- 698; Rubin (Intuit) Tr. 1548-1552, 1564-1565; Golder (Intuit) Tr. 1271-1272; RX1440 (Intuit)).

Response to Finding No. 385:

Complaint counsel has no specific response.

386. The landing page for TurboTax Free Edition is <https://turbotax.intuit.com/personal-taxes/online/free-edition.jsp>. (RX1531 (Intuit); Johnson (Intuit) Tr. 595-596; Rubin (Intuit) Tr. 1564).

Response to Finding No. 386:

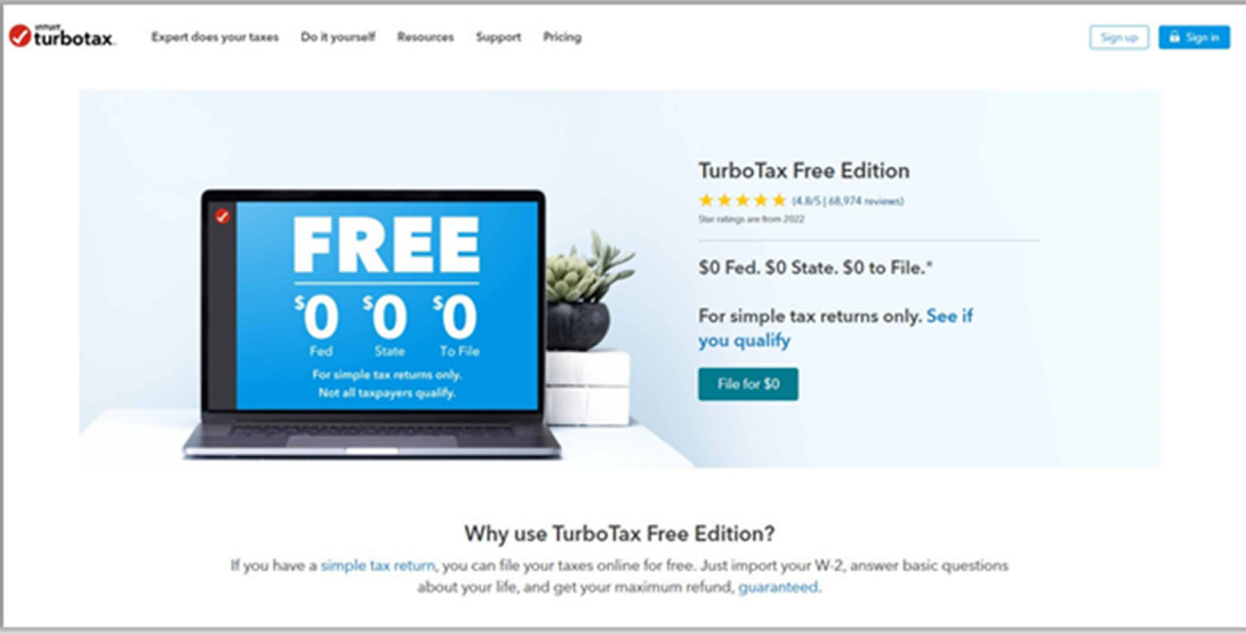
Complaint Counsel has no specific response.

387. The TurboTax Free Edition landing page is accessible “through search results,” “TurboTax Blog content,” “press releases,” and “articles written by the media” (Rubin (Intuit) Tr. 1564-1565), as well as by clicking on links for TurboTax Free Edition on the TurboTax website or by clicking on online TurboTax Free Edition display ads. (Johnson (Intuit) Tr. 595- 596; Rubin (Intuit) Tr. 1548-1552, 1563-1565; Ryan (Intuit) Tr. 697).

Response to Finding No. 387:

Complaint Counsel has no specific response.

388. RX1531, shown in part below, is a screenshot of a TurboTax Free Edition landing page from Tax Year 2022. (RX1531 (Intuit)).



TurboTax Free Edition
 ★★★★★ (4.8/5 | 48,974 reviews)
 Star ratings are from 2022

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

For simple tax returns only. See if you qualify

[File for \\$0](#)

Why use TurboTax Free Edition?
 If you have a simple tax return, you can file your taxes online for free. Just import your W-2, answer basic questions about your life, and get your maximum refund, guaranteed.

Response to Finding No. 388:

Complaint Counsel has no specific response.

389. The Free Edition landing page contains, at the very top of the page, multiple disclosures discussing and describing TurboTax Free Edition’s qualifications, including: “For simple tax returns only. See if you qualify.”; “For simple tax returns only[.] Not all taxpayers qualify.”; and “Why use TurboTax Free Edition? If you have a simple tax return, you can file your taxes online for free.” (RX1527 (Intuit); RX1528 (Intuit); RX1529 (Intuit); RX1530 (Intuit); RX1531 (Intuit); *see also* Rubin (Intuit) Tr. 1565-1566).

Response to Finding No. 389:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

The record shows, for example, the Intuit’s hyperlinks are not effective. As Professor Novemsky opined, Intuit’s placement of a fuller disclaimer behind a “simple returns” hyperlink made it unlikely that consumers would reach the disclaimer because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of “simple returns” on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674), while another consumer said that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

390. Several of these disclosures are in color-contrasted, hyperlinked text, including “See if you qualify” and “simple tax return.” (RX1527 (Intuit); RX1528 (Intuit); RX1529 (Intuit); RX1530 (Intuit); RX1531 (Intuit)).

Response to Finding No. 390:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

The record shows, for example, the Intuit’s hyperlinks are not effective. As Professor Novemsky opined, Intuit’s placement of a fuller disclaimer behind a “simple returns” hyperlink made it unlikely that consumers would reach the disclaimer because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of “simple returns” on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674), while another consumer said that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

391. Consumers who click on one of these disclosures are shown a pop-up box which states, “what qualifies as a simple tax return” and explains which tax situations are and are not covered by TurboTax Free Edition. (Rubin (Intuit) Tr. 1566-1567; RX1527 (Intuit); RX1528 (Intuit); RX1529 (Intuit); RX1530 (Intuit); RX1499 (Intuit)).

Response to Finding No. 391:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

The record shows, for example, the Intuit’s hyperlinks are not effective. As Professor Novemsky opined, Intuit’s placement of a fuller disclaimer behind a “simple returns” hyperlink made it unlikely that consumers would reach the disclaimer because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of “simple returns” on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674), while another consumer said that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

392. The TurboTax Free Edition landing page also includes a chart listing every TurboTax SKU and identifying which IRS tax forms and schedules each product covers. (RX1527 (Intuit); RX1528 (Intuit); RX1529 (Intuit); RX1530 (Intuit); RX1531 (Intuit); *see also* Rubin (Intuit) Tr. 1567-1568).

Response to Finding No. 392:

Complaint Counsel has no specific response.

393. RX1531, shown in part below, is a screenshot of the section of the TurboTax Free Edition landing page from Tax Year 2022 that includes a portion of that chart. (RX1531 (Intuit)).

FEATURES		REVIEWS	TAX FORMS	REQUIREMENTS	
Sort By Product		Sort By Form	Search forms		
Commonly Filed Tax Forms and Schedules		Free Edition - Basic Live	Deluxe - Deluxe Live	Premier - Premier Live	Self-Employed - Self-Employed Live
1040	U.S. Individual Income Tax Return	●	●	●	●
Schedule EIC	Earned Income Credit	●	●	●	●
Schedule 1	Additional Income and Adjustments to Income	●*	●	●	●
Schedule D	Capital Gains and Losses	●**	●**	●	●
Schedule 2	Additional Taxes		●	●	●
Schedule 3	Additional Credits and Payments		●	●	●
Schedule A	Itemized Deductions		●	●	●
Schedule B	Interest and Dividend Income		●	●	●
Schedule C	Profit or Loss from Business (Income)		●***	●	●
Schedule SE	Self-Employment Tax		●	●	●
Schedule E	Supplemental Income and Loss, including rental property			●	●
Schedule C	Profit or Loss from Business (Expenses)				●

Response to Finding No. 393:

Complaint Counsel has no specific response.

394. As the screenshot from RX1531 shows, the tax form chart located on the Free Edition landing page includes a “sort by product” option. (RX1531 (Intuit); RX1527 (Intuit); RX1528 (Intuit); RX1529 (Intuit); RX1530 (Intuit); *see also* Rubin (Intuit) Tr. 1568-1569).

Response to Finding No. 394:

Complaint Counsel has no specific response.

395. The tax form chart located on the Free Edition landing page also includes a search bar that allows consumers to search for a particular form or tax situation and determine the TurboTax SKU that covers that situation. ((RX1527 (Intuit); RX1528 (Intuit); RX1529 (Intuit); RX1530 (Intuit); RX1531 (Intuit); *see also* Rubin (Intuit) Tr. 1568-1569). For example, consumers interested in determining whether profits and losses from their farm activity are covered by a particular product can type “farm” in the search bar and immediately determine the TurboTax SKU that covers those profits and losses. (Rubin (Intuit) Tr. 1568-1569).

Response to Finding No. 395:

Complaint Counsel has no specific response.

396. The TurboTax Free Edition landing page, including the qualifying language, hyperlinked disclosures, and chart listing the tax forms supported by each SKU, is available to anyone who visits the TurboTax website, without the need to enter any personal information. (Rubin (Intuit) Tr. 1566-1567).

Response to Finding No. 396:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit's purported disclaimers were insufficient to change the deceptive message conveyed by Intuit's false "free" TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit's false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers' detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter "Deception Policy Statement").

The record shows, for example, the Intuit's hyperlinks are not effective. As Professor Novemsky opined, Intuit's placement of a fuller disclaimer behind a "simple returns" hyperlink made it unlikely that consumers would reach the disclaimer because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a "simple return" is and are under a preexisting misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of "simple returns" on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not "obvious." (FF-674), while another consumer said that "it is highly unlikely that people will click through to an external link." (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not

produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

397. The page provided substantively similar qualifying language, hyperlinked disclosures, and details surrounding the IRS's tax forms and schedules covered by each TurboTax SKU from Tax Year 2016 to Tax Year 2022. (RX1205 (Intuit); RX1206-A (Intuit); RX1527 (Intuit); RX1528 (Intuit); RX1529 (Intuit); RX1530 (Intuit); RX1531 (Intuit)).

Response to Finding No. 397:

Complaint Counsel has no specific response.

398. The extensive detail on this page ensures that reasonable consumers who view and then click on TurboTax display and search advertisements are unlikely to be misled by those ads. And since this page also shows up prominently in organic search results related to free TurboTax and similar phrases (Rubin (Intuit) Tr. 1551-1552, 1564-1565; Ryan (Intuit) Tr. 696-698; RX1440 (Intuit) at 1), it guards against any deception more broadly.

Response to Finding No. 398:

Complaint Counsel disputes this Proposed Finding.

The assertions (1) "The extensive detail on this page ensures that reasonable consumers who view and then click on TurboTax display and search advertisements are unlikely to be misled by those ads" and (2) "guards against any deception more broadly, while styled as facts, improperly call for a legal conclusion without any support, make gross generalizations about the record, do not cite to any portion of the record, and should be disregarded. (*See* Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.")).

The assertion "this page also shows up prominently in organic search results related to free TurboTax and similar phrases" is not supported by the testimony Intuit cites, as those witnesses do not testify that the page shows up "prominently."

C. TurboTax "See if you qualify" Webpage

399. The TurboTax website also includes a page dedicated to providing details concerning the qualifications for TurboTax's free SKUs (the "See if you qualify" webpage), available at <https://turbotax.intuit.com/best-tax-software/why-its-free>. (RX6 (Intuit); RX1501 (Intuit); GX439 (Ryan (Intuit) Decl.) ¶39).

Response to Finding No. 399:

Complaint Counsel has no specific response.

400. This “See if you qualify” page states, “Simple tax return? You could file for free[.] A simple return is one that’s filed using the IRS Form 1040 only, without attaching any schedules.” (RX6 (Intuit); RX1501 (Intuit)).

Response to Finding No. 400:

Complaint Counsel has no specific response.

401. The page further states, “If you have a simple tax return, you could be eligible to file for \$0[.] Simple tax returns are those filed using IRS Form 1040 only, with no added complexity. Only certain tax situations qualify.” (RX6 (Intuit); RX1501 (Intuit)).

Response to Finding No. 401:

Complaint Counsel has no specific response.

402. The page then goes on to detail the tax situations that are and are not covered by free TurboTax SKUs, and answers frequently asked questions, like “How does TurboTax make money?” (RX6 (Intuit); RX1501 (Intuit)).


Response to Finding No. 402:

Complaint Counsel has no specific response.

403. RX1501, shown in part below, is a screenshot of a portion of the “See if you qualify” webpage from Tax Year 2022. (RX1501 (Intuit)).

If you have a simple tax return, you could be eligible to file for \$0


Simple tax returns are those filed using IRS Form 1040 only, with no added complexity. Only certain tax situations qualify.



Situations covered

- 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

[Get started](#)



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 transactions)

[See all products](#)

Frequently asked questions

How does TurboTax make 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.

When financial situations aren't simple anymore (like owning a home, having a child, or managing investments), we hope our customers will choose to pay to prepare and file their returns with TurboTax.

Response to Finding No. 403:

Complaint Counsel has no specific response.

404. Intuit publishes the “See if you qualify” webpage to provide consumers with details concerning the qualifications for free TurboTax SKUs. (Rubin (Intuit) Tr. 1588-1589).

Response to Finding No. 404:

Complaint Counsel disputes the Proposed Finding, as Mr. Rubin does not testify that “Intuit publishes the ‘See if you qualify’ webpage to provide consumers with details concerning the qualifications for free TurboTax SKUs.” Instead, Mr Rubin testified that “the purpose of [the TurboTax blog posts] is to be found and read by people.” (See Rubin (Intuit) Tr. 1588-1589).

405. Intuit uses SEO strategies to ensure that webpages that discuss the qualifications for free TurboTax SKUs, like the “See if you qualify” webpage, appear prominently in online search results for free tax-preparation products. (Rubin (Intuit) Tr. 1548-1549, 1551, 1588-1591); *supra* ¶¶182, 185, 199-202).

Response to Finding No. 405:

Complaint Counsel disputes the Proposed Finding, as Mr. Rubin does not testify to that the relevant webpages appear “prominently.”

406. The extensive detail on the “See if you qualify” webpage ensures that reasonable consumers who are searching for information about free TurboTax SKUs or who visit the webpage are unlikely to be misled by any challenged advertisements.

Response to Finding No. 406:

Complaint Counsel disputes the Proposed Finding, which does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

407. Intuit’s decision to create and publish the “See if you qualify” webpage, and its efforts to ensure that consumers can easily access that webpage, is inconsistent with an intent to deceive consumers into believing that all TurboTax is free or that TurboTax is free for a consumer when that is not the case.

Response to Finding No. 407:

Complaint Counsel disputes the Proposed Finding, which does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

D. TurboTax Products & Pricing Page

408. When consumers click a button on the TurboTax website to start preparing their taxes, such as the “File for \$0” button on the TurboTax Free Edition landing page, they are taken to the TurboTax Products & Pricing page. (Rubin (Intuit) Tr. 1570-1571; RX53 (Intuit) at 36; RX439-A (Intuit)).

Response to Finding No. 408:

Complaint Counsel has no specific response.

409. This page is thus shown to all consumers before they start preparing their taxes with a TurboTax SKU. (Johnson (Intuit) Tr. 567; Rubin (Intuit) Tr. 1570-1571; RX52 (Intuit) at 36; RX578 (Intuit) at 71).

Response to Finding No. 409:

Complaint Counsel has no specific response.

410. Nearly [REDACTED] view the Products & Pricing page before even creating a username and password. (RX52 (Intuit) at 36).

Response to Finding No. 410:

Complaint Counsel has no specific response.

411. RX1532, shown in part below, is a screenshot of the Tax Year 2022 Products & Pricing page. (RX1532 (Intuit)).

The screenshot displays the TurboTax website's pricing page. At the top, there are two navigation options: "Do it yourself" and "Real experts help or do it for you". The main heading is "America's #1 brand of tax software". Below this, four product editions are listed: Free Edition, Deluxe, Premier, and Self-Employed. Each edition has a price, a description of what it covers, a "Start for free" button (with "Pay only when you file" in smaller text), and a star rating with the number of reviews. The Free Edition is priced at \$0, while the others range from \$39 to \$89. A large "FREE" graphic is prominently displayed in the center, with "\$0 \$0 \$0" below it, indicating that federal, state, and filing fees are zero for the Free Edition. To the right of this graphic is a list of six benefits for the Free Edition, each preceded by a checkmark. At the bottom, there are four columns detailing the features included in each edition, with a "Learn more" button under each column.

Response to Finding No. 411:

Complaint Counsel has no specific response.

412. The Products & Pricing webpage from prior years included substantially similar content as the Tax Year 2022 webpage. (RX439-A (Intuit); RX13 (Intuit); RX381 (Intuit); RX122 (Intuit); RX8 (Intuit); RX138 (Intuit); RX210-A (Intuit); RX1532 (Intuit); Rubin (Intuit) Tr. 1571; RX1018 (Golder Expert Report) ¶194).

Response to Finding No. 412:

Complaint Counsel has no specific response.

413. The Products & Pricing Page lists each TurboTax SKU, its price, and the relevant tax situations the SKU handles, so that before consumers begin their taxes, they are aware that all TurboTax products are not free, that there is a Free Edition for simple tax returns. (RX439-A (Intuit); RX13 (Intuit); RX381 (Intuit); RX122 (Intuit); RX8 (Intuit); RX138 (Intuit); RX210-A (Intuit); RX1532 (Intuit); Rubin (Intuit) Tr. 1571; RX1018 (Golder Expert Report) ¶194). The Products & Pricing page was designed “to make sure that [consumers] are aware of the qualifications and to make sure we get people in the right products, get consumers in the right products.” (Johnson (Intuit) Tr. 598).

Response to Finding No. 413:

Complaint Counsel disputes this Proposed Finding. There is no evidence that the Products & Pricing Page communicates the “relevant tax situations the SKU handles” in a format consumers see and understand, such that they would be “aware of the qualifications.”

414. The Products and Pricing page includes qualifying language for TurboTax Free Edition in multiple places, including hyperlinked statements that it is for “simple tax returns only,” “You’ll pay absolutely nothing to file your federal and state taxes if you have as simple tax return only,” and “Free filing of your simple federal and state tax returns only,” as well as a concise list of the tax situations covered. (Johnson (Intuit) Tr. 596-598; RX439-A (Intuit); RX13 (Intuit); RX381 (Intuit); RX122 (Intuit); RX8 (Intuit); RX138 (Intuit); RX210 (Intuit); RX1532 (Intuit)).

Response to Finding No. 414:

Complaint Counsel disputes this Proposed Finding to the extent it suggests that consumers were not misled by Intuit’s TurboTax free advertising as a result of information available at the Products & Pricing page. First, regardless of the effectiveness of disclosures on the website, the TurboTax “free” messaging still drives people to the website with the misperception that they can file for free. (RX1345 (Novemsky Rebuttal Expert Report) ¶250; *see* GX743 (Yoeli Exper Report) ¶77 (“[T]he question of whether deception occurred relates to consumers’ beliefs prior to arriving at the website.”)). Second, the Products & Pricing page obscures information about what “simple returns” actually means behind a hyperlink or in small font at the bottom of the page, requiring consumers to click or scroll to find the information. (RX1345 (Novemsky Rebuttal Expert Report) ¶250). Third, to the extent the Products & Pricing

Page repeats the “simple returns” language, that disclosure fails to convey to consumers that they may not qualify in a manner that is consistent with TurboTax’s qualification criteria. (RX1345 (Novemsky Rebuttal Expert Report) ¶250).

415. The Products & Pricing page also includes multiple hyperlinked disclosures concerning TurboTax Free Edition’s qualifications that, when clicked, bring up a pop-up screen with details on Free Edition’s qualifications. (Johnson (Intuit) Tr. 596-598; Shiller (FTC) Tr. 219-222; RX439-A (Intuit); RX13 (Intuit); RX381 (Intuit); RX122 (Intuit); RX8 (Intuit); RX138 (Intuit); RX210 (Intuit); RX1532 (Intuit)).

Response to Finding No. 415:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. FTC Policy Statement on Deception, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that its hyperlinked disclosures were effective. As Professor Novemsky opined, Intuit’s placement of a fuller disclaimer behind a “simple returns” hyperlink made it unlikely that consumers would reach the disclaimer because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of “simple returns” on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674), while another

consumer said that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

416. For example, as shown above, the current—Tax Year 2022—Products & Pricing page discloses qualifications for TurboTax Free Edition in at least four prominent locations and asks consumers to “see if you qualify” with contrasted, hyperlinked text. (RX1532 (Intuit) at 1-3). Consumers who click the hyperlinked text are shown a pop-up that states “What qualifies as a simple tax return?” and lists the situations covered (and not covered) by TurboTax Free Edition. (RX1498 (Intuit); RX1499 (Intuit); Johnson (Intuit) Tr. 596-597; Shiller (FTC) Tr. 219-222; *supra* ¶¶379-383, 415-416).

Response to Finding No. 416:

Complaint Counsel disputes this Proposed Fact, as Intuit does not cite any evidence that its disclosures are “prominent.”

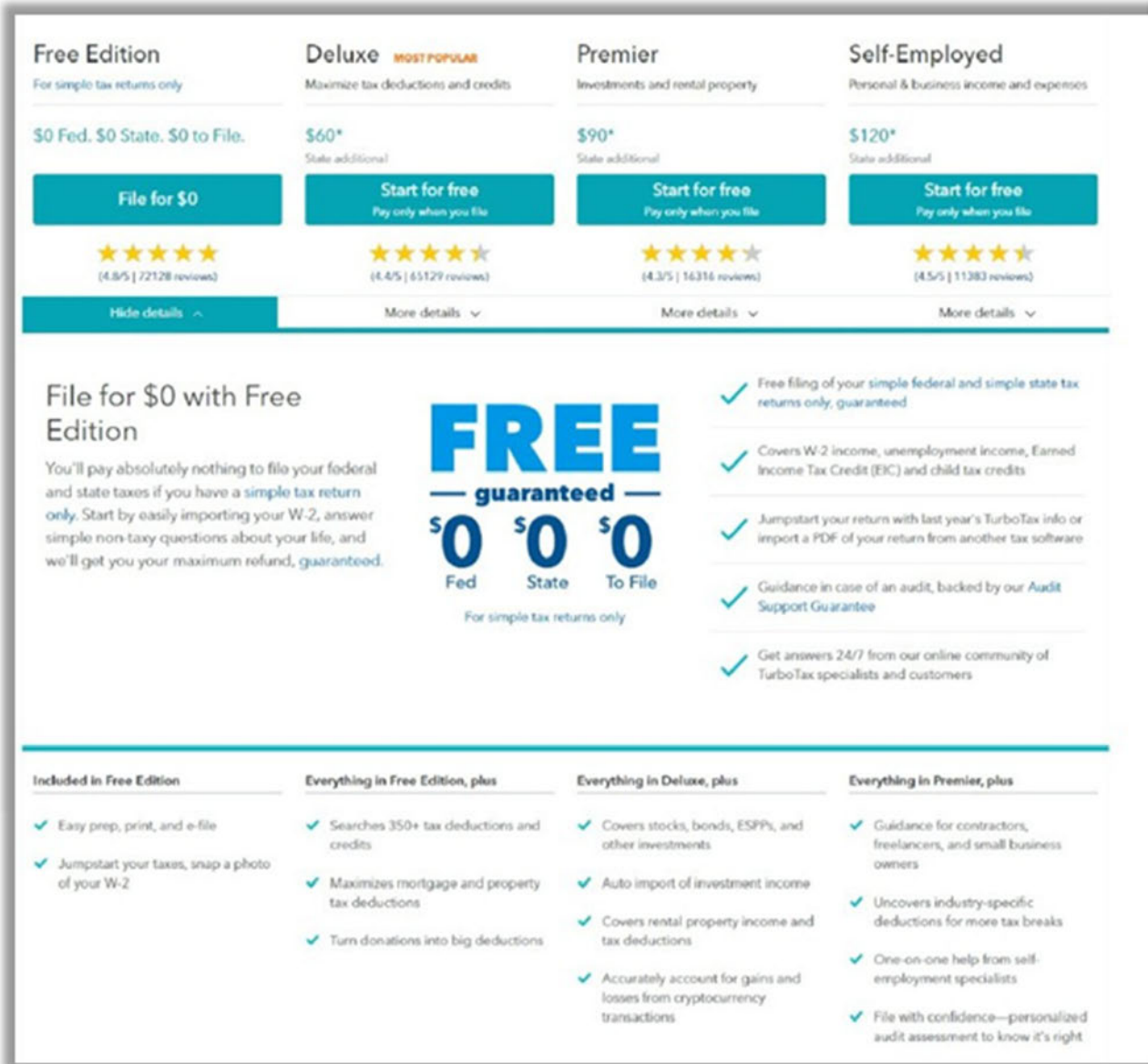
As Professor Novemsky opined, Intuit’s placement of a fuller disclaimer behind a “simple returns” hyperlink made it unlikely that consumers would reach the disclaimer because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of “simple returns” on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674), while another consumer said that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

417. A reasonable consumer who sees the Products & Pricing page would not be likely to believe that all TurboTax products are free or that TurboTax would necessarily be free for them.

Response to Finding No. 417:

Complaint Counsel disputes the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

418. RX138, shown in part below, is a screenshot of the Tax Year 2020 Products & Pricing page. (RX138 (Intuit)).



Response to Finding No. 418:

Complaint Counsel has no specific response.

E. TurboTax SKU Selector

419. Intuit's Products & Pricing page includes a tool (the "SKU Selector") that enables customers to receive a recommendation for the product most likely to meet their needs. (Johnson (Intuit) Tr. 565-567, 572, 596; Rubin (Intuit) Tr. 1575, 1579-1582; RX1018 (Golder Expert Report) ¶201; RX13 (Intuit); RX381 (Intuit); RX122 (Intuit); RX8 (Intuit); RX138 (Intuit); RX210 (Intuit); RX1532 (Intuit)).

Response to Finding No. 419:

Complaint Counsel disputes the Proposed Finding. While Complaint Counsel agrees that "Intuit's Products & Pricing page includes a tool (the "SKU Selector") that enables customers to receive a recommendation for [a TurboTax] product," there is no evidence that it is effective at matching consumers with the product "most likely to meet their needs."

In fact, in the version of the SKU Selector captured by Mr. Deal, for example, the SKU Selector presented consumers with the option "I want to maximize deductions and credits", in the (most prominent) top-left position. (GX743 (Yoeli Expert Report) ¶73). Given that all consumers would want this, and that selecting that tile pushes a consumers into a paid product, the SKU Selector, then, may be used to funnel people into paid products, rather than the "appropriate" product. (GX743 (Yoeli Expert Report) ¶73).

420. The tool on the Products & Pricing page has looked largely the same since Tax Year 2016. (GX150 (Goode (Intuit) IHT) at 104-105; RX13 (Intuit); RX381 (Intuit); RX8 (Intuit); RX1532 (Intuit)).













Response to Finding No. 420:

Complaint Counsel has no specific response.

421. RX1532, shown in part below, is a screenshot of the SKU Selector tiles on the Products & Pricing page from Tax Year 2022. (RX1532 (Intuit)).

Let's find the right tax solution for you

Select all that apply for a recommendation:

 I want to maximize deductions and credits <small>What does this mean?</small>	 I want a tax expert to do my taxes for me	 I have a job (received W-2)	 I paid rent	 I own a home	 I have children or dependents
 I want a tax expert to review my return	 I donated to charity	 I have unemployment income	 I sold stock, crypto, or own rental property	 I'm self-employed/an independent contractor <small>Am I self-employed?</small>	 I'm a freelancer/gig-worker

Response to Finding No. 421:

Complaint Counsel has no specific response.

422. Consumers can use the SKU Selector without creating a TurboTax account or entering any personal information. (Johnson (Intuit) Tr. 596, 599-600; Rubin (Intuit) Tr. 1571; RX52 (Intuit) at 36).

Response to Finding No. 422:

Complaint Counsel disputes the Proposed Finding. Using the SKU selector requires consumers to enter personal information about their tax filing situation, for example clicking “I donated to charity” or “I have unemployment income.” (See, e.g. IPFF-421).

423. Intuit has spent substantial time and resources on its SKU selection experience, with the aim of [REDACTED] (RX334 (Intuit) at -8486; Johnson (Intuit) Tr. 570; RX1027 (Deal Expert Report) ¶69; RX291 (Intuit); RX723 (Intuit); RX805 (Intuit)).

Response to Finding No. 423:

Complaint Counsel disputes this Proposed Finding. See RFF-419.

424. The SKU Selector invites consumers to “find the right tax solution for you.” (RX13 (Intuit); RX381 (Intuit); RX122 (Intuit); RX8 (Intuit); RX138 (Intuit); RX210 (Intuit); RX1532 (Intuit)). Customers can do so by clicking on one or more of twelve tiles representing different life situations that consumers could select to receive a recommendation for a TurboTax SKU. (Johnson (Intuit) Tr. 565-566, 599; Rubin (Intuit) Tr. 1575-1577, 1579-1581, 1613; RX210 (Intuit); Shiller (FTC) Tr. 215). The tiles describe life situations rather than tax forms in

order to make it easier to communicate to consumers what circumstances affect their tax situation. (Johnson (Intuit) Tr. 599; Rubin (Intuit) Tr. 1575-1577, 1579-1581, 1613).

Response to Finding No. 424:

Complaint Counsel disputes the final sentence of the Proposed Finding: “The tiles describe life situations rather than tax forms in order to make it easier to communicate to consumers what circumstances affect their tax situation.” In fact, the SKU Selector may be used to funnel people into paid products, rather than the “appropriate” product. *See* RFF-419.

425. The SKU Selector instructs consumers to “[s]elect all that apply for a recommendation.” (RX1532 (Intuit); RX9 (Intuit); Johnson (Intuit) Tr. 565-566, 599, 662-664, 672; Rubin (Intuit) Tr. 1575-1577, 1579-1581, 1613; Shiller (FTC) Tr. 215). As a consumer clicks on tiles, the SKU Selector presents different TurboTax product recommendations, which appear below the SKU Selector on the Products & Pricing page. (Johnson (Intuit) Tr. 565-566, 599, 662-664, 672; Rubin (Intuit) Tr. 1575-1577, 1579-1581, 1613; RX13 (Intuit); RX381 (Intuit); RX122 (Intuit); RX8 (Intuit); RX138 (Intuit); RX210 (Intuit); RX1532 (Intuit)).

Response to Finding No. 425:

Complaint Counsel has no specific response.

426. The SKU Selector contains four different tiles or tax situations that would result in a recommendation for TurboTax Free Edition. (Johnson (Intuit) Tr. 565-566, 599, 662-664, 672; Rubin (Intuit) Tr. 1575-1577, 1579-1581, 1613; Shiller (FTC) Tr. 216-217). For example, if taxpayers indicate that they rent their home, have a job with W-2 income, and have children or dependents, the tool recommends TurboTax Free Edition. (Johnson (Intuit) Tr. 565-566, 599, 662-664, 672; Rubin (Intuit) Tr. 1575-1577, 1579-1581, 1613; RX13 (Intuit); RX381 (Intuit); RX122 (Intuit); RX8 (Intuit); RX138 (Intuit); RX210 (Intuit); RX1532 (Intuit); RX1536; Rubin (Intuit) Tr. 1575-1577, 1614).

Response to Finding No. 426:

Complaint Counsel has no specific response.

427. When the SKU Selector provides a product recommendation for TurboTax Free Edition, it clearly discloses that TurboTax Free Edition is “For simple tax returns only.” (RX13 (Intuit); RX381 (Intuit); RX122 (Intuit); RX8 (Intuit); RX138 (Intuit); RX210 (Intuit); RX1532 (Intuit)).

Response to Finding No. 427:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies “for simple tax returns only” was prominent, conspicuous, or understood by consumers.

428. When consumers select a tax situation not covered by TurboTax Free Edition, the SKU Selector removes the highlight from the TurboTax Free Edition product, indicating that the consumer likely does not qualify to use it. (Shiller (FTC) Tr. 215-216). Instead, the SKU Selector recommends a paid TurboTax SKU. (Shiller (FTC) Tr. 215-218). For example, if taxpayers select that they “own a home,” the tool suggests TurboTax Deluxe. (RX11 (Intuit)). And if taxpayers select that they “sold stock, crypto, or own rental property,” the tool recommends TurboTax Premier. (RX12 (Intuit)).

Response to Finding No. 428:

Complaint Counsel has no specific response.

429. Roughly 60% of new TurboTax customers use the SKU Selector tiles, and approximately [REDACTED] of returning TurboTax customers do so. (Rubin Intuit) Tr. 1581; RX53 (Intuit) at 73, 75; *see also* RX52 (Intuit) at 36).

Response to Finding No. 429:

Complaint Counsel has no specific response.

430. Forty to fifty percent of consumers who use the SKU Selector receive a recommendation to start in TurboTax Free Edition. (Rubin (Intuit) Tr. 1581-1582). This is roughly the same percentage of consumers who complete their taxes in Free Edition. (Rubin (Intuit) Tr. 1581-1582).

Response to Finding No. 430:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that the forty to fifty percent of consumers who use the SKU Selector receive a recommendation to start in TurboTax Free Edition *are the same consumers* as those who complete their taxes in Free Edition. Intuit, notably, has not provided that data or information.

431. Consumers are free to ignore the recommendation provided by the SKU Selector and start in any TurboTax SKU they want, including TurboTax Free Edition. (Rubin (Intuit) Tr. 1641; Shiller (FTC) Tr. 215-216).

Response to Finding No. 431:

Complaint Counsel has no specific response.

432. Third-party websites and reviewers often recommend that consumers start their tax returns using TurboTax Free Edition, regardless of their tax situation. (RX505 (Intuit) at 3; Golder (Intuit) Tr. 1086-1087). For example, a *New York Times* Wirecutter article entitled “The Best Online Tax Filing Software,” published on February 15, 2022, and updated on April 18, 2022 and February 7, 2023, made that recommendation. (RX505 (Intuit) at 3; RX80 (Intuit) at 2; RX1497 (Intuit) at 2; Rubin (Intuit) Tr. 1560). Such third-party reviews are widely read and important to consumers’ tax-preparation product purchasing decisions. (Golder (Intuit) Tr. 1087).

Response to Finding No. 432:

Complaint Counsel disputes this Proposed Finding. While Intuit makes the general claim that “Third-party websites and reviewers *often* recommend that consumers start their tax returns using TurboTax Free Edition, regardless of their tax situation,” (emphasis added) it has only pointed to one instance.

433. The Wirecutter articles noted that “TurboTax requires us to state that its Free Edition is ‘for simple tax returns only’ and that ‘not all taxpayers qualify.’” (RX505 (Intuit) at 3; RX80 (Intuit) at 2; RX1497 (Intuit) at 2). Nonetheless, the article stated that Wirecutter “think[s] most people should start with Free Edition.” (RX505 (Intuit) at 3; RX80 (Intuit) at 2; RX1497 (Intuit) at 2). It explained that “[e]ven if you might have some deductible expenses, such as mortgage interest or charitable donations, it’s better to start here and upgrade to Deluxe only if you’re required to.” (RX505 (Intuit) at 3; RX80 (Intuit) at 2; RX1497 (Intuit) at 2).

Response to Finding No. 433:

Complaint Counsel has no specific response.

434. In Tax Year 2021, 3.7 million consumers started filing their taxes in TurboTax Free Edition without using the SKU Selector. (Rubin (Intuit) Tr. 1582). Of those, 2.8 million—approximately 75%—completed their taxes for free using TurboTax Free Edition. (Rubin (Intuit) Tr. 1582).

Response to Finding No. 434:

Complaint Counsel has no specific response.

435. The SKU Selector tool further illustrates that reasonable consumers were unlikely to be deceived according to Complaint Counsel’s theory. The tool provided in extremely simple language an easy way for consumers to assess the likelihood that they would be able to use a free TurboTax product. While the tool did not predict with perfect accuracy the right SKU for the consumer, the choices that Intuit made were in the best interests of the consumer.

Response to Finding No. 435:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

F. TurboTax Blog Posts And Other TurboTax Website Content

436. The TurboTax website includes multiple TurboTax Blog posts and FAQs describing Free Edition's qualifications. (Rubin (Intuit) Tr. 1589-1590).

Response to Finding No. 436:

Complaint Counsel has no specific response.

437. For example, in a 2022 FAQ on the TurboTax website entitled, "Is TurboTax Free Edition right for me?," Intuit explained that "Free Edition is an online-only product that supports simple tax returns that can be filed on Form 1040 without any attached schedules," and goes on to explain the situations TurboTax Free Edition covers. (RX63 (Intuit) at 1; Rubin (Intuit) Tr. 1589-1590).

Response to Finding No. 437:

Complaint Counsel has no specific response.

438. Intuit publishes blog posts about free TurboTax SKUs on the TurboTax website to make information about the qualifications for those free SKUs readily available to consumers. (Rubin (Intuit) Tr. 1588-1589). As Mr. Rubin explained, Intuit publishes blog posts "discussing ... the qualifications" for free TurboTax SKUs so that they are "found and read by people." (Rubin (Intuit) Tr. 1589).

Response to Finding No. 438:

Complaint Counsel has no specific response.

439. Intuit also uses SEO strategies to ensure that blog posts detailing the qualifications for free TurboTax SKUs appear prominently in online search results for free tax-preparation products. (Rubin (Intuit) Tr. 1548-1549, 1551, 1589, 1591; *supra* ¶¶182, 185, 199-202).

Response to Finding No. 439:

Complaint Counsel has no specific response.

440. The detail provided about the qualifications for free TurboTax SKUs in blog posts and FAQs on the TurboTax website makes it unlikely that reasonable consumers searching for that information or visiting the TurboTax website would be misled by any challenged advertisements.

Response to Finding No. 440:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding, which calls for a legal conclusion without any support, makes gross generalizations about the record, does not cite to any portion of the record, and should be disregarded. *See* Order

on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

441. Intuit’s decision to publish blog posts detailing the qualification of free TurboTax SKUs webpage, and its efforts to ensure that those blog posts appear prominently in search results, indicate that Intuit did not intend to deceive consumers into believing that all TurboTax is free or that TurboTax is free for a consumer when that is not the case.

Response to Finding No. 441:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding, which calls for a legal conclusion without any support, makes gross generalizations about the record, does not cite to any portion of the record, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that it did not intend to deceive consumers.

G. TurboTax Promptly Notifies Consumers If They Need To Upgrade

442. Once customers select a TurboTax SKU, they begin preparing their returns by entering their personal or tax information. (Johnson (Intuit) Tr. 672). TurboTax then guides them through the entry of their information with a series of questions about their tax situation, such as sources of income, deductions, and tax credits. (Johnson (Intuit) Tr. 680-683).

Response to Finding No. 442:

Complaint Counsel has no specific response.

443. Most commonly, a taxpayer’s sources of income determine the right SKU for them. The TurboTax interview process begins with income (Rubin (Intuit) Tr. 1541), so consumers are likely to find out whether they do not qualify to use TurboTax Free Edition at the outset of the process.

Response to Finding No. 443:

Complaint Counsel disputes the Proposed Finding in part. The portion of the asserted fact “so consumers are likely to find out whether they do not qualify to use TurboTax Free Edition at the outset of the process” is not supported does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

444. If customers provide information indicating that the TurboTax SKU they selected does not support their individual tax situation, TurboTax immediately notifies them of that fact through a large screen, which offers them the opportunity to upgrade to the least expensive TurboTax SKU that covers their tax situation to complete their taxes. (Rubin (Intuit) Tr. 1505-1506, 1583-1584; Johnson (Intuit) Tr. 675-676; RX1018 (Golder Expert Report) ¶¶199, 216 & fig. 41; RX318 (Intuit); GX152 (Johnson (Intuit) Dep.) at 132; GX155 (Rubin (Intuit) IHT) at 40).

Response to Finding No. 444:

Complaint Counsel has no specific response.

445. The screens are designed to ensure that customers understand why they need to upgrade to complete their taxes, as well as the price of the options available. (RX294 (Intuit) at -9054).

Response to Finding No. 445:

Complaint Counsel has no specific response.

446. Any misimpression a consumer may have about filing for free “certainly gets cured” by a TurboTax upgrade screen. (Novemsky (FTC) Tr. 1777-1778).

Response to Finding No. 446:

Complaint Counsel disputes the Proposed Finding to the extent it improperly calls for a legal conclusion and misrepresent the testimony of Professor Novemsky. A more complete excerpt of Professor Novemsky’s answer, below, makes clear that was testifying to the factual matter that once a consumer encounters an upgrade screen (referred to also as a hard stop), that consumer no longer has the impression that they can file for free. (*See* Novemsky (FTC) Tr. 1777-1778). Intuit’s efforts to misconstrue that into a legal conclusion about whether upgrade screens can “cure” deception is misplaced.

Q. And Professor Golder also opined that advertisements, especially TurboTax advertisements, are only part of the consumer buy-in process. In your opinion, does that mean that consumers can't be deceived by advertisements?

A. Of course they're only part of the buying process. I don't see the relevance of that observation. Certainly you can be deceived by an advertisement, you could go to the TurboTax website, try to file for free, and hit a hard stop and realize, oh, I can't file for free.

So the deception certainly gets cured when you hit the hard stop and are told no, you can't do that, but prior to that, of course you would have been deceived and it would have had an impact on the choices you made up to that point. So the fact that you interact with other information sources, whether TurboTax website or really anything else, doesn't speak to whether it's possible that when you see the marketing from TurboTax itself, that at that moment you don't form a false impression that you can file for free when, in fact, you cannot.

(Novemsky (FTC) Tr. 1777-1778).

447. In Tax Year 2021, only 14% of TurboTax customers began their tax returns in a SKU for which they did not qualify and thus saw such an upgrade screen, and the percentage has been less than 20% historically. (Rubin (Intuit) Tr. 1552-1553; RX37 (Intuit) at 4; RX47 (Intuit) at 9; RX51 (Intuit) at 13; RX59 (Intuit) at 3; RX820 (Intuit); GX416 (Intuit) at 31; RX1018 (Golder Expert Report) ¶¶206-208).

Response to Finding No. 447:

Complaint Counsel has no specific response.

448. Complaint Counsel argue that consumers who start their tax returns in TurboTax Free Edition but do not qualify to use that SKU find out that they need to switch to a paid TurboTax SKU only “after investing time and effort gathering and inputting into TurboTax their sensitive personal and financial information,” and therefore feel “locked-in” to TurboTax SKUs through a bait and switch. (Complaint Counsel’s Pretrial Brief at 5, 11, 31, 50-51 (Feb. 17, 2023)). But the Court heard no evidence at trial to support that contention and it is untrue.

Response to Finding No. 448:

Complaint Counsel disputes in part this Proposed Finding of fact. Specifically, Complaint Counsel disputes the sentence: “But the Court heard no evidence at trial to support that contention and it is untrue,” which does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

449. Consumers do *not* spend significant time and effort preparing their taxes with TurboTax generally, let alone before being informed of any need to switch SKUs. The average TurboTax Free Edition customer currently *completes* his or her taxes in just 28 minutes. (Rubin (Intuit) Tr. 1541). And customers who are told they need to switch are typically told shortly after starting their returns. (Rubin (Intuit) Tr. 1541; Johnson (Intuit) Tr. 681; *infra* ¶450; *see also* GX138 (Adamson (FTC) Dep.) at 58).

Response to Finding No. 449:

Complaint Counsel disputes this Proposed Finding. Intuit has not introduced evidence as to what is “significant” to a consumer. The evidence shows on average, consumers encountered an upgrade screen [REDACTED] after beginning to enter their information. (FF-14; GX631 (Intuit) at CC-00013297; *see also* FF-865). Complaint Counsel disagrees with Intuit’s characterization of this amount of time as “shortly” and Intuit has not established that this would not be a meaningful amount of time for consumers. (FF-866). In fact, a number of consumer complaints and consumer testimony illustrate that many consumers reached the end of tax filing before learning that they couldn’t file for free. (*See* RFF-782; FF-671—FF-673; *see also, e.g.*, FF-635; FF-651; FF-657; *see also* RFF-792 (on average, consumers spent [REDACTED] entering tax information before encountering a hard stop telling them to upgrade).

450. Most customers who do not qualify for TurboTax Free Edition are told that within 30 minutes or less of starting their return. (Rubin (Intuit) Tr. 1541; Deal (Intuit) Tr. 1334-1340; RX1027 (Deal Expert Report) ¶105 & fig. 12; RX819 (Intuit); RX821 (Intuit), RX823 (Intuit)). The data, moreover, capture only the length of time the TurboTax website was up on the customer’s browser (i.e., elapsed time), so the data overstate the average time consumers were actively preparing their tax return. (Deal (Intuit) Tr. 1336-1338; RX1027 (Deal Expert Report) ¶¶82, 106).

Response to Finding No. 450:

Complaint Counsel disputes this Proposed Finding, which is eviscerated by Professor Novemsky (whose analysis, while aimed at specifically at Mr. Deal’s expert report, discusses the data relied on in this Proposed Finding):

Relatedly, in [Mr. Deal’s] analysis of users’ time elapsed before being prompted to upgrade at a Hard Stop screen, Mr. Deal attempts to show that, “among the customers who started their tax return using Free Edition and sought to report sources of income other than W-2 income and limited interest and dividends,” customers do not make too significant a time investment on the TurboTax website to switch. He reports in his analysis that half of these customers spend 30 minutes or less before reaching a Hard Stop. This analysis appears to have been narrowed to present the data most favorably, biasing Mr. Deal’s result. In particular, Mr. Deal notes that he limits the analysis to Free Edition customers who sought to report sources of income other than W-2 income and limited interest and dividends, meaning that his analysis appears to

be based on customers who encounter a Hard Stop at the income stage. As I discussed in Section VI.G of this report, Intuit's data show that the time elapsed before a customer sees their first Hard Stop increases significantly from Hard Stop's related to "Income & Wages" to Hard Stops related to "Deductions & Credits" or anything else.

Additionally, Mr. Deal's analysis of time elapsed excludes customers whose time elapsed He reports in his analysis that half of these customers spend 30 minutes or less before reaching a Hard Stop. This analysis appears to have been narrowed to present the data most favorably, biasing Mr. Deal's result. In particular, Mr. Deal notes that he limits the analysis to Free Edition customers who sought to report sources of income other than W-2 income and limited interest and dividends, meaning that his analysis appears to be based on customers who encounter a Hard Stop at the income stage. As I discussed in Section VI.G of this report, Intuit's data show that the time elapsed before a customer sees their first Hard Stop increases significantly from Hard Stop's related to "Income & Wages" to Hard Stops related to "Deductions & Credits" or anything else. Additionally, Mr. Deal's analysis of time elapsed excludes customers whose time elapsed. And as noted, when a switch is required, consumers can always leave TurboTax entirely—and sometimes do.

(RX1345 (Novemsky Rebuttal Expert Report) ¶296).

451. And as noted, when a switch is required, consumers can always leave TurboTax entirely—and sometimes do. (Rubin (Intuit) Tr. 1585-1588; Deal (Intuit) Tr. 1331-1332; RX52 (Intuit) at 4; RX1018 (Golder Expert Report) ¶59; GX150 (Goode (Intuit) IHT) at 110, 241-242; GX152 (Johnson (Intuit) IHT) at 129-130, 137-138). Consumers testified that they are aware they can switch to a competitor after starting their returns with TurboTax. (RX369 (Goldstein (Consumer) Dep.) at 71).

Response to Finding No. 451:

Complaint Counsel disputes this Proposed Finding, which ignores the impact of sunk costs on a consumer's decision to switch. While consumers literally can switch, the consumer who "has 'sunk' time and energy into entering their taxes into TurboTax, and, in deciding to switch, is comparing a product for which they would not have to put in this time and energy again (TurboTax)" to another product for which they would have to repeat that same time and energy. (GX743 (Yoeli Expert Report) ¶85).

452. That consumers sometimes choose to abandon their returns after being prompted to switch demonstrates that they do not feel locked in to using TurboTax and illustrates that, to the extent Complaint Counsel are relying on a bait-and-switch theory, they have failed to prove

their case. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 46-59; RX1016-A (Kirk Fair Expert Report) ¶¶16, 22, 35; GX150 (Goode (Intuit) IHT) at 110).

Response to Finding No. 452:

Complaint Counsel disputes this Proposed Finding, which tries to set up a straw man that consumers must be locked in to using TurboTax in order for deception to occur.

Whether consumers decide to switch after learning that they were deceived is not informative of whether deception occurred. (GX743 (Yoeli Expert Report) ¶81 (“[D]eception occurs prior to, and regardless of, switching.”). Deception occurs because Intuit’s free ads create a false expectation that they can file for free when then cannot, regardless of what a consumer does once they learn of being deceived. As long as there is some sunk cost for consumers to switch, Intuit can benefit from deception. (GX743 (Yoeli Expert Report) ¶81 (“[O]nce customers have begun filling out their taxes, they have a relative disincentive to switch services. They are not literally locked in to TurboTax and it is not ‘inevitable’ that they will file with TurboTax, but Turbo Tax does have an advantage. This is all that is needed for Intuit to have benefitted from its deception.”). “[T]o quote the economist Edward P. Lazear, ‘Bait and switch works because search costs are sunk, not because they lock consumers in.’” (GX743 (Yoeli Expert Report) ¶81).

VIII. TurboTax’s Competitors Advertised Their Free Products As Being Available For Taxpayers With Simple Tax Returns

453. As noted, TurboTax’s major competitors in the online tax-preparation industry all offer and advertise free federal tax filing products with eligibility qualifications based on customers’ tax complexity. (Ryan (Intuit) Tr. 707-708; *supra* ¶¶141, 143-144).

Response to Finding No. 453:

Complaint Counsel has no specific response.

454. Intuit’s competitors advertise their free tax-preparation products as being available for consumers with simple returns. (Ryan (Intuit) Tr. 729-730 (TaxAct), 744-745 (TaxSlayer), 759-760 (H&R Block); Golder (Intuit) Tr. 1088-1092, 1121-1122; RX1018 (Golder Expert Report) ¶¶108-111). Competitors’ ads expressly use the phrases like “simple returns,” “simple tax return,” or “simple tax situations” to disclose the qualifications for their free products. (RX616 (Intuit); RX632 (Intuit); RX1040 (Intuit); RX1192 (Intuit); RX1338 (Intuit); RX1339 (Intuit); RX1340 (Intuit); RX1341 (Intuit); GX789 (FTC); GX790 (FTC); GX791 (FTC); GX814 (FTC); GX832 (FTC); GX839 (FTC)). Many competitor video advertisements include only written qualifications, without any verbal qualifying language. (RX1338 (Intuit);

RX1339 (Intuit); RX1340 (Intuit); GX787 (FTC); GX789 (FTC); GX790 (FTC); GX808 (FTC); GX814 (FTC); GX832 (FTC); GX839 (FTC)).

Response to Finding No. 454:

Complaint Counsel has no specific response.

455. Competitors' ads for free tax-preparation products sometimes identify the name of the specific tax-preparation product or offer being advertised, such as TaxSlayer Simply Free or H&R Block Free Online. (RX632 (Intuit); RX1040 (Intuit); RX1338 (Intuit); RX1340 (Intuit); GX787 (FTC); GX788 (FTC); GX808 (FTC); GX814 (FTC); GX832 (FTC); GX839 (FTC); Golder (Intuit) Tr. 1088-1090).

Response to Finding No. 455:

Complaint Counsel has no specific response.

456. The qualifications in competitor TV ads for free tax-preparation products always appear at the bottom of the screen, and often near the end of the ad on a title card. (RX1018 (Golder Expert Report) ¶131; RX632 (Intuit); RX1040 (Intuit); RX1338 (Intuit); RX1340 (Intuit); RX1341 (Intuit); GX789 (FTC); GX790 (FTC); GX791 (FTC); GX814 (FTC); GX832 (FTC); GX839 (FTC); Ryan (Intuit) Tr. 729-730 (TaxAct), 744-745 (TaxSlayer)).

Response to Finding No. 456:

Complaint Counsel disputes the Proposed Finding. In some of Intuit's competitors' ads, qualifications for the free tax software appear in the middle of the screen, not the bottom of the screen. (RX1018 (Golder Expert Report) ¶ 110 & Figure 17).

457. For example, a screenshot of the title card from a TaxSlayer TV ad for its "Simply Free" product is provided below. (RX1338 (Intuit)).



Response to Finding No. 457:

Complaint Counsel has no specific response.

458. Intuit’s competitors also market their free tax-preparation products on their websites as being available for “simple” returns or tax situations. (Golder (Intuit) Tr. 1088-1090; RX97-A (Intuit); RX422 (Intuit); RX428 (Intuit); RX1018 (Golder Expert Report) ¶112).

Response to Finding No. 458:

Complaint Counsel has no specific response.

459. Competitor ads for free tax-preparation products demonstrate that advertising referring to “simple returns” is standard in the tax-preparation industry, that consumers are thus familiar with advertisements for tax-preparation products that have qualifications, and that the ads communicate those qualifications using “simple returns” language. (Golder (Intuit) Tr. 1088-1092, 1121-1122; RX1018 (Golder Expert Report) ¶108).

Response to Finding No. 459:

Complaint Counsel disputes the Proposed Finding. The evidence cited by Intuit does not support the assertion that consumers are “familiar with advertisements for tax-preparation products that have qualifications, and that the ads communicate those qualifications using ‘simple returns’ language” because the evidence cited shows that Intuit’s competitors use additional disclaimer language and do not rely solely on “simple returns” to communicate

qualifications, for example adding “students” and “W-2 employees.” (See RX1018 (Golder Expert Report) ¶¶ 108 & 110, Figures 15 & 17). Moreover, while Complaint Counsel does not dispute that some Intuit’s competitors used terms similar to “simple” in describing some of the qualifications of their tax preparation products and services, Professor Golder’s opinions about consumer familiarity with the term “simple” are based on speculation and are unsupported. (FF-690). He formed his opinions without surveying a single taxpayer about their understanding or familiarity with the term. (FF-684; FF-686).

460. Given their familiarity with advertising for free tax-preparation products, including the use of “simple returns” and the placement of disclosures, reasonable consumers were not likely to be misled by the challenged ads into believing that all TurboTax products are free or that TurboTax would be free for them when it was not. (Golder (Intuit) Tr. 1090-1091, 1095-1096, 1121-1122; RX1018 (Golder Expert Report) ¶113).

Response to Finding No. 460:

Complaint Counsel disputes the Proposed Finding. The evidence cited by Intuit does not support the assertion that “reasonable consumers were not likely to be misled by the challenged ads into believing that all TurboTax products are free or that TurboTax would be free for them when it was not.” Instead, the evidence cited by Intuit shows that at one point in time, 22% of consumers (a significant number) were confident that TurboTax was free. (Golder (Intuit) Tr. 1095-1096). And survey evidence from Professor Novemsky shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486-FF-487). What is more, consumer testimony (FF-664) and consumer complaints (FF-619; FF-620; FF-623FF-635—FF-662) also show that many consumers had the expectation that they could use TurboTax for free when that was not the case. (See, e.g., FF-642 (“Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”)).

Moreover, while Complaint Counsel does not dispute that some of Intuit’s competitors used terms similar to “simple” in describing some of the qualifications of their tax preparation products and services, Professor Golder’s opinions about consumer familiarity with the term “simple” are based on speculation and are unsupported. (FF-690). He formed his opinions without surveying a single taxpayer about their understanding or familiarity with the term. (FF-684; FF-686; FF-704). The evidence also shows that even if, for the sake of argument, consumers are familiar with the “simple returns” language, they do not understand what the term means, how it applies to their tax situation, and may not engage with it at all. (FF-491—FF-492; FF-494—FF-500). Consumer testimony also shows that consumers do not understand the term. (FF-669—FF-670 (with one consumer testifying that “they “ha[d] no idea unless it told me — Unless TurboTax explicitly told me ‘You qualify for free,’ I would have no idea ... So I am putting my trust in them to do that” and that the phrase simple tax returns “has no connotation to me because I don’t understand what is and is not a simple tax return.”)). What is more, the fact that Intuit’s competitors use the term differently than Intuit makes it *less*, not more, likely that consumers will understand what it means. (FF-697—FF-698). Even Intuit changed the meaning of “simple returns” over time. (FF-13).

IX. Complaint Counsel Failed To Prove That TurboTax’s Free Advertising Was Deceptive

461. Complaint Counsel failed to offer reliable evidence that ads for free TurboTax SKUs deceived a significant minority of reasonable consumers into believing that all TurboTax SKUs are free or that a free TurboTax SKU was free for them when it was not.

Response to Finding No. 461:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, the evidence shows that more than a significant minority, even a majority, of taxpayers believe that TurboTax is free for them when it is not. Survey evidence from Professor Novemsky shows that consumers who could not file for free, who had not used

TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486-FF-487). What is more, consumer testimony (FF-664) and consumer complaints (FF-619; FF-620; FF-623FF-635—FF-662) also show that many consumers had the expectation that they could use TurboTax for free when that was not the case. (*See, e.g.*, FF-642 (“Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”)).

And while Intuit focuses its argument here on TurboTax “SKUS,” evidence shows that consumers do not distinguish between SKUS, and that for 95% of consumers, the only takeaway from TurboTax advertisements is “TurboTax” and that only “a handful” remember the specific product name (even immediately after watching the advertisement as part of a 20-minute survey). (GX340 (Intuit) at CC-00006849; CC-00006856; CC-00006845 *see also* FF-609—FF-610).

462. The evidence—including Intuit’s testing of TurboTax ads, consumer surveys, customer feedback, and lack of consumer complaints—instead shows that reasonable consumers were not deceived. (*Infra* ¶¶623-760).

Response to Finding No. 462:

Complaint Counsel disputes the Proposed Finding for reasons set forth in RFF-623—RFF-760. Intuit’s testing of TurboTax ads shows that consumers take away the message that TurboTax is free. (FF-596—FF-618). Moreover, Intuit customer feedback and complaints illustrate that consumers thought they would be able to use TurboTax for free because of the ads but were not able to. (FF-619—FF-623; *see also, e.g.*, FF-636—FF-637; FF-642—FF-647; FF-649—FF-651; FF-655—FF-660; FF-643). In addition, consumer deponents testified that they thought they would be able to file for free and were not able to. (FF-664). Finally, perception survey evidence shows that consumers were under the misimpressions that they could file for

free, and that TurboTax marketing played a role in their misimpression. (*See* FF-480—FF-488; F-496—FF-497).

463. Complaint Counsel allege that the claims conveyed by TurboTax ads are “likely to mislead” reasonable consumers because they “[were] not true for two-thirds of American taxpayers.” (Evans (FTC) Tr. 23-24). When the Court asked whether Complaint Counsel meant two-thirds “of those who attempt to go to the website and use TurboTax” or of “all tax filers, which is a heck of a lot bigger sample and makes your number pretty much meaningless,” Complaint Counsel confirmed that they meant two-thirds of “all American taxpayers.” (Evans (FTC) Tr. 24).

Response to Finding No. 463:

Complaint Counsel has no specific response to the fact that the exchange above occurred at trial. However, Complaint Counsel respectfully disputes that Complaint Counsel’s metric of “all tax filers...makes [that] number pretty much meaningless.” “All taxpayers” encompasses approximately 160 million taxpayers. (FF-23). In TY 21, the TurboTax website was visited [REDACTED] times. (FF-851). In addition, between 2018 and 2022, the total number of “free” TurboTax advertising impressions exceeded 19 billion (FF-553—FF-557), which, when distributed across 160 million, results in dozens and dozens of views per taxpayer, regardless of what tax preparation method they may have used. (Novemsky (Complaint Counsel) Tr. 369-370). Given this wide dissemination of the ads and the significant number of website visits, the total number of taxpayers is a meaningful measure for purposes of deception in this matter.

Additionally, contrary to Intuit’s argument that the relevant consumers are only those in the market for an online tax preparation product, Intuit seeks to [REDACTED]

[REDACTED] (*See* RFF-464 (citing, as an example, [REDACTED])).

464. But “all U.S. taxpayers” is not the “appropriate denominator” to “assess who qualifies” for TurboTax’s free offerings because that is “not the target market in this case.” (Golder (Intuit) Tr. 1169). “Many consumers,” such as those who file “through paid preparers” like “CPAs,” are “not ... in the market for an online tax preparation product.” (Golder (Intuit) Tr. 1169). And “of those who use software DIY solutions” (i.e., those who file their taxes online), “a majority” have a “simple return” and thus are eligible to file using free TurboTax SKUs.

Response to Finding No. 465:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Additionally, Complaint Counsel disputes that the relevant market is only those taxpayers in the market for online tax services (*see* RFF-464). Therefore, limiting the denominator to exclude consumers who use assisted tax preparation methods is not appropriate. Further, even though “most” consumers who use a DIY tax solution may be simple filers, the evidence shows that 49% (37 million of 75 million), more than a significant minority, are not and could not file for free with TurboTax. (Johnson (Intuit) Tr. 592-593).

466. Considering that most consumers in the online tax-preparation market are in fact eligible to file for free using TurboTax’s free SKUs, and that others in the market have “very complex returns” and would not reasonably believe they can file for free using free TurboTax SKUs, Complaint Counsel have not established that the challenged ads were likely to mislead a significant minority of reasonable consumers.

Response to Finding No. 466:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Additionally, Complaint Counsel disputes that the relevant market is only those taxpayers in the market for online tax services (*see* RFF-464). And Intuit’s speculation that “very complex filers...would not reasonably believe they can file for free” is not supported by any evidence in the record, nor does Intuit define what a “very complex” tax filer is, or how many consumers would fall into that bucket.

467. Complaint Counsel have also pressed the theory that the challenged ads are “deceptive door-openers.” (Evans (FTC) Tr. 31). That is, they argue the challenged ads were deceptive simply by virtue of driving consumers to the TurboTax website. As the Court observed at trial, the upshot of this theory is that “it doesn’t matter what a consumer sees at the website,” because all that matters is that the ads “induced [consumers] to the website.” (Chappell (ALJ) Tr. 32). Complaint Counsel have not established that the theory applies here.

Response to Finding No. 467:

Complaint Counsel disputes the Proposed Finding which, although stylized as a finding of fact, is a legal argument unsupported by a specific reference to the evidentiary record as required. Complaint Counsel does not dispute that the quotations pulled are accurate (if confusing, as they do not support the ultimate conclusion called for in this paragraph). Complaint Counsel's discussion establishing that Intuit's advertisements serve as deceptive door openers is addressed in its post-trial briefing. Complaint Counsel Reply to Intuit Post-Trial Brief at Part II.B.1.

468. Common sense suggests that merely opening the door to the TurboTax website is not enough to establish actionable deception, especially since the qualifications for TurboTax's free SKUs were always accessible on the TurboTax homepage and Free Edition landing page. Spending five seconds on the TurboTax website does not support a finding of actionable deception.

Response to Finding No. 468:

Complaint Counsel disputes the Proposed Finding. What Intuit's lawyer believes to be "common sense" is irrelevant and not instructive. The Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record."). Complaint Counsel's discussion establishing that Intuit's advertisements serve as deceptive door openers is addressed in its post-trial briefing. Complaint Counsel Reply to Intuit Post-Trial Brief at Part II.B.1.

469. The deceptive door-opener theory also does not apply because the challenged ads either expressly mention the TurboTax website or link directly to the TurboTax website. (*Supra* ¶¶215, 218, 222, 241, 244, 253-254, 262, 266, 270, 275, 278, 284-285, 290, 294, 299, 306, 323). And consumers could easily and quickly reach the website and find the qualifications for TurboTax's free SKUs "through search results," "TurboTax Blog content," "press releases," or "articles written by the media." (Rubin (Intuit) Tr. 1564-1565); *supra* ¶¶253-254, 269-270, 284-285; *infra* ¶¶520, 522, 524). The detailed information on the website, moreover, is accessible before consumers "have to input their name or any other personal information." (Rubin (Intuit) Tr. 1566-1567). Accordingly, that information on the TurboTax website must be considered when assessing whether the challenged ads are deceptive, and it demonstrates that reasonable consumers were not misled into believing that they could file for free using TurboTax when that was not the case.

Response to Finding No. 469:

Complaint Counsel disputes this Proposed Finding to the extent it does not set forth a factual assertion supported by the evidentiary records, but is instead improperly calls for a legal conclusion, such as whether caselaw on deceptive door openers would apply.

Complaint Counsel further disputes this Proposed Finding, as the record does not establish consumers can “easily and quickly” find the qualifications for TurboTax’ Free Edition. (See RFF-253— RFF-254, RFF-269— RFF-270, RFF-284— RFF-285, RFF-520, RFF-522, RFF-524).

Complaint Counsel further disputes “that information on the TurboTax website must be considered when assessing whether the challenged ads are deceptive, and it demonstrates that reasonable consumers were not misled into believing that they could file for free using TurboTax when that was not the case.” This is purported “fact” improperly calls for a legal conclusion without any support, makes gross generalizations about the record, does not cite to any portion of the record, and should be disregarded. (See Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”)).

Subject to the above objections, disputes, and corrections, Complaint Counsel has no specific response as to whether “information on the website, moreover, is accessible before consumers ‘have to input their name or any other personal information.’”

A. Reasonable Consumers In The Tax-Preparation Industry Are Not Misled By Free TurboTax Advertising

470. Complaint Counsel contend that reasonable consumers seeing the challenged ads would be misled into believing that all of TurboTax is free or that TurboTax is free for them even if it is not. (Evans (FTC) Tr. 19-20; Complaint Counsel’s Pretrial Brief at 35, 44-45 (Feb. 17, 2023)). But Complaint Counsel have not offered competent evidence to support that contention, including offering any evidence about reasonable consumers in *this industry*.

Response to Finding No. 470:

Complaint Counsel disputes the Proposed Finding. The evidence Complaint Counsel has amassed showing consumers who can’t use TurboTax for free believe that is free for them is *explicitly* related to the tax preparation industry. For instance, the perception survey asked

consumers in the market for tax preparation services what their beliefs about tax preparation are. (FF-481; FF-484; FF-510; *see also* FF-486-FF-487). What is more, consumer complaints to Intuit (from consumers in the tax preparation industry) show that consumers in that industry did not receive TurboTax for free when they thought they would. (FF-619; FF-620; FF-623; FF-635—FF-662). Intuit documents also show what consumers perceived regarding free TurboTax offers. (FF- FF-600; FF-604—FF-608, FF-611—FF-616; FF-618). Finally, consumer deponents who had used TurboTax testified about their expectations regarding free TurboTax. (FF-664).

471. Unlike Complaint Counsel, Intuit has offered substantial evidence about reasonable consumers in the tax-preparation industry and their familiarity with and understanding of free offers and free advertising, including testimony from Intuit executives and experts. (Golder (Intuit) Tr. 1063-1064, 1088-1096, 1121-1122; RX1018 (Golder Expert Report) ¶¶108-113, 164-167; Ryan (Intuit) Tr. 730, 744, 750, 759). That evidence establishes that reasonable consumers in the tax-preparation industry: (1) understand that free tax- preparation offers by Intuit and its competitors are qualified; (2) are skeptical of offers for free tax- preparation products; (3) perform extensive research about tax-preparation products before deciding which to use; and (4) know to look for and where to find qualifications for free tax- preparations in ads.

Response to Finding No. 471:

Complaint Counsel disputes the Proposed Finding. Intuit has not offered “substantial evidence” about reasonable consumers in the tax preparation industry and their familiarity with and understanding of free offers. In fact, Intuit’s experts did not ask a single consumer about their understanding of whether they could use TurboTax (or any other tax provider) for free. (FF-680—FF-681). Reasonable consumers do not necessarily understand that tax preparation offers are qualified. (RFF-486). And while some consumers might be skeptical of offers for free tax preparation, at least a significant minority, if not a majority, is not. (RFF-486; RFF-483). Reasonable consumers also do not necessarily perform “extensive research” and if anything, that research may reinforce Intuit’s deceptive messaging. (*See, e.g.*, RFF-505). And finally, consumers do not necessarily know, and Intuit has provided no evidence other than speculative testimony from its expert, to look for and find qualifications for free tax preparation in ads. (RFF-474—RFF-476).

1. Reasonable Consumers Understand Free Offers Are Qualified

472. Reasonable consumers do not view ads for free TurboTax SKUs in a vacuum. Instead, they understand these ads based on prior experiences, including their past experiences with free offerings generally, their exposure to free tax-preparation products in particular, and their personalized purchasing process, and the research they conduct before selecting a tax-preparation product. (Golder (Intuit) Tr. 1063-1065; RX1018 (Golder Expert Report) ¶163).

Response to Finding No. 472:

Complaint Counsel disputes the Proposed Finding to the extent it implies that all consumers conduct research during the tax preparation selection process. The sources cited by Intuit do not support that position or reference “research” conducted by consumers. Complaint Counsel does not dispute the remainder of the Proposed Finding.

473. Reasonable consumers are familiar with free offers across a wide range of product categories, and understand that they are generally qualified, or not available to all consumers in all circumstances. (Golder (Intuit) Tr. 1064, 1091-1092; RX1018 (Golder Expert Report) ¶¶164-167). In addition, reasonable consumers are familiar with how those offers are advertised. (Golder (Intuit) Tr. 1105-1108). Those offers are almost always qualified in some way, meaning that the free product is not available for all consumers in all circumstances. (Golder (Intuit) Tr. 1091-1092; RX1018 (Golder Expert Report) ¶¶164-166).

Response to Finding No. 473:

Complaint Counsel does not dispute that reasonable consumers are familiar with free offers across a wide range of product categories. Complaint Counsel disputes the remainder of the Proposed Finding. Other than Professor Golder’s speculative and unsupported opinions about what consumers “can expect” regarding free offers (RX1018 (Golder Expert Report) ¶ 165), Intuit has not put forward any direct evidence that consumers are familiar with the how free offers are advertised and what consumers understand about those free offers. (GX749 (Novemsky Rebuttal Expert Report) ¶ 233). Moreover, Complaint Counsel dispute that the existence of some qualifications for free products means that “the free product is not available for all consumers in all circumstances.” Many of the examples cited by Intuit are, in fact, free for all consumers, though with certain potentially undesirable features, such as ads, or qualifications to the free product. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 247, 248). These are entirely distinct from Intuit’s free offer that is not free for two-thirds of taxpayers, regardless of whether

those taxpayers would be willing to accept some less desirable feature, such as seeing advertising during their tax preparation. (See GX749 (Novemsky Rebuttal Expert Report) ¶¶ 247, 248; FF-22—FF-23).

474. For example, reasonable consumers commonly encounter “Buy One Get One Free” (“BOGO”) offers, which allow customers to receive a product for free *after purchasing another product*, usually of greater or equivalent value. (Golder (Intuit) Tr. 1094-1095; RX1018 (Golder Expert Report) ¶165; RX484 (Intuit), RX423 (Intuit)). And even without qualifying language or written disclosures present, reasonable consumers understand based on their experiences that such BOGO offers are typically limited to receiving a free product of lesser or equal value relative to the product purchased. (Golder (Intuit) Tr. 1094-1095). They understand, for instance, that when Domino’s Pizza advertises a BOGO offer, they cannot buy a six-inch personal pizza with no toppings and expect to get an 18-inch large pizza with all of the toppings for free. (Golder (Intuit) Tr. 1094-1095).

Response to Finding No. 474:

Complaint Counsel does not dispute that reasonable consumers encounter “Buy One Get One Free” (“BOGO”) offers, which allow customers to receive a product for free after purchasing another product. Complaint Counsel disputes the remainder of the Proposed Finding. First, Intuit claims that the free product consumers receive in a BOGO offer are “usually of equal or lesser value” without providing any support or analysis of what usually is or isn’t offered in a BOGO promotion. (RX1018 (Golder Expert Report) ¶ 165). Additionally, BOGO offers refer to bundles of products and are thus not applicable to consumers’ perceptions of the advertisement of a standalone product as a free product. (GX749 (Novemsky Rebuttal Expert Report) ¶ 247).

475. Further, reasonable consumers commonly encounter “Free with Purchase” offers, which provide customers with a free sample or gift with a purchase. (RX1018 (Golder Expert Report) ¶165; RX479 (Intuit)). Marketers spend more than \$2 billion every year promoting such offers. (RX1245 (Intuit) at 2; RX1018 (Golder Expert Report) ¶165). But again, reasonable consumers understand from experience that the free offer has a qualification—in this case that a purchase is required. (RX1018 (Golder Expert Report) ¶¶166-167; RX479 (Intuit)).

Response to Finding No. 475:

Complaint Counsel does not dispute that reasonable consumers commonly encounter “Free with Purchase” offers which provide customers with a free sample or gift with a purchase. Complaint Counsel disputes the remainder of the Proposed Finding. Other than Professor

Golder’s speculative and unsupported opinions about what consumers “can expect” regarding free offers (RX1018 (Golder Expert Report) ¶ 165), Intuit has not put forward any evidence that consumers understand about those free offers. (GX749 (Novemsky Rebuttal Expert Report) ¶ 233). And as with BOGO offers, “Free with Purchase” offers refer to bundles of products and are thus not applicable to consumers’ perceptions of the advertisement of a standalone product as a free product. (GX749 (Novemsky Rebuttal Expert Report) ¶ 247).

476. In short, the “public understands” that free offers are usually coupled with the *requirement* to purchase paid products—i.e., that they must pay “a regular price for the merchandise or service which must be purchased by consumers in order to avail themselves of that which is represented to be ‘Free.’” (16 C.F.R. §251.1(b)(1)).

Response to Finding No. 476:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, the authority cited by Intuit does not make as broad a statement as Intuit would like to imply. It goes on to provide additional detail: “when the purchaser is told that an article is ‘Free’ to him *if another article is purchased*, the word ‘Free’ indicates that he is paying nothing for that article and no more than the regular price for the other.” (16 C.F.R. §251.1(b)(1)) (emphasis added); *see also* RFF-474—RFF-475).

477. Reasonable consumers are also familiar with free offers or discount pricing that is available only to certain consumers. (Golder (Intuit) Tr. 1092-1093; RX1018 (Golder Expert Report) ¶165). Holiday Inn, for example, advertises that “Kids Stay and Eat Free.” (Golder (Intuit) Tr. 1092; RX1049 (Intuit) at -8241-8244). Reasonable consumers understand based on their experiences, and even without the presence of written disclosures, that there are limitations on that free offer (such as the fact that the kids have to be staying at the Holiday Inn in order to eat for free, have to be staying with a paying adult, and have to eat at the Holiday Inn’s own restaurant). (Golder (Intuit) Tr. 1092-1094).

Response to Finding No. 477:

Complaint Counsel does not dispute the Proposed Finding that consumers are also familiar with free offers or discount pricing that is available only to certain consumers. Complaint Counsel disputes the remainder of the proposed finding. Professor Golder’s

speculative testimony regarding consumer understanding of Holiday Inn pricing, regardless of the presence of disclosures, are not contained in his report, or supported by any fact in evidence, and should be disregarded. (*See* Chappell (ALJ) Tr. 889 (the Court’s admonition that “anything that’s in the record -- in the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.”)).

478. Reasonable consumers also frequently encounter “free tiers of service” offers, which give customers free access to products or content with limitations to which paying customers are not subject. (RX1018 (Golder Expert Report) ¶165; RX410 (Intuit); RX502 (Intuit)).

Response to Finding No. 478:

Complaint Counsel has no specific response.

479. YouTube and Spotify, for example, each offer free versions of their products that require consumers to view ads in order to use the product, alongside premium versions of their products that are ad-free and include additional features, which are only available by paying a fee. (RX410 (Intuit), RX802 (Intuit)). And companies such as Adobe often offer a free, basic version of their software alongside a paid version that offers a full suite of features. (RX1240 (Intuit)). Google similarly offers a basic free version of its mail service alongside a paid version that includes more features. (RX1505 (Intuit)).

Response to Finding No. 479:

Complaint Counsel has no specific response.

480. Because reasonable consumers often come across tiered product offerings with qualified free offers accompanied by more comprehensive paid options, they are familiar with such offers and understand their nature. (Golder (Intuit) Tr. 1091-1092, 1094; RX410 (Intuit), RX802 (Intuit), RX1505 (Intuit)). Even when free ads do not include qualifying language or limitations, reasonable consumers know from experience to expect such limitations. (RX1018 (Golder Expert Report) ¶¶165-166).

Response to Finding No. 480:

Complaint Counsel does not dispute that consumers often come across tiered product offerings with qualified free offers accompanied by more comprehensive paid options. Complaint Counsel disputes the remainder of the Proposed Finding. The evidence cited by Intuit for support of this Proposed Finding says nothing about qualifying language in offers for tiered products or consumer understanding of limitations, describing instead that the limitations exist,

and consumers may encounter them. (RX1018 (Golder Expert Report) ¶¶ 165-166). The evidence in this matter shows that even consumers who have encountered product limitations may not understand the limitations, since a significant minority of consumers who recently paid to use TurboTax were still under the misimpression that they met the qualifications for free when they did not. (FF-486).

481. In the online tax-preparation industry, consumers are frequently exposed to product lineups mirroring TurboTax's that include free offerings that are available only to taxpayers with simple tax returns, as well as paid products that cover additional tax situations or offer additional features. (Golder (Intuit) Tr. 1091, 1095-1096; RX1018 (Golder Expert Report) ¶¶ 108, 113).

Response to Finding No. 481:

Complaint Counsel disputes that product lineups in the tax preparation industry "mirror" the TurboTax lineup. Other tax preparation services have qualification criteria that differ from TurboTax's. (*See, e.g.*, FF-697; *see also* RX82 (Intuit) (showing that TaxAct covers unemployment income with its free option, which TurboTax does not). Complaint Counsel does not dispute the remainder of the Proposed Finding.

482. Free offers for consumers with simple tax returns are ubiquitous in the online tax-preparation industry. (Ryan (Intuit) Tr. 729-730, 744-745, 750, 759-760; *see also* RX1018 (Golder Expert Report) ¶ 108). Indeed, every major player in the industry employs a business model similar to TurboTax's model, offering their tax-preparation software for free to taxpayers with simple returns, alongside paid products capable of handling more complex returns. (Ryan (Intuit) Tr. 729-730 (TaxAct), 744-745 (TaxSlayer), 759-760 (H&R Block); Golder (Intuit) Tr. 1088-1092, 1121-1122; RX1018 (Golder Expert Report) ¶¶ 108-113; RX82 (Intuit); RX83 (Intuit); RX97 (Intuit); RX98 (Intuit); RX359 (Intuit); RX422 (Intuit); RX428 (Intuit); RX874 (Intuit) at 33). TurboTax, H&R Block, TaxAct, and TaxSlayer all offer a free product with qualifications tied to the simplicity of one's returns, alongside paid products for more complex returns. (Ryan (Intuit) Tr. 729-730 (TaxAct), 744-745 (TaxSlayer), 759-760 (H&R Block); Golder (Intuit) Tr. 1088-1092; RX1018 (Golder Expert Report) ¶ 10; RX82 (Intuit); RX83 (Intuit); RX97 (Intuit); RX98 (Intuit); RX359 (Intuit)). Those companies together serve approximately 90% of Americans who use online tax-preparation services. (RX412 (Intuit)).

Response to Finding No. 482:

Complaint Counsel has no specific response.

483. Given the ubiquity of qualified free offers in the tax-preparation industry alongside paid tax-preparation products, reasonable consumers are unlikely to necessarily

believe that a free tax-preparation product is free for them, and they also understand that their ability to qualify for that offering depends on the complexity of their tax returns, even without being told that is the case. (Golder (Intuit) Tr. 1091, 1095-1096; RX1018 (Golder Expert Report) ¶¶108-113).

Response to Finding No. 483:

Complaint Counsel disputes the Proposed Finding. Though Professor Golder speculates about what reasonable consumers are likely or unlikely to necessarily believe, the clear and direct evidence shows that consumers *do* believe that TurboTax is going to be free for them when that is not the case. Survey evidence from Professor Novemsky shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486-FF-487). What is more, consumer testimony (FF-664) and consumer complaints (FF-619; FF-620; FF-623FF-635—FF-662) also show that many consumers had the expectation that they could use TurboTax for free when that was not the case. (*See, e.g.*, FF-642 (“Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”)). Additionally, the evidence cited by Intuit does not support or address the claim that consumers understand what qualifies them for a free tax return without being told about limitations of any offer.

484. Likewise, when reasonable consumers see a free TurboTax advertisement, they understand that the free product or offer is just one of the TurboTax SKUs available and that there are qualifications to use it. (Golder (Intuit) Tr. 1091-1092). Reasonable consumers would also know from the ads themselves and their own experiences that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website. (Golder (Intuit) Tr. 1123-1126). And as discussed, that information is, in fact, available on the TurboTax website. (*Supra* ¶¶364-441).

Response to Finding No. 484:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the testimony Intuit cites to for the proposition that “when reasonable consumers see a free TurboTax advertisement, they understand that the free product or offer is just one of the TurboTax SKUs available and that there are qualifications to use it” does not support that assertion. The testimony

merely discusses what consumers encounter when they go to the TurboTax or other websites or a purported disclaimer they may see in an ad. (Golder (Intuit) Tr. 1091-1092). Moreover, the testimony Intuit relies on for the assertion that “[r]easonable consumers would also know from the ads themselves and their own experiences that additional information about whether that consumer qualifies for a free product is likely to be available on the TurboTax website” does not support that assertion and is merely Professor Golder’s discussion of purported disclaimers that have at one time appeared in Intuit advertising. (Golder (Intuit) Tr. 1123-1126). What is more, evidence clearly shows that when consumers see TurboTax free ads, their takeaway is that TurboTax—not some TurboTax SKU—is free. (FF-609).

2. Reasonable Consumers Are Skeptical Of Free Offers

485. Beyond their familiarity with free offers generally and free tax-preparation offers in particular, reasonable consumers also understand that for-profit companies, like Intuit, are in business to earn money and thus they do not expect those businesses to offer their products for free to everyone. (RX1018 (Golder Expert Report) ¶¶166-167; RX578 (Intuit) at 15-16). Even consumers identified by Complaint Counsel acknowledged that because it is a profit-seeking business, Intuit cannot offer all its products for free to everyone. (GX123 (Lee (Consumer) Dep.) at 14-15; GX135 (Phyfer (Consumer) Dep.) at 37; GX137 (DuKatz (Consumer) Dep.) at 26-27; GX124 (Bodi (Consumer) Dep.) at 14; GX125 (Beck (Consumer) Dep.) at 20, 43-44; GX138 (Adamson (Consumer) Dep.) at 22-23; GX139 (Derscha (Consumer) Dep.) at 23; GX130 (Tew (Consumer) Dep.) at 20).

Response to Finding No. 485:

Complaint Counsel disputes the Proposed Finding. Consumer beliefs about whether companies monetize their products or “do not provide everything for free” do not preclude that consumers believe that companies offer products advertised as free for free. (GX749 (Novemsky Rebuttal Expert Report) ¶ 245). Consumers can be under the misimpression that they can use TurboTax for free, even if not all Intuit products are free. (*See, e.g.*, GX124 (Bodi (Consumer) Dep.) at 31-33; GX139 (Derscha (Consumer) Dep.) at 76; (Phyfer (Consumer) Dep.) at 79-81, 88-90, 104-105; GX130 (Tew (Consumer) Dep.) at 52-54; GX123 (Lee (Consumer) Dep.) at 53-54; GX137 (DuKatz (Consumer) Dep.) at 27-28, 82-83). And survey evidence shows that over

24%, a significant minority of consumers, who recently paid for TurboTax and decidedly know that TurboTax isn't always free, are under the misimpression that it is free for them. (FF-486).

486. Because reasonable consumers understand that businesses cannot offer all of their products for free to everyone, and know that free offers are generally qualified, reasonable consumers are naturally skeptical of free offers. (Rubin (Intuit) Tr. 1524; Johnson (Intuit) Tr. 605); Golder (Intuit) Tr. 1095-1098; RX1018 (Golder Expert Report) ¶¶167-168).

Response to Finding No. 486:

Complaint Counsel disputes the Proposed Finding. Survey evidence, consumer testimony, complaints to Intuit, and Intuit's own documents show that many consumers, and at least a significant minority, are not skeptical of Intuit's free offers and think they can file for free. (FF-481; FF-484; FF-486-FF-487; FF-664; FF-619; FF-620; FF-623; FF-635—FF-662). Even evidence cited for this proposition undermines Intuit's claim, with a study showing that only 18% of surveyed consumers do not trust free trial offers. (RX1018 (Golder Expert Report) ¶ 168), and that at a minimum, 22%, or a significant minority, of consumers were confident that TurboTax Free Edition was free (Golder (Intuit) Tr. 1096; FF-598; *see also* RX597 (Intuit) at INTUIT-FTC-PART3-000601649 (also showing 44% consumer awareness of "free" TurboTax). Intuit's documents show that up to 49% of consumers were confident that TurboTax Free Edition was free. (FF-597). Moreover, Intuit's own survey evidence shows that consumers are not skeptical of free offers, even after being told they cannot use a free TurboTax product. (RX1016-A (Kirk Fair Expert Report) Ex. 4a. (Showing that 28% indicated they would "most likely" select Free Edition even after being told they did not qualify for it on a hard stop)).

487. Consumer skepticism of free offers means that reasonable consumers do not believe that free offers are free for everyone or even necessarily free for them; they instead expect free offers to be limited. (Golder (Intuit) Tr. 1095-1097; RX1018 (Golder Expert Report) ¶¶166-170). That expectation holds even if the relevant terms and conditions are not expressly stated. (Golder (Intuit) Tr. 1094-1096). That skepticism also leads reasonable consumers to conduct research to determine if they qualify to use the free offer. (RX1018 (Golder Expert Report) ¶167; Golder (Intuit) Tr. 1095-1098).

Response to Finding No. 487:

Complaint Counsel dispute the Proposed Finding. Professor Golder, in support of his opinion, makes the illogical leap from identifying that any skeptical consumers exist to claiming that therefore skepticism is a characteristic of consumers at large or of “reasonable consumers.” Indeed, evidence relied on by Professor Golder indicates that skepticism about free offers among consumers exists but is limited to a certain subgroup. (GX749 (Novemsky Rebuttal Expert Report) ¶ 239; RX1018 (Golder Expert Report) ¶¶ 168-169). Moreover, Intuit’s own survey evidence shows that consumers are not skeptical of free offers, even after being told they cannot use a free TurboTax product. (RX1016-A (Kirk Fair Expert Report) Ex. 4a. (Showing that 28% indicated they would “most likely” select Free Edition even after being told they did not qualify for it on a hard stop)).

488. Reasonable consumers likewise react to free offers in the tax-preparation industry with skepticism, and thus do not believe that all tax-preparation products offered by a company are free, that a free tax-preparation product or offer is available for free to everyone, or that the free offer will be free for them. (RX33 (Intuit) at -9032; RX34 (Intuit) at -9950; RX56 (Intuit) at -5638); RX578 (Intuit) at 15; RX597 (Intuit) at -1665; GX655 (Intuit)). As Mr. Rubin and Mr. Johnson both explained, consumers in the tax-preparation industry exhibit “free skepticism” and a natural tendency to disbelieve “free” offers or expect they are too good to be true. (Rubin (Intuit) Tr. 1524; Johnson (Intuit) Tr. 605).

Response to Finding No. 488:

Complaint Counsel disputes the Proposed Finding. Intuit makes the illogical leap from identifying that any skeptical consumers exist to claiming that therefore skepticism is a characteristic of consumers at large. Indeed, evidence it relies on indicates that skepticism about free offers among consumers exists but is limited to a certain subgroup. Several documents cited by Intuit mention consumer skepticism, but do not provide any metrics of exactly how many are skeptical. (RX33 (Intuit) at INTUIT-FFA-FTC-000139032, RX34 (Intuit) at INTUIT-FFA-FTC-000549950 (“certain participants” are skeptical); RX578 (Intuit) at 15). Other documents show that some consumers are skeptical, but that a significant minority is not. (RX56 (Intuit) at INTUIT-FFA-FTC-000525627 (showing that between 34-45% of consumers in 2019 were aware

that “TT” was free, with 22%, a significant minority, confident that it was free); RX597 (Intuit) at INTUIT-FTC-PART3-000601649; INTUIT-FTC-PART3-000601658; INTUIT-FTC-PART3-000601665 (showing that 22% of consumers are confident that “TT” is free, and 49% of consumers were confident that “TT Free” was “truly free”). Intuit’s documents also show that for top of funnel advertising “‘Free’ followed by ‘easy’ are still the main messages people remember from the ads.” (RX56 (Intuit) at INTUIT-FFA-FTC-000525630). And Intuit documents show that Intuit was making a concerted effort to eliminate skepticism of free as early as in fiscal year 2018. (*See* RX578 (Intuit) at INTUIT-FTC-PART3-000601557 (“incorporating the word ‘guaranteed’ into the offering and changing the name from Federal Free Edition to Free Edition will be levers we explore to reduce that skepticism”). Moreover, much of Intuit’s research is from 2018 and 2019 (*see, e.g.*, RX578 (Intuit), RX56 (Intuit)), and Intuit has since aired free ads thousands of times with billions of impressions, (FF-53), which may further overcome consumer skepticism of a free TurboTax option. What is more, many consumers in the digital age are conditioned to expect that online products can be free. The breadth and frequency of consumers’ experiences with free online products and services means that they are likely to be open to such offers from TurboTax, and receptive to the pervasive and long-running messaging claiming that TurboTax is free. (GX303 (Novemsky Expert Report) ¶ 81). Moreover, Intuit’s own survey evidence shows that consumers are not skeptical of free offers, even after being told they cannot use a free TurboTax product. (RX1016-A (Kirk Fair Expert Report) Ex. 4a. (Showing that 28% indicated they would “most likely” select Free Edition even after being told they did not qualify for it on a hard stop)).

489. Intuit’s internal market research has long confirmed that consumers are skeptical of free claims concerning tax-preparation products. (RX33 (Intuit) at -9032; RX34 (Intuit) at -9950; RX56 (Intuit) at -5638).

Response to Finding No. 489:

Complaint Counsel dispute the Proposed Finding. Intuit makes the illogical leap from identifying that any skeptical consumers exist to claiming that therefore skepticism is a

characteristic of consumers at large. Indeed, evidence it relies on indicates that skepticism about free offers among consumers exists but is limited to a certain subgroup. Between 34-45% of consumers in 2019 were aware that “TT” was free, with 22%, a significant minority, confident that it was free (RX56 (Intuit) at INTUIT-FFA-FTC-000525627); *see also* RX34 (Intuit) at INTUIT-FFA-FTC- 000549950 (“certain participants” are skeptical); RX33 (Intuit) at INTUIT-FFA-FTC-000139032 (mentioning skepticism, but providing no metric of the number of skeptical consumers). And other evidence shows that 49%, nearly half of consumers, were confident about a free TurboTax option. (FF-597; *see also* RX597 (Intuit) at INTUIT-FTC-PART3-000601658; INTUIT-FTC-PART3-000601665). Moreover, Intuit’s own survey evidence shows that consumers are not skeptical of free offers, even after being told they cannot use a free TurboTax product. (RX1016-A (Kirk Fair Expert Report) Ex. 4a. (Showing that 28% indicated they would “most likely” select Free Edition even after being told they did not qualify for it on a hard stop)).

490. For instance, Intuit research found that consumers exhibit “free skepticism,” meaning they expect the scope of free tax-preparation offers to be limited and “have [a] natural expectation that ... costs are involved.” (RX33 (Intuit) at -9032; *see also* RX34 (Intuit) at -9950) (finding that respondents were skeptical and “distrust[ed]” TurboTax’s “truly free” claims)). Other Intuit research showed that [REDACTED] of consumers incorrectly thought TurboTax Free Edition did not include free federal filing, and even fewer thought it included free state filing and expert help, even though it did. (GX655 (Intuit)). And still more Intuit research showed that only 22% of consumer respondents were “confident” that TurboTax Free Edition was actually free (RX56 (Intuit) at -5638), and that 29% of respondents were outright “doubtful” that TurboTax Free Edition was “truly free.” (RX597 (Intuit) at -1665).

Response to Finding No. 490:

Complaint Counsel dispute the Proposed Finding. Intuit makes the illogical leap from identifying that any skeptical consumers exist to claiming that therefore skepticism is a characteristic of consumers at large. Several documents cited by Intuit mention consumer skepticism, but do not provide any metrics of exactly how many are skeptical. (RX33 (Intuit) at INTUIT-FFA-FTC-000139032; *see also* RX34 (Intuit) at INTUIT-FFA-FTC- 000549950 (“certain participants” are skeptical)). Some of Intuit’s research shows that a significant minority

of consumers were confident that TurboTax was free, (RX56 (Intuit) at INTUIT-FFA-FTC-000525627), while other research showed that, while 29% of consumers were “doubtful” that TurboTax Free Edition was “truly free,” 49% were confident that it *was* truly free. (RX597 (Intuit) at INTUIT-FTC-PART3-000601658; INTUIT-FTC-PART3-000601665). And finally, which features are included in a free product is irrelevant to consumer perceptions about whether TurboTax is free for them. Moreover, Intuit’s own survey evidence shows that consumers are not skeptical of free offers, even after being told they cannot use a free TurboTax product. (RX1016-A (Kirk Fair Expert Report) Ex. 4a. (Showing that 28% indicated they would “most likely” select Free Edition even after being told they did not qualify for it on a hard stop)).

491. Complaint Counsel did not offer any evidence disputing that reasonable consumers are skeptical of free offers or that reasonable consumers otherwise believed that the free claims in the challenged advertisements were unqualified.

Response to Finding No. 491:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, Intuit’s own documents show that at least a significant minority, and up to 49% of consumers, are not skeptical that TurboTax is free. (FF-597—FF-598; *see also* RX597 (Intuit) at INTUIT-FTC-PART3-000601658, INTUIT-FTC-PART3-000601665; RX56 (Intuit) at INTUIT-FFA-FTC-000525627). In addition, Complaint Counsel provided survey evidence showing that consumers were not skeptical of TurboTax free and thought they could file for free when that was not the case. (FF-481; FF-484; FF-486—FF-487). Complaint Counsel has also identified consumer complaints and consumer testimony illustrating that consumers thought they could use TurboTax for free when that was not the case. (FF-664; FF-619; FF-620; FF-623; FF-635—FF-662). Moreover, Professor Novemsky opined that “modern consumers, particularly those who are familiar with online products, are not inherently skeptical that a product can be free, as they have been conditioned by years of exposure to numerous free and

‘freemium’ products, like the Google suite of products, Facebook, or smart phone games, to name a few.” (GX303 (Novemsky Expert Report) ¶ 81). Moreover, Intuit’s own survey evidence shows that consumers are not skeptical of free offers, even after being told they cannot use a free TurboTax product. (RX1016-A (Kirk Fair Expert Report) Ex. 4a. (Showing that 28% indicated they would “most likely” select Free Edition even after being told they did not qualify for it on a hard stop)).

492. To overcome the skepticism of consumers who do qualify to use TurboTax’s free SKUs, Intuit must repeatedly inform those consumers that TurboTax has truly free TurboTax SKUs, including TurboTax Free Edition, for consumers with simple tax returns. (Rubin (Intuit) Tr. 1524-1525; GX147 (Roark (Intuit) Dep.) at 103-104; *supra* ¶¶191-196).

Response to Finding No. 492:

Complaint Counsel disputes the Proposed Finding to the extent it suggests that all or most consumers are skeptical of TurboTax’s free offer. Reasonable consumers are not necessarily skeptical of free offers, RFF-488—RFF-489, and the record provides ample evidence that reasonable consumers were, in fact, misled by Intuit’s advertising to think TurboTax was free for them when it was not. Survey evidence from Professor Novemsky shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486—FF-487). What is more, consumer testimony (FF-664) and consumer complaints (FF-619; FF-620; FF-623; FF-635—FF-662) also show that many consumers had the expectation that they could use TurboTax for free when that was not the case. (*See, e.g.*, FF-642 (“Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”)).

493. Based on their familiarity with and skepticism toward free offers, including free tax-preparation offers, reasonable consumers viewing free TurboTax advertisements would not have been misled into believing either that all TurboTax SKUs are free or that TurboTax would be free for them when it was not. (Golder (Intuit) Tr. 1091-1095).

Response to Finding No. 493:

Complaint Counsel disputes the Proposed Finding. Reasonable consumers are not necessarily skeptical of free offers, RFF-488—RFF-489, and the record provides ample evidence that reasonable consumers were, in fact, misled by Intuit’s advertising to think TurboTax was free for them when it was not. Survey evidence from Professor Novemsky shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486—FF-487). What is more, consumer testimony (FF-664) and consumer complaints (FF-619; FF-620; FF-623; FF-635—FF-662) also show that many consumers had the expectation that they could use TurboTax for free when that was not the case. (*See, e.g.*, FF-642 (“Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”)).

494. Complaint Counsel contend that consumers expected TurboTax’s free offers to be available for everyone because a *different* company—Cash App Taxes—has a tax-preparation product supposedly provided “at no charge to all consumers.” (Complaint Counsel’s Pretrial Brief at 34-35 (Feb. 17, 2023)). But that assertion is belied by the record.

Response to Finding No. 494:

Complaint Counsel disputes the Proposed Finding. As an initial matter, Complaint Counsel contends that consumers expected TurboTax’s free offers to be available for free for them because of Intuit’s marketing and advertising. (*See, e.g.*, Complaint Counsel’s Pretrial Brief at 1, 20-23 (Feb. 17, 2023)). The fact that another tax preparation company provided tax services for free is merely an additional reason (on top of the extensive evidentiary record) of why consumers would be likely to believe TurboTax’s deceptive advertising. Intuit’s own records reflect that [REDACTED]

[REDACTED]. *See*

GX296 (Intuit) at CC-00006362 [REDACTED]

[REDACTED]

495. Cash App Taxes engages in “[REDACTED]” and is used by relatively few consumers. (RX45 (Intuit) at -4795; *see also* Rubin (Intuit) Tr. 1438, 1536; RX1503 (Intuit); RX1504 (Intuit)). It is unlikely that a significant minority of reasonable consumers would even be aware of that offer, let alone rely on it (while ignoring the practices of the major market participants) to form their understanding of other companies’ offerings in the tax-preparation industry.

Response to Finding No. 495:

Complaint Counsel was no specific response to the Proposed Finding that Cash App Taxes engages in [REDACTED] and is used by relatively few consumers. Complaint Counsel disputes the remainder of the Proposed Finding. As an initial matter, the remainder of the Proposed Finding is unsupported by any citation to the record. Moreover, Intuit documents show that reasonable consumers could have been aware of Cash App’s free offers. Cash App Taxes (formerly Credit Karma) attracted a significant number of consumers away from TurboTax, showing that at least hundreds of thousands of TurboTax consumers have been aware of Credit Karma (*See* RX578 (Intuit) at INTUIT-FTC-PART3-000601548-49 (discussing that in TY16, 75%, or 750,000, of Credit Karma customers had previously used TurboTax).

Additionally, Intuit documents acknowledge [REDACTED]. *See* GX296 (Intuit) at CC-00006362 [REDACTED]

[REDACTED] Intuit documents also show that [REDACTED] (RX45 (Intuit) at INTUIT-FTC-PART3-000484806).

496. Even if consumers were aware of Cash App Taxes, it is *not* free for “all consumers” (Rubin (Intuit) Tr. 1536; RX1503 (Intuit), RX1504 (Intuit); RX1027 (Deal Expert Report) App’x C, ¶12 & fig. C.2.A), and thus does not support Complaint Counsel’s theory. Cash App Taxes is not available to taxpayers who wish to file multiple state tax returns, part-year state tax returns, or non-resident state tax returns; who want to claim earned foreign income or foreign tax credits; or for taxpayers that are married but file separately in a community- property state

like California. (Rubin (Intuit) Tr. 1536-1537; RX1504 (Intuit) at 3). Nor is it available for taxpayers who require any of almost two dozen different forms for their federal or state returns. (RX1504 (Intuit) at 3-6).

Response to Finding No. 496:

Complaint Counsel disputes that Cash App Taxes (formerly Credit Karma) and its business model does not support Complaint Counsel’s theory. Intuit’s own documents and even its answer to the Complaint in this matter, support that *Intuit* considered Cash App Taxes to be a “truly free offer.” (FF-08; GX296 (Intuit) at CC-00006362; RX578 at INTUIT-FTC-PART3-000601551 (“Credit Karma entered tax preparation as an adjacent area form which they could collect additional information. To help attract tax preparation customers, they launched with a 100% free offering where customers would never have to pay to prepare and file taxes.”)).

Moreover, Intuit documents also show that [REDACTED]

[REDACTED] (RX45 (Intuit) at INTUIT-FTC-PART3-000484806).

Complaint Counsel does not dispute the remainder of the Proposed Finding.

497. Cash App Taxes’ limitations only reinforce the existence of consumer skepticism when it comes to free tax-preparation offers. Reasonable consumers would not necessarily assume Cash App Taxes is free for them, or free to “all consumers,” as there are no free tax-preparation products available to all consumers for all tax situations. (Rubin (Intuit) Tr. 1535-1536).

Response to Finding No. 497:

Complaint Counsel disputes the Proposed Finding. Intuit itself, a party likely much more sophisticated than the average consumer about tax preparation options, considered Cash App Taxes to be 100% free. (FF-08; GX296 (Intuit) at CC-00006362; RX578 at INTUIT-FTC-PART3-000601551 (“Credit Karma entered tax preparation as an adjacent area form which they could collect additional information. To help attract tax preparation customers, they launched with a 100% free offering where customers would never have to pay to prepare and file taxes.”)).

In fact, Intuit considered [REDACTED]

[REDACTED]. See GX296 (Intuit) at CC-00006362. Moreover, [REDACTED]

█ (RX45 (Intuit) at INTUIT-FTC-PART3-000484806). If Intuit considered Cash App Taxes to be free, it is entirely plausible that the reasonable consumer would.

498. Because Cash App Taxes is not free for all consumers, as Complaint Counsel alleged, reasonable consumers would not rely on Cash App Taxes to conclude that all TurboTax SKUs are free or that TurboTax must be free for them.

Response to Finding No. 498:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). And what is more, even Intuit, a tax preparation provider, believed that Cash App Taxes was “100% free.” (FF-08; GX296 (Intuit) at CC-00006362; RX578 at INTUIT-FTC-PART3-000601551). It is therefore entirely consistent that reasonable consumers (with less sophistication and knowledge than Intuit executives) would have the same understanding, which may contribute to their beliefs about TurboTax.

499. Complaint Counsel further argue that the existence of “many online products” that are free—such as Google, Facebook, YouTube, and Spotify—would lead reasonable consumers to understand that all TurboTax SKUs are free. (Complaint Counsel’s Pretrial Brief at 35 (Feb. 17, 2023)). That argument is likewise refuted by the evidence.

Response to Finding No. 499:

Complaint Counsel disputes the Proposed Finding. Complaint Counsel’s argument in its Pretrial Brief is more nuanced than Intuit presents: in addition to Intuit’s ubiquitous advertisements, consumer experiences with other free products may “lead[] consumers to reasonably conclude that free means free for Intuit’s online tax preparation products.” (Complaint Counsel’s Pretrial Brief at 35 (Feb. 17, 2023)). Moreover, the evidence does not refute Complaint Counsel’s argument. (*See, e.g.*, FF-490; GX303 (Novemsky Expert Report) ¶ 81 (“The breadth and frequency of consumers’ experiences with free online products and services means that they are likely to be open to such offers from TurboTax, and receptive to the pervasive and long-running messaging claiming that TurboTax is free.”)).

500. Rather than identifying “completely free” SKUs, Complaint Counsel have mostly identified additional examples of products that have free offers with restrictions alongside paid options with additional features. (RX410 (Intuit); RX802 (Intuit); RX1505 (Intuit)). YouTube and Spotify, for example, each offer free versions of their products that require consumers to view ads in order to use them, alongside premium versions of the products that are ad-free and offer additional features, which are only accessible with payment of a monthly fee. (RX410 (Intuit); RX802 (Intuit)). Google similarly offers a basic free version of its mail service alongside a paid version that includes more features. (RX1505 (Intuit)). These examples confirm that consumers are familiar with (and thus would expect) free offers to have certain restrictions while being accompanied by paid options. (Golder (Intuit) Tr. 1091-1092, 1094).

Response to Finding No. 500:

Complaint Counsel disputes the Proposed Finding that “[r]ather than identifying “completely free” SKUs, Complaint Counsel have mostly identified additional examples of products that have free offers with restrictions alongside paid options with additional features” and that “[t]hese examples confirm that consumers are familiar with (and thus would expect) free offers to have certain restrictions while being accompanied by paid options.”

As Intuit acknowledges in IFF-500, YouTube and Spotify, and Google, are free (do not require pecuniary payment) for all consumers. While the consumer experience might be worse compared to that of a paid plan, the firms offer a product that allows the consumer to satisfy the need (for example, streaming music or videos) at zero cost. (See GX749 (Novemsky Rebuttal Report) ¶ 248). Intuit does not offer a similar “basic service” product that any consumer could use to fulfill their tax obligations: to satisfy this need, most consumers would need to upgrade even if they were willing to accept the minimum functionality required to file the specific tax return that applies to their situation. (GX749 (Novemsky Rebuttal Report) ¶ 248; see also GX303 (Novemsky Expert Report) ¶ 82). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

501. Complaint Counsel also point to Facebook as an example of a completely free product. But the FTC contends that Facebook is not really free. (FTC’s Opposition to Motion to Dismiss at 11, *FTC v. Facebook*, No. 1:20-cv-03590 (D.D.C. Apr. 7, 2021), ECF No. 59). In any event, Facebook—like Google, YouTube, and Spotify—is nothing like a tax-preparation product and says nothing about what is commonplace in the tax-preparation market that is relevant to consumers’ understanding of TurboTax’s free offers.

Response to Finding No. 501:

Complaint Counsel does not dispute that “Complaint Counsel also point to Facebook as an example of a completely free product.” Complaint Counsel disputes that “the FTC contends that Facebook is not really free. (FTC’s Opposition to Motion to Dismiss at 11, *FTC v. Facebook*, No. 1:20-cv-03590 (D.D.C. Apr. 7, 2021), ECF No. 59).” Rather, in that matter, the FTC has disputed “that Facebook offers its services to users in ‘unlimited quantities’ or for ‘free’” because “Facebook offers PSN services to users with a nominal price of zero, but with non-price terms and conditions that include the ability to monetize user data and engagement through advertising.” FTC’s Opposition to Motion to Dismiss at 11, *FTC v. Facebook*, No. 1:20-cv-03590 (D.D.C. Apr. 7, 2021), ECF No. 59). Though Complaint Counsel has focused on the pecuniary meaning of “free” in this matter, Complaint Counsel understands that Intuit similarly monetizes TurboTax user data. For example, Intuit’s terms and conditions for customers who sign up for TurboTax accounts requires customers to “agree to these terms to use our services. By using Intuit services, you are instructing us to share your data across our platform for marketing, eligibility and other purposes described in our Global Privacy Statement, consistent with applicable law. This data may include credit information and other information we obtain from third parties.” (GX286 (Complaint Counsel) at CC-00005990). And Intuit’s [REDACTED] [REDACTED] (GX410 (Intuit) at 1). Complaint Counsel also disputes that “Facebook—like Google, YouTube, and Spotify—is nothing like a tax-preparation product and says nothing about what is commonplace in the tax-preparation market that is relevant to consumers’ understanding of TurboTax’s free offers.” As an initial matter, this Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, consumer expectations related to other free online products is relevant to consumers’ understanding of TurboTax’s free offers because the breadth and frequency of consumers’ experiences with free online products and

services means that they are likely to be open to such offers from TurboTax, and receptive to the pervasive and long-running messaging claiming that TurboTax is free. (GX303 (Novemsky Expert Report) ¶ 81).

3. Tax-Preparation Products Are High-Involvement Products That Reasonable Consumers Research At Length Before Selecting

502. Online tax-preparation products are “high-involvement products”—i.e., involve considerable consumer engagement—because they relate to significant financial transactions that involve substantial risk for consumers. (Golder (Intuit) Tr. 1074-1076). As Mr. Johnson explained, selecting an online tax-preparation service or method is a significant event for taxpayers, in part because for many consumers, their tax refund is the largest paycheck they receive in a single year. (Johnson (Intuit) Tr. 577).

Response to Finding No. 502:

Complaint Counsel disputes that “[o]nline tax-preparation products are ‘high-involvement products’—i.e., involve considerable consumer engagement—because they relate to significant financial transactions that involve substantial risk for consumers.” This is not necessarily true in every instance. Professor Golder’s opinion about whether tax preparation product selection is a high-involvement process is speculative and unsupported. (FF-738—FF-739). There are other high-risk, high-value transactions like retirement savings that research shows are *not* high involvement transactions. (FF-739). It is not clear that tax preparation is necessarily high involvement since some consumer may not want to think about tax filing or research different tax preparation options, and some consumers delay filing their taxes and may not have time to conduct extensive research. (*See* FF-801—FF-803; Novemsky (Complaint Counsel) Tr. 1777 (“Filing taxes is not fun for most people. And so if it’s not fun for you, you’re not going to want to think about it, and if you don’t want to think about it, you’re not going to have that kind of mental involvement. You’re not going to be processing a lot of information. You’re not going to be looking at a lot of sources of information for that. [High-involvement is] not to me an obvious characterization of how people approach their tax filing.”)). Complaint Counsel does not dispute the remainder of the Proposed Finding.

503. Because online tax-preparation products are high-involvement products, consumers engage in a correspondingly high-involvement purchase process. (Golder (Intuit) Tr. 1062-1063, 1075-1076; RX1018 (Golder Expert Report) ¶144; RX1017 (Hauser Expert Report) ¶102; RX546 (Intuit)). For instance, most consumers do not proceed directly from viewing a TV advertisement to filing their taxes online without encountering or investigating additional information sources. (Golder (Intuit) Tr. 1067-1068, 1076-1077; RX1018 (Golder Expert Report) ¶150). Instead, they research potential tax-filing options, consider their features, evaluate alternatives, and make a decision about which product is best for their needs. (Golder (Intuit) Tr. 1064-1067, 1078-1079, 1081; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 56-57; Rubin (Intuit) Tr. 1585-1586; RX1018 (Golder Expert Report) ¶¶143-145; RX1017 (Hauser Expert Report) ¶102; RX1016A (Kirk Fair Expert Report) ¶20).

Response to Finding No. 503:

Complaint Counsel disputes that online tax-preparation products are necessarily “high-involvement products” and that “consumers engage in a correspondingly high-involvement purchase process.” This is not necessarily true in every instance. (*See* RFF-502). Complaint Counsel also dispute that “most consumers” “research potential tax-filing options, consider their features, evaluate alternatives, and make a decision about which product is best for their needs.” Most of Intuit’s “evidence” regarding what “most consumers” do is based on speculation by its experts. (RFF-502; *see also* FF-801—FF-803; RX546 (a scholarly article that describes some consumer behavior but does not address tax preparation). Moreover, the survey evidence it *does* have is unreliable, providing inflated results (RFF-505) and shows, at most, that consumers interact with other media in addition to TV ads, but Intuit ignores that the other media (for example, online search) contains Intuit’s advertising and marketing for “free” TurboTax. (RFF-505). Complaint Counsel does not dispute the remainder of the Proposed Finding.

504. In selecting an online tax-preparation product, consumers engage in an individualized consumer buying process—a process that follows a well-recognized framework for understanding consumer behavior. (Golder (Intuit) Tr. 1055, 1061). The consumer buying process is often represented as a five-stage model, describing the typical series of activities and behavior that consumers engage in that result in a purchase decision: problem recognition, information search, evaluation of alternatives, purchase decision, and post-purchase behavior. (Golder (Intuit) Tr. 1065-1067; RX560 (Intuit) at 172-179; RX486 (Intuit); RX1018 (Golder Expert Report) ¶143, fig. 21). Consumers may pass through the buying process in their own personal way, skipping certain steps or returning and repeating prior steps throughout the process. (Golder (Intuit) Tr. 1071-1074). The complexity and expense of a product or service can impact the level of consumer involvement in the consumer buying process. (Golder (Intuit) Tr. 1062-1063, 1072-1074; RX1018 (Golder Expert Report) ¶144).

Response to Finding No. 504:

Complaint Counsel has no specific response.

505. In the information search—or research—stage of selecting a tax-preparation provider, consumers consider a variety of sources, including visiting tax-preparation websites and the IRS website, speaking with friends and family, reading reviews and testimonials, conducting internet searches, and consulting articles, rankings, and third-party reviews. (Johnson (Intuit) Tr. 600-601; Golder (Intuit) Tr. 1070-1071, 1078-1079, 1081-1087, 1105-1107; Yoeli (FTC) Tr. 1758-1759 (agreeing with Dr. Hauser’s Purchase Driver Survey results); RX1555 (Kirk Fair (Intuit) Trial Dep.) at 51-52, 56; RX1018 (Golder Expert Report) ¶¶143, 151, 157-161, fig. 24; RX1017 (Hauser Expert Report) ¶109; RX1016-A (Kirk Fair Expert Report) ¶¶23, 33-37, 47; RX57-A (Intuit) at 22; RX825 (Intuit); *see also* RX72 (Harford (Consumer) Dep.) at 57-59). On average, consumers use no fewer than three different sources when researching tax-preparation products. (RX1017 (Hauser Expert Report) ¶109).

Response to Finding No. 505:

Complaint Counsel disputes the Proposed Finding to the extent it suggests that all consumers engage in all the activities listed in the Proposed Finding. As noted above (RFF-502—RFF-503), all consumers do not necessarily engage with much information about tax filing. Moreover, Complaint Counsel disputes that “consumers use no fewer than three different sources when researching tax-preparation products.” The Purchase Driver Survey relied on for this conclusion is methodologically flawed and leads to inflated results. (FF-786—FF-800). For example, the survey asks respondents about “research” they conduct, but this framing is subject to demand artifacts because respondents are likely to understand from the framing and emphasis of this question that the researcher believes they should have done research, encouraging them to provide examples of research they might have conducted, whether or not they in fact undertook those activities. (FF-788). Moreover, the question emphasis on “research” is also likely to lead respondents to report activities that they actively pursued, and activities they think would be considered “research,” which is unlikely to include the context in which most individuals would view advertisements, as those are more passive activities. (FF-787; FF-789). In addition, the survey, without any justification, only reported answers regarding “research” for consumers who switched or considered switching tax preparation providers, which is less than half of respondents. (FF-796—FF-797). The survey results are therefore based on less than half of

respondents, leading to inflated results and unreliable conclusions. (FF-796). Also, though Professor Hauser attempts to show that consumers obtain information about TurboTax from sources other than TurboTax, in reality, many sources that consumers selected as part of the survey are either directly related to Intuit marketing (such as online searches, which lead consumers to see both paid search ads and interact with TurboTax search engine optimization), or likely reflect TurboTax advertising content. (FF-793; FF-798—FF-800). For example, word-of-mouth is influenced by advertising a substantial amount of the time, with one study showing that up to 25% of conversations about brands mention advertising. (FF-800). It is worth noting that Professor Hauser’s “research” options also reflect an incomplete list, with important choices missing, further calling the survey results into question. (FF-792; FF-794—FF-795; *see* RFF-597). Complaint Counsel also disputes the characterization of Dr. Yoeli’s testimony. Though Intuit mischaracterizes Dr. Yoeli’s testimony as “agreeing with Dr. Hauser’s Purchase Driver Survey results,” Dr. Yoeli did not wholesale endorse the Purchase Driver Survey, and instead testified that “the fact that consumers do consider familiarity and price as important to them in driving their purchase decisions. And that was something that supported some of the views that I was putting forth.” (Yoeli (Complaint Counsel) Tr. 1758-1759). Moreover, Intuit’s deception made it harder for consumers to understand and rely upon ads for tax preparation services. (FF-850). This would not only disincentivize TurboTax customers from searching for alternatives, but also impact consumers who don’t use TurboTax. (FF-850). For all of these consumers, they would, likewise be less likely to search, and thus end up in a product that does not suit their needs as well. (FF-850).

506. Reasonable consumers’ skepticism of free offers also leads them to conduct additional research about those free offers, especially when encouraged to do so (as they are by the clear invitation in many of the challenged ads). (Golder (Intuit) Tr. 1096-1097). Conducting such research is consistent with the multi-step buying process that reasonable consumers engage in before selecting a tax-preparation product. (Golder (Intuit) Tr. 1062-1063, 1075-1076; RX1017 (Hauser Expert Report) ¶102; RX546 (Intuit)).

Response to Finding No. 506:

Complaint Counsel disputes the Proposed Finding. First, Intuit has not established that all reasonable consumers are skeptical of free offers, and in fact, Intuit’s evidence shows that at least a significant minority is not skeptical. (*See, e.g.*, RFF-486). Moreover, the “clear invitation” by Intuit is not for consumers to conduct research, but rather to visit and engage with another piece of Intuit marketing: the website, which is an integrated into TurboTax’s free advertising. (*See, e.g.*, IFF-173; RFF-173 (Intuit includes in some TV ads the phrase “See if you qualify at turbotax.com,”); FF-455). Intuit’s website includes a significant number of deceptive free claims (FF-456—FF-466) and does not provide clear and conspicuous information about restrictions on free TurboTax. (*See* RFF-366—RFF-367; RFF-370; RFF-374; RFF-376; RFF-389—RFF-391; RFF-396; RFF-414—RFF-416; RFF-419; RFF-424; RFF-446; RFF-450).

507. Consumers’ research into tax-preparation products as part of this high-involvement purchase process often includes considering different kinds of products, such as online DIY products, assisted tax-preparation products, and others. (RX1018 (Golder Expert Report) ¶145; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 15-16, 51, 56-57; RX1016-A (Kirk Fair Expert Report) ¶¶20, 34, 43).

Response to Finding No. 507:

Complaint Counsel disputes the Proposed Finding that consumer research “often” includes considering different kinds of products, such as online DIY products, assisted tax preparation products, and others. This claim is not supported by the evidence cited. (RX1018 (Golder Expert Report) ¶145 (merely listing that other DIY products exist). Intuit relies heavily on Ms. Kirk Fair’s conclusions (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 15-16, 51, 56-57 (discussing questions about what surveyed consumers would do after encountering a hard stop telling them they can’t file for free with TurboTax); RX1016-A (Kirk Fair Expert Report) ¶¶20, 34, 43 (discussing a survey design that is seriously flawed (*see* FF-892—FF-904) in which Ms. Kirk Fair specifically presented consumers with different tax preparation options, and measured how they would react to different survey stimuli mimicking versions of the hard stop screen, and concluding “the intersection of Intuit’s free advertising and upgrade screens do not induce

upgrades from TurboTax’s Free Edition to Paid versions of TurboTax”). However, both Ms. Kirk Fair’s conclusions and her survey are deeply flawed. (*See* FF-893—FF-904; *see also* RFF-746—RFF-760).

508. Reasonable consumers often receive referrals from friends or conduct Google searches before deciding to use TurboTax or another tax-preparation provider. (GX135 (Phyfer (Consumer) Dep.) at 28; GX125 (Beck (Consumer) Dep.) at 27; RX70 (Beckett (Consumer) Dep.) at 51; RX72 (Harford (Consumer) Dep.) at 57-60).

Response to Finding No. 508:

Complaint Counsel does not dispute that consumers may conduct Google searches before deciding to use TurboTax or another tax preparation provider. Complaint Counsel disputes the remainder of the Proposed Finding. Intuit’s own survey evidence (though plagued by design flaws, *see* RFF-505) shows that only 19.2% of respondents listed recommendations from family and friends as an important factor in their tax preparation method selection. (RX1017 (Hauser Expert Report) Figure 16, Exhibit 13a). Moreover, consumer testimony shows that consumers do not always conduct research, especially if they think they understand the advertised offer. (*See, e.g.*, GX135 (Phyfer (Consumer) Dep.) at 93 (“Q. And you never did any research in tax year 2018 to determine whether your tax return was a simple return, right? A. Right. So I had no reason to believe it was different than the previous.”). This confirms Professor Novemsky’s opinions that consumers tend to be cognitive misers and are unlikely to conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-502). Moreover, when consumers do conduct research, for example through Google, they are likely to encounter TurboTax advertisements that reinforce the “free” message. (*See* RFF-505).

509. During the consumer buying process, it is also common for consumers to “cross-shop” potential tax-filing options and simultaneously consider alternative DIY tax-preparation software and providers, along with TurboTax. (Rubin (Intuit) Tr. 1585-1586, 1610-1611; RX1018 (Golder Expert Report) ¶143). Consumers can view competitors’ websites “simultaneously” to “look at other software[] at the same time to decide which to use.” (Rubin (Intuit) Tr. 1586, 1610). As Dr. Yoeli acknowledged, consumers can “have more than one browser window open at a time,” such that they “could be in TurboTax and TaxSlayer at the same time.” (Yoeli (FTC) Tr. 1718-1719). Indeed, Intuit’s internal research confirms that

consumers often engage in cross-shopping: [REDACTED]

(RX57-A (Intuit) at 25).

Response to Finding No. 509:

Complaint Counsel disputes the Proposed Finding that it is “common” for consumers to “cross-shop” potential tax filing options because the evidence does not support it. Professor Golder’s expert report has no findings about the commonality of cross-shopping, and Intuit’s own research shows [REDACTED]

[REDACTED] (RX57-A (Intuit) at 25 (“

[REDACTED] *see also* GX749 (Novemsky Rebuttal Expert Report) ¶ 211 ([REDACTED]

[REDACTED] Considering that only around 20% of TurboTax customers leave TurboTax, (RX1018 (Golder Expert Report) ¶ 47 (describing an 80% retention rate), [REDACTED]

[REDACTED] Complaint Counsel has no specific response to the remainder of the Proposed Finding.

510. Intuit’s advertising at the top of the marketing funnel, *supra* ¶¶155-160, when consumers are just beginning to think about filing their taxes, is meant to “move [consumers] from being unaware to being aware” of their different tax filing options. (Golder (Intuit) Tr. 1106; *see also* Golder (Intuit) Tr. 1065-1069; RX1018 (Golder Expert Report) ¶153). Intuit’s brand advertising, therefore, simply aims to “drive awareness and consideration of the brand and its products” as consumers start thinking about their different filing options. (GX146 (Ryan (Intuit) Dep.) at 22; RX582 (Intuit) at -1293).

Response to Finding No. 510:

Complaint Counsel has no specific response.

511. Reasonable consumers expect and understand that information conveyed at the top of the marketing funnel will be limited, and that more information is available elsewhere. (Golder (Intuit) Tr. 1070-1071, 1105-1107, 1115-1117).

Response to Finding No. 511:

Complaint Counsel disputes the Proposed Finding. While consumers may expect some information to be limited at the top of the marketing funnel, consumers expect to receive accurate information about central characteristics of a product that is being advertised, like its

price. This is illustrated by consumer complaint trends and actual complaints to Intuit, for example. (*See e.g.*, FF-619—FF-623; *see also, e.g.*, FF-635—FF-637; FF-642—FF-647; FF-649—FF-651; FF-655—FF-660). What is more, Intuit made an effort to convey the free message at the top of the funnel (not a free message limited by other information) and to counteract any consumer skepticism regarding “free” TurboTax. (*See* FF-50; GX290 (Intuit) at CC-00006225 (explaining that Intuit added the language “Guaranteed” to “address skepticism of free, build credibility of TT Free, and drive trial”); GX295 (Intuit) at CC-00006316 (“Convince consumers TurboTax Absolute Zero is truly free ... Guarantee”), CC-00006333 (“Drive believability of TT Free ... add ‘Guaranteed’ in lock-up”) & CC-00006351 (“Findings:...‘A[bsolute]/Z[ero] Guarantee’ is the strongest concept to battle free skepticism”)).

512. TurboTax ads for free SKUs provided disclosures about qualifications that were consistent with reasonable consumers’ expectations for advertising at the top of the marketing funnel. (Golder (Intuit) Tr. 1070-1071, 1105-1108; *supra* ¶¶205-301). The disclosures were located where consumers would expect to find them and provided enough detail to inform consumers about qualifications without confusing them. (*Supra* ¶¶205-301; *infra* ¶¶514-527).

Response to Finding No. 512:

Complaint Counsel disputes the Proposed Finding because the evidence cited by Intuit does not support it. Professor Golder’s testimony merely describes what is common in the industry, not what reasonable consumers would expect regarding disclosures at the top of the marketing funnel. Professor Golder can only speculate and has no direct evidence regarding what reasonable consumers do or do not expect regarding TurboTax’s disclosures for its free advertising. (*See* FF-701; FF-704). Moreover, the evidence clearly shows that Intuit’s disclosures were ineffective. They were small, and only appeared at the bottom of the screen. (FF-492—FF-493). Moreover, even if consumers could see them, they likely did not understand or interact with them. (FF-491—FF-503). The perception survey conducted by Professor Novemsky, which measured consumer impressions based on TurboTax advertising in the marketplace, including disclaimers, confirmed that consumers had not taken away an accurate message about their ability to file for free. (FF-480—FF-488; *see also* RFF-205—RFF-301).

513. Reasonable consumers’ “care and consideration” when evaluating tax-preparation options (Golder (Intuit) Tr. 1064, 1073-1074), the multi-step buying process they engage in before deciding to purchase a tax-preparation product, and their understanding that information conveyed in ads at the top of the marketing funnel will be limited, refutes any likelihood that those consumers would have simply assumed based on the challenged ads that all TurboTax SKUs were free or that TurboTax must be free for them when it was not.

Response to Finding No. 513:

Complaint Counsel disputes the Proposed Finding. As an initial matter, other than Professor Golder’s baseless musing about “care and consideration” (terms not contained in his expert report), there is no evidence about the “care and consideration” that consumer bring to the tax preparation selection process, and there is no evidence that even consumers exhibiting “care and consideration” would be able to overcome deceptive TurboTax advertising. (See RFF-502—RFF-503). Far from “simply assum[ing]” that they could file for free with TurboTax, the evidence shows that beliefs about filing for free are directly linked to TurboTax advertising. (See FF-481; FF-484; FF-486—FF-487; FF-600; FF-604—FF-608, FF-611—FF-616; FF-618; *see also, e.g.*, FF-635—FF-637; FF-642—FF-647; FF-649—FF-651; FF-655—FF-660).

4. Reasonable Consumers Know To Look For And Where To Find Qualifications For Free Offers In Advertisements

514. In addition to being familiar with free offers, reasonable consumers are also familiar with how those free offers are advertised, including where disclosures are likely to be located in an advertisement, and the fact that the disclosures do not necessarily include all information about a free offer’s qualifications. (Golder (Intuit) Tr. 1105-1108).

Response to Finding No. 514:

Complaint Counsel disputes the Proposed Finding. As an initial matter, while Professor Golder opines at length in his expert report about how TurboTax ads compare to other ads, Professor Golder’s opinion that “reasonable consumers are also familiar with how those free offers are advertised, including where disclosures are likely to be located in an advertisement, and the fact that the disclosures do not necessarily include all information about a free offer’s qualifications” is not contained in his expert report and should be disregarded. (See Chappell (ALJ) Tr. 889 (admonishing the parties that “anything that’s in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be

considered in any decision in this case.”). What is more, Professor Golder does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-690; FF-693—FF-694; FF-701—FF-702; FF-704). Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (See FF-481; FF-484; FF-486—FF-487; RFF-534; FF-619—FF-623; *see also, e.g.*, FF-635—FF-637; FF-642—FF-647; FF-649—FF-651; FF-655—FF-660).

515. Reasonable consumers understand, for example, that TV ads of all kinds include disclosures at the bottom of the TV screen. (Golder (Intuit) Tr. 1111-1114; RX1018 (Golder Expert Report) ¶131). Reasonable consumers are also familiar with disclosures in TV ads being shorter than those found on websites. (Golder (Intuit) Tr. 1105-1106).

Response to Finding No. 515:

Complaint Counsel disputes the Proposed Finding. While some consumer may be aware that in some TV ads, text appears at the bottom of the screen, Intuit has put forward no evidence other than Professor Golder’s conjecture about what reasonable consumers do or do not understand about what that text means and whether it is a disclaimer or not. Professor Golder does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-690; FF-693—FF-694; FF-701—FF-702; FF-704). Much of Professor Golder’s analysis is based on his review of advertisements from companies other than TurboTax, but Professor Golder has done no analysis to determine whether the other ads are deceptive, or what message they convey to consumers, and is thus uninformative. (See FF-701—FF-702). Complaint Counsel further disputes this Proposed

Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (See FF-481; FF-484; FF-486—FF-487; RFF-534; FF-619—FF-623; *see also, e.g.*, FF-635—FF-637; FF-642—FF-647; FF-649—FF-651; FF-655—FF-660).

516. Moreover, when reasonable consumers see text at the bottom of the screen in a TV advertisement, they understand (whether or not they read the text) that the product or offering being advertised has qualifications or limitations. (Golder (Intuit) Tr. 1111-1114).

Response to Finding No. 516:

Complaint Counsel disputes the Proposed Finding. As an initial matter, while Professor Golder opines at length in his expert report about how TurboTax ads compare to other ads, Professor Golder’s opinion that “when reasonable consumers see text at the bottom of the screen in a TV advertisement, they understand (whether or not they read the text) that the product or offering being advertised has qualifications or limitations” is not contained in his expert report and should be disregarded. (See Chappell (ALJ) Tr. 889 (admonishing the parties that “anything that’s in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.”)). Complaint Counsel disputes this Proposed Finding because it relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-690; FF-693—FF-694; FF-701—FF-702; FF-704). Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free”

TurboTax claims. (See FF-481; FF-484; FF-486—FF-487; RFF-534; FF-619—FF-623; *see also*, *e.g.*, FF-635—FF-637; FF-642—FF-647; FF-649—FF-651; FF-655—FF-660).

517. Reasonable consumers therefore knew to look for disclosures in free TurboTax TV ads at the bottom of the TV screen, and understood that those disclosures would not include all the information available about the qualifications for the free TurboTax offer. (Golder (Intuit) Tr. 1105-1106, 1111-1114; RX1018 (Golder Expert Report) ¶131).

Response to Finding No. 517:

Complaint Counsel disputes this Proposed Finding because it relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-690; FF-693—FF-694; FF-701—FF-702; FF-704). Intuit has put forward no evidence that any consumers saw or understood Intuit’s disclaimers. Much of Professor Golder’s analysis is based on his review of advertisements from companies other than TurboTax, but Professor Golder has done no analysis to determine whether the other ads are deceptive, or what message they convey to consumers, and is thus uninformative. (See FF-701—FF-702). Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (See FF-481; FF-484; FF-486—FF-487; RFF-534; FF-619—FF-623; *see also*, *e.g.*, FF-635—FF-637; FF-642—FF-647; FF-649—FF-651; FF-655—FF-660).

518. Further, because reasonable consumers understand that text at the bottom of the TV screen during ads means there are qualifications for the product being advertised, consumers viewing free TurboTax TV ads understood from the disclosures on the bottom of the screen that the free offers being advertised were qualified, even if they did not read the disclosure text on the screen. (Golder (Intuit) Tr. 1111-1114).

Response to Finding No. 518:

Complaint Counsel disputes this Proposed Finding because it relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-690; FF-693—FF-694; FF-701—FF-702; FF-704). Intuit has put forward no evidence that any consumers saw or understood Intuit’s disclaimers. Much of Professor Golder’s analysis is based on his review of advertisements from companies other than TurboTax, but Professor Golder has done no analysis to determine whether the other ads are deceptive, or what message they convey to consumers, and is thus uninformative. (*See* FF-701—FF-702). Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements contained adequate disclosures. The evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See* FF-481; FF-484; FF-486—FF-487; RFF-534; FF-619—FF-623; *see also, e.g.*, FF-635—FF-637; FF-642—FF-647; FF-649—FF-651; FF-655—FF-660).

519. Complaint Counsel did not offer any evidence disputing that reasonable consumers understand where disclosures appear in TV ads and that the existence of disclosures means the offer being advertised is qualified, even if consumers do not read the disclosures.

Response to Finding No. 519:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, Complaint Counsel has provided ample evidence that in this matter, Intuit’s TV ad disclosures were not sufficient to alert consumers that they could not use TurboTax for free, as illustrated by perception survey data regarding misimpressions, consumer complaints, and Intuit’s internal marketing documents that show that the takeaway from

TurboTax free ads was that TurboTax was free. (See FF-481; FF-484; FF-486—FF-487; RFF-534 (survey evidence); FF-600; FF-604—FF-608, FF-611—FF-616; FF-618 (Intuit marketing documents); *see also, e.g.*, FF-635—FF-637; FF-642—FF-647; FF-649—FF-651; FF-655—FF-660 (consumer complaints regarding Intuit’s free advertising)).

520. In addition to being familiar with disclosures in TV ads, reasonable consumers are familiar with disclosures in online ads and product websites. For instance, reasonable consumers are familiar with disclosures that are available by clicking a hyperlink—such as on the TurboTax website and display ads—and know in particular that hyperlinks are typically displayed in blue text and that clicking that text will lead to a webpage with additional information. (Golder (Intuit) Tr. 1116-1117; RX1018 (Golder Expert Report) ¶182; Shiller (FTC) Tr. 209-210). Even complaining consumers identified by Complaint Counsel understood that the blue text on the TurboTax website indicated that there was a hyperlink and that by clicking on that link they could learn more about the qualifications for TurboTax’s free offers. (GX124 (Bodi (Consumer) Dep.) at 17; GX128 (Benbrook (Consumer) Dep.) at 28-29; GX135 (Phyfer (Consumer) Dep.) at 93; GX137 (DuKatz (Consumer) Dep.) at 64, 67).

Response to Finding No. 520:

Complaint Counsel has no specific response regarding that reasonable consumers know that hyperlinks are typically displayed in blue text and that clicking that text will lead to a webpage with additional information, or that consumers who complained about TurboTax understood that the blue text on the TurboTax website indicated that there was a hyperlink. Complaint Counsel disputes the remainder of the Proposed Finding, as it is not supported by the evidence. The evidence cited by Intuit merely shows that consumers may recognize a hyperlink when it is pointed out to them by an attorney for Intuit during a deposition (GX124 (Bodi (Consumer) Dep.) at 17; GX128 (Benbrook (Consumer) Dep.) at 28; GX137 (DuKatz (Consumer) Dep.) at 64, 67; GX135 (Phyfer (Consumer) Dep.) at 93) but does not mean that reasonable consumers visiting the TurboTax website in the ordinary course understood “that by clicking on that link they could learn more about the qualifications for TurboTax’s free offers” or that disclosures are available behind hyperlinks. It is even more baffling that Intuit cites to FTC investigator testimony where Intuit’s attorneys are questioning her about website captures the investigator made as evidence of what a “reasonable consumers” understand about TurboTax ads or the website. (Shiller (Complaint Counsel) Tr. 209-210). Ms. Shiller obviously has significant

additional knowledge about TurboTax than an ordinary consumer. (*See, e.g.*, Shiller (Complaint Counsel) Tr. 142; 157 -158 (describing work conducted as an investigator on this matter since 2019)).

521. Accordingly, reasonable consumers visiting the TurboTax website understood that additional information about the qualifications for free TurboTax offers was available by clicking on the hyperlinked disclosure text on the TurboTax website. (Golder (Intuit) Tr. 1116-1117; RX1018 (Golder Expert Report) ¶182; Shiller (FTC) Tr. 209-210); *see also* GX124 (Bodi (Consumer) Dep.) at 17; GX128 (Benbrook (Consumer) Dep.) at 28; GX135 (Phyfer (Consumer) Dep.) at 93; GX137 (DuKatz (Consumer) Dep.) at 64, 67).

Response to Finding No. 521:

Complaint Counsel disputes the Proposed Finding. The evidence cited by Intuit merely shows that consumers may recognize a hyperlink when it is pointed out to them by an attorney for Intuit during a deposition (GX124 (Bodi (Consumer) Dep.) at 17; GX128 (Benbrook (Consumer) Dep.) at 28; GX137 (DuKatz (Consumer) Dep.) at 64, 67; GX135 (Phyfer (Consumer) Dep.) at 93) does not mean that “reasonable consumers visiting the TurboTax website” in the ordinary course “understood that additional information about the qualifications for free TurboTax offers was available by clicking on the hyperlinked disclosure text on the TurboTax website.” (Professor Golder relies on this consumer testimony in forming his opinions and is equally mistaken. (RX1018 (Golder Expert Report) ¶182)). It is even more baffling that Intuit cites to FTC investigator testimony where Intuit’s attorneys are questioning her about website captures the investigator made as evidence of what a “reasonable consumers” understand about TurboTax ads or the website. (Shiller (Complaint Counsel) Tr. 209-210). Ms. Shiller obviously has significant additional knowledge about TurboTax than an ordinary consumer. (*See, e.g.*, Shiller (Complaint Counsel) Tr. 142; 157 -158 (describing work conducted as an investigator on this matter since 2019)).

Moreover, as Professor Novemsky opined, Intuit’s placement of a fuller disclaimer behind a “simple returns” hyperlink made it unlikely that consumers would reach the disclaimer because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting

misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of “simple returns” on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674), while another consumer said that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (*See* GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

522. Reasonable consumers similarly understand that online ads provide quick access to detailed information about the offer being advertised, which distinguishes online ads from other kinds of ads. As Professor Golder explained, “medium matters” because consumers interact with television and online ads differently. (Golder (Intuit) Tr. 1116-1117). 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. (Golder (Intuit) Tr. 1116).

Response to Finding No. 522:

Complaint Counsel disputes that “[r]easonable consumers similarly understand that online ads provide quick access to detailed information about the offer being advertised, which distinguishes online ads from other kinds of ads. This Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Complaint Counsel does not have a specific response to the remainder of the Proposed Finding.

523. Consumers’ ability to quickly gain access to detailed information about a free offer, and consumers’ understanding that they can do so, reinforce 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. In fact, the evidence reflects not only that consumers do not expect those details to be provided in online ads, but that doing so is impossible in this industry, and also that consumers would be overwhelmed if full details were provided in that format. (Golder (Intuit) Tr. 1108, 1130, 1173-1176; *see also* Novemsky (FTC) Tr. 1780, 1821).

Response to Finding No. 523:

Complaint Counsel disputes that “[c]onsumers’ ability to quickly gain access to detailed information about a free offer, and consumers’ understanding that they can do so, reinforce 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.” This Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Complaint Counsel further disputes that evidence reflects that “not only that consumers do not expect those details to be provided in online ads, but that doing so is impossible in this industry.” The evidence cited by Intuit does not support that consumers “expect details to be provided in online ads” or that providing “details” is impossible in the tax preparation industry. Professor Golder’s testimony merely discusses information overload in various advertising setting for hypothetical longer disclosures. (Golder (Intuit) Tr. 1108-09 (discussing TV ads, not online ads) 1130 (opining that providing the same level of detail in ads as is available on the website wouldn’t be “helpful”) 1173-1176 (opining about information overload for lengthy disclosures). Moreover, though Professor Novemsky opined that providing complicated details in short 6 or 30 second ads might overload consumers with information, he also opined that whether disclaiming an advertisement accurately is difficult or not “doesn’t say anything about whether that ad is deceptive” and that “how complicated the criteria that TurboTax has chosen happened to be, is not really at issue here. To me my understanding is are consumers taking away the wrong idea and to me that’s not really relevant to what a disclosure you can get across in a TV ad or some other channel.” (Novemsky (Complaint Counsel) Tr. 1780-1781; *see also* GX749 (Novemsky Rebuttal Expert Report) ¶ 231).

524. Reasonable consumers viewing online ads for free TurboTax offers thus understood that additional information was available by clicking on those ads, and they would not be misled into believing that all TurboTax SKUs were free or that a free TurboTax offer was necessarily free for them. (Golder (Intuit) Tr. 1116).

Response to Finding No. 524:

Complaint Counsel disputes the Proposed Finding that reasonable consumers “would not be misled into believing that all TurboTax SKUs were free or that a free TurboTax offer was necessarily free for them.” The evidence cited by Intuit does not support this assertion. (Golder (Intuit) Tr. 1116 (merely testifying about consumer understanding that clicking on ads would provide more information). In fact, the evidence shows the opposite. Perception survey evidence shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486—FF-487). Complaint Counsel has no specific response for the remainder of the Proposed Finding.

525. Complaint Counsel offered no evidence specific to online ads (or video ads or any other kind of ad) demonstrating that consumers were likely to be misled into believing that all TurboTax SKUs were free or that TurboTax would be free for them when it was not.

Response to Finding No. 525:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, perception survey evidence shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486—FF-487).

526. Reasonable consumers also understand that for any online product they can, and commonly do, visit the product website to explore details and gather information about a particular offering. (Johnson (Intuit) Tr. 600-601; Golder (Intuit) Tr. 1070-1071, 1105-1107).

Response to Finding No. 526:

Complaint Counsel has no specific response.

527. Reasonable consumers therefore understood that they could visit the TurboTax website to learn more about free TurboTax SKUs, regardless of how they learned about the free offer. (Johnson (Intuit) Tr. 600-601; Golder (Intuit) Tr. 1070-1071, 1105-1107). That understanding would prevent reasonable consumers from immediately assuming based on the challenged ads that all TurboTax SKUs were free or that TurboTax must be free for them when it was not.

Response to Finding No. 527:

Complaint Counsel does not dispute that “[r]easonable consumers therefore understood that they could visit the TurboTax website.” Complaint Counsel disputes the remainder of the Proposed Finding. As an initial matter, Intuit’s assertions are pure speculation. Moreover, perception survey evidence shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486—FF-487). Moreover, consumers may not seek out additional information on the TurboTax website, even if they were aware that it exists. (*See, e.g.*, RFF-521).

B. Professor Novemsky’s Survey Is Fatally Flawed For Countless Reasons And Does Not Provide Reliable Evidence of Deception Or Anything Else

528. Beyond the ads themselves, Complaint Counsel seek to prove deception primarily through a perception study conducted by Professor Nathan Novemsky in March 2022 that he claims showed that many consumers who do not qualify for TurboTax Free Edition erroneously believe they do. (Novemsky (FTC) Tr. 360; GX303 (Novemsky Expert Report) ¶8).

Response to Finding No. 528:

Complaint Counsel disputes that it has sought to prove deception “primarily through a perception study conducted by Professor Novemsky.” Though Complaint Counsel relies on the perception survey and Intuit advertising, the record includes voluminous other important evidence that Complaint Counsel has relied on, for example Intuit internal documents regarding its free advertising (*see, e.g.*, FF-596—FF-618) and customer feedback and complaints illustrating that consumers thought they would be able to use TurboTax for free because of the TurboTax ads but were not able to. (FF-619—FF-623; *see also, e.g.*, FF-636—FF-637; FF-642—

FF-647; FF-649—FF-651; FF-655—FF-660; FF-643). In addition, consumer deponents testified that they thought they would be able to file for free and were not able to. (FF-664).

529. But that survey is flawed in numerous ways and does not provide reliable evidence that reasonable consumers were deceived by TurboTax marketing. Surveys performed by other experts, moreover, confirm that consumers were not deceived.

Response to Finding No. 529:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, Complaint Counsel does not agree that the survey performed by Professor Novemsky is flawed. Professor Novemsky designed and conducted a reliable and scientifically valid survey. (FF-504—FF-545). None of Intuit’s experts conducted a survey that directly addresses the question whether or not, and to what extent, consumers believe they can use TurboTax for free. (FF-680-FF-681). Indeed, the surveys conducted by Intuit’s experts buttress Complaint Counsel’s theory, for example that price is material to consumers. (*See* FF-596; FF-804—FF-806). And even though Intuit’s cross-examination of Professor Novemsky took nearly twice as long as his direct exam (compare Novemsky (Complaint Counsel) Tr. 347-399 (Professor Novemsky’s direct exam beginning at approximately 9:50 a.m. and ending at approximately 10:52 a.m.) to Novemsky (Complaint Counsel) Tr. 399, 487, 399 (Professor Novemsky’s cross exam beginning at approximately 11:00 a.m., lasting until lunch at approximately 1:21 p.m., resuming after lunch at approximately 2:37 p.m. and the examination, including redirect and recross, continuing until approximately 4:46 p.m.), Intuit was not able to undermine the validity of his survey.

1. Survey Design

530. Although Professor Novemsky opines that TurboTax marketing has *caused* consumers to wrongly believe that they can file their taxes for free using TurboTax, his survey did not test for causality. (Novemsky (FTC) Tr. 354, 362; Hauser (Intuit) Tr. 896-897, 900, 952-954; RX1017 (Hauser Expert Report) ¶¶27-29).

Response to Finding No. 530:

Complaint Counsel disputes the Proposed Finding. Professor Novemsky did test for causality by asking consumers about the source of their misimpressions. (FF-482—FF-487; Novemsky (Complaint Counsel) Tr. 354 (“[M]any consumers, are actually taking away false message from TurboTax marketing that they can file for free when, in fact, they are not eligible to file for free; *that this is coming from TurboTax marketing*”) (emphasis added); 362 (“[A]bout 72 percent of participants who think they can file for free attribute that knowledge to TurboTax ads, the TurboTax website, or both. Q. And what is the significance of that result? A. I think it’s quite relevant to the opinions that I offered, which suggest that TurboTax -- the impression that consumers can file for free when they can’t *is coming from TurboTax itself*, from its own marketing campaign, in this case the advertisements and the website.”) (emphasis added); *see also* Tr. 393). Moreover, Professor Novemsky eliminated other sources of consumer misimpressions, specifically that consumers misimpressions come from Intuit’s competitors’ advertising, by analyzing Intuits’ share of voice in the TV advertising space. (FF-550—FF-552; FF-558—FF-559). In that space alone, Intuit dominated share of voice, accounting, on average, for 72% of impressions related to “free” tax preparation messaging between 2018 and 2022, (FF-552), with over 19 billion total impressions. (FF-553—FF-557; RFF-463).

531. Testing causality requires a test-control experimental design in which participants in a “test” group are exposed to whatever subject matter is being studied, and participants in a “control” group are exposed to some kind of placebo stimulus (or no stimulus at all). (Hauser (Intuit) Tr. 847-850, 896-897, 900, 952-954; RX1017 (Hauser Expert Report) ¶27; RX1349 (Intuit) at 1840-1841). By examining the differences in responses between the two groups, researchers can isolate and measure any effect that the tested subject matter caused. (Hauser (Intuit) Tr. 847-850; RX1017 (Hauser Expert Report) ¶27).

Response to Finding No. 531:

Complaint Counsel disputes that testing causality requires a test-control experiment. While an experimental survey design requires a test and control for purposes of testing causality, (*see, e.g.*, Novemsky (Complaint Counsel) Tr. 492 (“Q. And in the context of wanting to test an advertisement, you would set up two different groups of people, right? A. Control test -- a

control test design would include at least two groups of people, yes.”), Professor Novemsky did not undertake an experimental design for the perception survey. (Novemsky (Complaint Counsel) Tr. 492; 494 *see also* FF-531—FF-540). As Professor Novemsky testified, “[t]here are other ways to do causal inference without experimental design at all.” (Novemsky (Complaint Counsel) Tr. 494-495; *see also* FF-532. Notably, Intuit itself has [REDACTED] [REDACTED]. (See IFF-709; RFF-709). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

532. As Professor Novemsky himself testified when serving as an expert in another case, it is “impossible” to “draw any causal inference” without “an experimental design that includes a control group and a test group.” (RX1349 (Intuit) at 1841). Absent a control group, Professor Novemsky stated under oath, one cannot test what an “ad caused consumers to understand or not understand.” (RX1349 (Intuit) at 1840).

Response to Finding No. 532:

Complaint Counsel disputes the Proposed Finding. As Professor Novemsky testified at trial, his prior testimony was related to “a very specific situation. It’s there are different ways to get at causality in that context where I made that statement, that person I was rebutting someone, and that person had not done anything else. In this situation, I did a number of things to get at causality that did not involve a test control methodology.” (Novemsky (Complaint Counsel) Tr. 492; *see also* 494-495). As Professor Novemsky testified, “if there is an experimental design, you need to have a control group, but I did not undertake an experimental design.” (Novemsky (Complaint Counsel) Tr. 492).

533. Professor Novemsky admits that his survey here did not use a test-control design. (Novemsky (FTC) Tr. 491-492, 494). He did not assign survey participants to “test” and “control” groups, and he did not show either group anything. (Novemsky (FTC) Tr. 491-492).

Response to Finding No. 533:

Complaint Counsel disputes the Proposed Finding to the extent it suggests Professor Novemsky did not show respondents the survey instrument, which he showed to every respondent. (See GX303 (Novemsky Expert Report) App’x F).

534. Indeed, although Professor Novemsky purports to draw a causal conclusion about TurboTax's marketing, and although he went to the TurboTax website to determine the qualifications for Free Edition when designing his survey, he did not show participants any TurboTax advertisements or the TurboTax website. (Novemsky (FTC) Tr. 354, 399, 405-406, 408-410). And he did not ask any participants about their understanding of the written or verbal disclosures included in the challenged ads, or their understanding of the detailed information provided on the TurboTax website. (Novemsky (FTC) Tr. 1816, 1821-1823).

Response to Finding No. 534:

Complaint Counsel has no specific response to the Proposed Finding that "Professor Novemsky purports to draw a causal conclusion about TurboTax's marketing, and although he went to the TurboTax website to determine the qualifications for Free Edition when designing his survey, he did not show participants any TurboTax advertisements or the TurboTax website." Complaint Counsel disputes the remainder of the Proposed Finding. Professor Novemsky tested consumer understanding of disclaimers Intuit used in the disputed ads, specifically the phrase "simple U.S. return" (FF-491; FF-508; *see also* GX303 (Novemsky Expert Report) ¶¶ 83-84; Novemsky (Complaint Counsel) Tr. 372 ("I also studied their understanding of the words 'simple returns,' the disclaimer that TurboTax used in some of its marketing.")). Moreover, Professor Novemsky's survey studied consumer perceptions in the marketplace that would have included exposures to Intuit's "simple returns" disclaimer language. Novemsky (Complaint Counsel) Tr. 1826 ("My understanding is that some ads that were on the air when my -- when and before my survey was run, did include that language. And so to the extent that language was curing any misperception, that would have been picked up in my survey. So my survey included all information in the marketplace in mid to late March 2022, so to the extent that language was in the marketplace, it would be part of consumer understanding that's measured in my survey."); *see also* GX303 (Novemsky Expert Report) ¶¶ 23, 100).

535. As Intuit's survey expert, Dr. John Hauser, explained at trial, Professor Novemsky could have "give[n] just [the] TurboTax brand name to one group and then [the] TurboTax brand name plus advertising plus websites" to another group, and compared perceptions across the groups. (Hauser (Intuit) Tr. 900). But Professor Novemsky did not do that, and therefore his study does not prove that TurboTax ads "caused a change in perceptions." (Hauser (Intuit) Tr. 900).

Response to Finding No. 535:

Complaint Counsel disputes the Proposed Finding. Complaint Counsel disputes that the perception survey “does not prove that TurboTax ads ‘caused a change in perceptions.’” Professor Novemsky did test for causality with the perception survey by asking consumers about the source of their misimpressions. (FF-482—FF-487; Novemsky (Complaint Counsel) Tr. 354 (“[M]any consumers, are actually taking away false message from TurboTax marketing that they can file for free when, in fact, they are not eligible to file for free; *that this is coming from TurboTax marketing*”) (emphasis added); 362 (“[A]bout 72 percent of participants who think they can file for free attribute that knowledge to TurboTax ads, the TurboTax website, or both. Q. And what is the significance of that result? A. I think it’s quite relevant to the opinions that I offered, which suggest that TurboTax -- the impression that consumers can file for free when they can’t *is coming from TurboTax itself*, from its own marketing campaign, in this case the advertisements and the website.”) (emphasis added); *see also* Tr. 393).

536. As Professor Novemsky himself put it, his survey was an “unaided test of respondents’ impressions at the time of the survey”—and thus a memory test, even though he conceded that “memory is not perfect” and survey participants “could have forgotten anything” about TurboTax ads they had seen before. (GX749 (Novemsky Rebuttal Expert Report) ¶21, Novemsky (FTC) Tr. 460-462).

Response to Finding No. 536:

Complaint Counsel has no specific response to the Proposed Finding that the perception survey “was an ‘unaided test of respondents’ impressions at the time of the survey’—and thus a memory test.” Complaint Counsel also has no specific response to the Proposed Finding that “memory is not perfect.” Complaint Counsel disputes that Professor Novemsky “conceded” that survey participant could have forgotten anything about TurboTax ads they had seen before. Professor Novemsky’s testimony was broader, addressing that survey respondents could have forgotten anything generally. (Novemsky (Complaint Counsel) Tr. 460-462). Moreover, Professor Novemsky opined that psychologists regularly ask respondents to record the source of their beliefs or impressions and respondents are able to indicate when they do not remember the

source of their impressions in these studies, as they were able to in the perception survey by indicating “Don’t know.” (FF-592; GX749 (Novemsky Rebuttal Expert Report) ¶ 91; GX303 (Novemsky Expert Report) ¶ 78). Unaided surveys are commonly used. As Professor Novemsky testified:

A different type of survey, the one that I used here, is called a perception survey, or sometimes an A&U in the industry, an attitudes and usage survey. We’re trying to count up how many consumers have certain beliefs or attitudes. And so that’s more appropriate when you have something that you can’t replicate in the lab. It’s something that’s used broadly, so crime victimization surveys, consumer sentiment surveys on which economic policy is based, all use this type of structure. Professor Hauser, one of the experts from TurboTax in this matter, used this structure for his purchase driver survey. It’s a commonly used structure. So they’re both commonly used structures to answer different questions.

(Novemsky (Complaint Counsel) Tr. 381-382).

Moreover, Intuit’s long running advertising campaign makes it less likely that consumers would have forgotten its advertising in this instance. (See GX749 (Novemsky Rebuttal Expert Report) ¶¶ 91; 15 (opining that Intuit’s long running and pervasive marketing campaign may compound the impact of ads and mitigate decay of impact)).

537. Despite the absence of a test-control design, Professor Novemsky opined that he could draw causal conclusions by ruling out possible alternative causes of consumer misimpression. (Novemsky (FTC) Tr. 530). But he did not undertake any experimental studies to eliminate other causes of consumer misimpression. (RX1392 (Novemsky (FTC) Dep.) at 89-91; Hauser (Intuit) Tr. 910-911).

Response to Finding No. 537:

Complaint Counsel disputes the Proposed Finding to the extent it suggests Professor Novemsky did not do anything to rule out possible alternative causes of consumer misimpressions. Professor Novemsky conducted an in-depth analysis of Intuit’s share of voice in the free advertising space to rule out the possibility that Intuit’s competitors were causing consumer misimpressions regarding free. (See RFF-530; FF-548—FF-560). Complaint Counsel does not otherwise have a specific response.

538. Professor Novemsky also acknowledged that his survey measured the cumulative effect of “everything”—i.e., every possible source of information—“that was in the marketplace up until the time of [the] survey.” (Novemsky (FTC) Tr. 1827). In his words, participants answered his survey questions “having seen whatever they saw in the world”—which may or may not have included any TurboTax ads. (Novemsky (FTC) Tr. 405).

Response to Finding No. 538:

Complaint Counsel has no specific response.

539. Professor Novemsky’s failure to employ a control group means that his survey results could have been caused by the ordering and phrasing of the survey questions themselves—i.e., by what researchers call “survey noise.” (Hauser (Intuit) Tr. 849-850, 896-897, 920-926, 940-945; RX1017 (Hauser Expert Report) ¶¶27-28, 33). Professor Novemsky could have asked a control group the same survey questions he asked his main survey group about TurboTax, but with a fictional brand name that does not conduct any marketing substituted for TurboTax. (Hauser (Intuit) Tr. 896-897). That would have enabled him to estimate the portion of his survey results caused by the survey instrument itself and subtract that out from his survey results concerning TurboTax. (Hauser (Intuit) Tr. 896-897). Because he did not do so, Professor Novemsky cannot rule out possible alternative causes within his own survey. (Novemsky (FTC) Tr. 405, 1827; Hauser (Intuit) Tr. 910-911, 953).

Response to Finding No. 539:

Complaint Counsel disputes the Proposed Finding. First, as Intuit’s experts acknowledged, surveys do not require controls to be reliable and are routinely found to be reliable without controls. (FF-534, *see also* FF-532, FF-780). Moreover, Professor Novemsky employed several measures that allowed him to reliably measure survey results and avoid “noise,” for example changing the order of questions to avoid “order effect,” employing quasi-filters, and pretesting his survey questions. (FF-523—FF-525). What is more, the perception survey results from open-ended questions show that the survey did not cause bias: less than 1% of respondents mentioned the survey instrument, while many respondents offered thoughtful answers about eligibility for “free” TurboTax that showed that they were considering factors outside of the survey to answer the question. (FF-589; GX749 (Novemsky Rebuttal Expert Report) at Figures 5-8). For example, survey respondents said in open-ended question responses to the question about why they thought they could file for free that they thought they could file for free because they “fall into the income bracket who can use it for free.” (GX749 (Novemsky Rebuttal Expert Report) at Figures 8 Row 1), or “[b]ecause free. Free free free free. The

commercial.” (GX303 (Novemsky Expert Report) ¶ 80). Moreover, Professor Hauser was unable to identify any plausible alternative causes. (FF-579).

540. Given these failures, any causal conclusions that Professor Novemsky attempts to draw are scientifically invalid and unreliable. (Hauser (Intuit) Tr. 952-953; RX1017 (Hauser Expert Report) ¶26).

Response to Finding No. 540:

Complaint Counsel disputes the Proposed Finding. Professor Novemsky’s causal conclusions are scientifically valid and reliable because they are based on reliable principles of survey design. (FF-509; *see* RFF-530—RFF-532; RFF-534—RFF-537; RFF-539). Using a perception survey rather than a test/control design was appropriate in this instance to measure the extent of taxpayers’ opinions and beliefs as to whether they can file their taxes for free using TurboTax online software, given Intuit’s long-running, pervasive “free” advertising campaign. (FF-504, FF-531—FF-540). Professor Novemsky also employed several measures that allowed him to reliably measure survey results and avoid “noise,” for example changing the order of questions to avoid “order effect,” employing quasi-filters, and pretesting his survey questions. (FF-521, FF-523—FF-525).

2. Survey Population

541. Professor Novemsky’s survey is independently unreliable because it used a flawed population that was likely unfamiliar with TurboTax’s product offerings or advertising.

Response to Finding No. 541:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, Professor Novemsky’s survey used a reliable survey population. (FF-510—FF-519). Though Intuit claims, without support, that the survey population was likely “unfamiliar” with TurboTax product offerings or advertising, that claim is unsupported by direct survey evidence showing that consumers were aware of TurboTax advertising and listed it as a source of their misimpressions. (*See* FF-484—FF-487). Survey respondents in Group B (not the

main Group of interest) had recently paid to use TurboTax and were therefore very familiar with TurboTax product offerings. (FF-519). Finally, to the extent Intuit is making the absurd argument that the perception survey should have included consumers who had already filed their taxes with TurboTax that tax season, it misunderstands the entire purpose of the survey: to test perceptions in the marketplace *prior* to purchase of a tax preparation option. (FF-574). In addition, between 2018 and 2022, the total number of “free” TurboTax advertising impressions exceeded 19 billion (FF-553—FF-557), which, when distributed across 160 million, results in dozens and dozens of views per taxpayer, regardless of what tax preparation method they may have used or considered. (Novemsky (Complaint Counsel) Tr. 369-370; *see also* RFF-463).

542. Professor Novemsky screened out most individuals who attempted to take the survey: 12,249 people began the survey, but 10,508 of them were terminated due to their responses to screening questions. (GX303 (Novemsky Expert Report) ¶¶65 & App’x I). And given that additional respondents abandoned the survey, only 771 people ultimately completed it. (GX303 (Novemsky Expert Report) ¶¶65, 71 & App’x I; Novemsky (FTC) Tr. 463; RX1392 (Novemsky (FTC) Dep.) at 194-195). Of those 771 people, another 164 people opted-out, leaving his survey with just 607 participants, which equals a response rate of less than 5%. (GX303 (Novemsky Expert Report) ¶¶50-51, 65, 71 & App’x I; RX1392 (Novemsky (FTC) Dep.) at 194-195).

Response to Finding No. 542:

Complaint Counsel does not dispute that 12,249 people began the survey (excluding 164 consumers who opted out), and that 771 people (including 164 opt-out respondents) completed it. Complaint Counsel disputes the remainder of the Proposed Finding. 11,634 respondents were terminated from the survey because they were not part of the target population or were otherwise ineligible to participate (GX303 (Novemsky Expert Report) App’x I (the sum of rows 3 through 13). Excluding opt-out consumers, 607 consumers qualified for the survey. (GX303 (Novemsky Expert Report) App’x I, Row 1). Only 8 respondents terminated the survey during the main questionnaire. (GX303 (Novemsky Expert Report) App’x I, Row 15). Intuit appears to take the position that “response rate” calculations should take into consideration all survey respondents who start a survey without regard to who was actually eligible, but that is not survey practice and is the incorrect calculation for response rates. (RX709 (Intuit) at INTUIT-FTC-PART3-

000608643 n. 109 (Diamond, S.S., 2011, Reference Guide on Survey Research: “response rate can be generally defined as the number of complete interviews with reporting units divided by *the number of eligible reporting units in the sample*”) (emphasis added)).

Though methods for calculating response rates vary, (RX709 (Intuit) at INTUIT-FTC-PART3-000608643 n. 109) calculating survey completion rates based on survey participants who qualified for the survey, including opt-outs, shows that 779 respondents were qualified to take the survey. (GX303 (Novemsky Expert Report) ¶ 51, App’x I). Of those 779 respondents, only 8 terminated during the survey, and the remaining 771 (99%) provided responses. (GX303 (Novemsky Expert Report) App’x I). And while there is no reason to suggest that the 164 survey respondents who opted out would provide systematically different answers than the other completes and their dropping out would result in a non-response bias. (FF-544; FF-576; GX303 (Novemsky Expert Report) ¶ 51; 71). And taking a conservative position where one considers all opt-outs similar to those 8 who terminated during the survey process, the perception survey would still have 607 out of 779 qualified respondents (78%) providing responses. (GX303 (Novemsky Expert Report) ¶ 51, App’x I).

543. One critical group that Professor Novemsky excluded was all participants who qualify to file for free with TurboTax Free Edition. (Novemsky (FTC) Tr. 359, 419-420). This group constitutes over a third of all taxpayers in the United States, and over half of the taxpayers who would consider an online DIY tax-preparation product. (Novemsky (FTC) Tr. 419-420); Johnson (Intuit) Tr. 592-593, 657; Ryan (Intuit) Tr. 739; RX814 (Intuit) at -6786; GX303 (Novemsky Expert Report) ¶97 n.129).

Response to Finding No. 543:

Complaint Counsel disputes the Proposed Finding that participants eligible to file for free with TurboTax Free Edition were “one critical group.” The purpose of the perception survey was to determine the impressions consumers not eligible to file for free had about their ability to file for free, (Novemsky (Complaint Counsel) Tr. 359; *see also* FF-504—FF-505)), so excluding consumers who *were* eligible resulted in the correct target population. (GX303 (Novemsky Expert Report) ¶ 21 (“The target population is the segment of the population whose characteristics, beliefs, behavior, and perceptions the survey is intended to represent. The

consumers of interest (and the appropriate target population) for the Perception Survey are potential taxpayers who at the time the survey was conducted were considering using an online tax software to file their 2021 taxes and would not have qualified for TurboTax Free Edition.”)). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

544. That group is also the one Intuit targets with TurboTax Free Edition ads, and the one most likely to have seen the challenged ads. (Rubin (Intuit) Tr. 1530-1535; Johnson (Intuit) Tr. 618; Ryan (Intuit) Tr. 704; GX654 (Intuit)).

Response to Finding No. 544:

Complaint Counsel disputes the Proposed Finding. The evidence shows that Intuit’s “free” campaigns did not exclusively target consumers eligible to file for free. Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (See FF-47—FF-466). Between 2018 and 2022, the total number of “free” TurboTax mass marketing TV advertising impressions exceeded 19 billion (FF-553—FF-557), which, when distributed across 160 million, results in dozens and dozens of views per taxpayer, regardless of what tax preparation method they may have used or considered. (Novemsky (Complaint Counsel) Tr. 369-370; see also RFF-463). Consumer complaints and testimony also illustrate that consumers not eligible for Intuit’s free products and offers nonetheless saw the free advertising. (See, e.g., FF-635—FF-637; FF-642—FF-647; FF-649—FF-651; FF-655—FF-650; FF-643 (“ADVERTISES FREE, FREE, FREE, BUT ITS ACTUALLY FEE, FEE, FEE!”)).

545. Thus, from the beginning, Professor Novemsky focused on a population that was comparatively *less* likely to have seen ads for TurboTax’s free products and offers. (Hauser (Intuit) Tr. 901-902).

Response to Finding No. 545:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Findings are not contained in Professor Hauser’s report, or supported by any fact in evidence, and should be disregarded. (See Chappell (ALJ) Tr. 889 (the Court’s admonition that “anything that’s in the record -- in the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.”)).

Moreover, as discussed above (RFF-544), the record does not show that consumers eligible for free TurboTax offers and products would have been more likely to have seen ads for those products and offers.

546. In addition, Professor Novemsky excluded from his survey population all respondents who had already filed their Tax Year 2021 tax return by the time they took the survey in March 2022—a group that makes up approximately 60% of all U.S. taxpayers. (Novemsky (FTC) Tr. 416-417; Hauser (Intuit) Tr. 901).

Response to Finding No. 546:

Complaint Counsel has no specific response.

547. These respondents, having recently been in the market for tax software, were more likely to be familiar with the qualifications for filing for free with TurboTax Free Edition and other competitor products. (Hauser (Intuit) Tr. 901; GX303 (Novemsky Expert Report) ¶22).

Response to Finding No. 547:

Complaint Counsel has no specific response.

548. At trial, Professor Novemsky suggested that he designed his survey to include only participants who “are in the market for tax software, while they’re in that market.” (Novemsky (FTC) Tr. 379). But his survey did not ask any questions to determine whether the survey participants actually were “in the market” at the time they took the survey. (GX303 (Novemsky Expert Report) App’x E). In fact, Professor Novemsky acknowledged that he did not know whether any of his survey participants, at the time they took his survey, had even gathered their personal information or relevant documents needed to complete their tax returns. (Novemsky (FTC) Tr. 433-434).

Response to Finding No. 548:

Complaint Counsel disputes the proposed finding that the perception survey “did not ask any questions to determine whether the survey participants actually were “in the market” at the time they took the survey.” Professor Novemsky ensured that the survey respondents were in the market for tax preparation by asking consumers during survey screening whether they were involved in decisions regarding tax preparation, had already filed their taxes, and their plans for filing taxes, and included only those respondents who make or contribute to tax filing decisions, who had not yet filed their taxes, and were planning on filing a tax return in 2022, based on

income earned in 2021. (GX303 (Novemsky Expert Report) ¶¶ 21, 39). Complaint Counsel does not have a specific response to the remainder of the Proposed Finding.

549. Many of Professor's Novemsky's respondents likely were *not* in the market at the time of the survey: In Tax Year 2021, about 40% of the taxpayers in the United States who had not filed their taxes by March ultimately obtained an extension. (Hauser (Intuit) Tr. 902). There is no reason to believe that those taxpayers would be "in the market" for tax-preparation software or even thinking about their tax situation at the time of the survey. (Hauser (Intuit) Tr. 902-903). Nonetheless, Professor Novemsky did not take any measures to determine whether any of his survey respondents were getting an extension. (GX303 (Novemsky Expert Report) App'x E; Hauser (Intuit) Tr. 902).

Response to Finding No. 549:

Complaint Counsel objects to the Proposed Finding that "[m]any of Professor's Novemsky's respondents likely were *not* in the market at the time of the survey: In Tax Year 2021, about 40% of the taxpayers in the United States who had not filed their taxes by March ultimately obtained an extension." Illustrative of the danger of not relying on the expert report, Intuit here misstates Professor Hauser findings, which, in addressing the Novemsky Report, are that "the 'survey sample includes *people who were planning to file their taxes in the last five weeks prior to the tax filing deadline* as well as anybody who planned to file their taxes after having been granted an extension,' which 'corresponds to a substantial portion of all tax filers,' or approximately 40% of tax filers." (RX1017 (Hauser Expert Report) ¶ 40) (emphasis added). Complaint Counsel objects to the remainder of the Proposed Finding to the extent it relies on testimony provided by Professor Hauser, because the testimony referenced reflects analysis regarding IRS data not contained in Professor Hauser's expert report. (*See* Chappell (ALJ) Tr. 889 (the Court's admonition that "anything that's in the record -- in the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.")). Moreover, even if survey respondents were intending to file their taxes after an extension, they very well may have been in the market for a tax preparation option to request that extension, or to quantify any taxes owed, which must be paid even if an extension is granted.

550. Finally, Professor Novemsky designed “Group A” in his survey—which he called the “main group of interest”—to include only the survey participants who had not filed their taxes using TurboTax in at least the three previous years (and who potentially had *never* used TurboTax). (Novemsky (FTC) Tr. 413; GX303 (Novemsky Expert Report) ¶7).

Response to Finding No. 550:

Complaint Counsel has no specific response.

551. Group A is particularly unlikely to have seen or paid attention to any recent TurboTax advertising. (Hauser (Intuit) Tr. 908). For starters, there is no way of knowing whether any Group A respondents had ever used a TurboTax SKU. (Hauser (Intuit) Tr. 907; Novemsky (FTC) Tr. 413). Nor is there any way of knowing whether any had ever visited the TurboTax website. (Hauser (Intuit) Tr. 908; Novemsky (FTC) Tr. 413). And Group A participants had an extensive history using tax-preparation products offered by TurboTax’s *competitors*: 69.1% had filed their taxes with a competitor in the previous three years. (GX757 (FTC) at S120, S130; RX Summary 1).

Response to Finding No. 551:

Complaint Counsel does not dispute that there is no way of knowing whether any Group A respondents had ever used a TurboTax SKU, and that Group A participants had a history using tax-preparation products offered by TurboTax’s competitors: 69.1% had filed their taxes with a competitor in the previous three years. Complaint Counsel disputes the remainder of the Proposed Finding. Survey evidence refutes this unsupported claim, since over 70% of Group A survey respondents who thought they could file for free (which reflects approximately 38% of all 404 Group A participants) indicated that their impression about whether or not they can file for free came from the TurboTax website or advertising, directly showing that Group A respondents had seen and paid attention to TurboTax ads. (FF-483—FF-484, GX303 (Novemsky Expert Report) Figures 1 (showing the total of Group A participants was 404)). What is more, 46.9% of consumers who had not used TurboTax in the last three years and were under a misimpression about their ability to file for free indicated that impressions came from the TurboTax website. (GX303 (Novemsky Expert Report) Figure 2).

552. Given all this, Group A members are likely to have been influenced by advertising from TurboTax *competitors*, rather than by TurboTax advertising. (GX757 (FTC) at S120, S130; Hauser (Intuit) Tr. 908, 911; RX Summary 1 (Intuit)). Thus, to the extent any Group A members are under a misimpression about their ability to file their taxes for free, it is unlikely that the misimpression was caused by TurboTax advertising. (Hauser (Intuit) Tr. 908, 911).

Response to Finding No. 552:

Complaint Counsel disputes the Proposed Finding. First, as discussed above, RFF-550—RFF-551, the evidence shows that Group A members were, in fact, influenced by TurboTax advertising. (FF-483—FF-484, *see also* RFF-544 (discussing billions of impressions related to Intuit’s free ads, and Intuit’s dominant share of voice in free advertising). Moreover, the evidence also shows that Group A survey respondents who exclusively used online software to file their taxes in the last three years were less likely to think they could file their taxes for free with TurboTax than survey respondents who used other methods, directly undermining Intuit’s unsupported theory that experiences with competitors caused consumer misimpressions about TurboTax. (*See* GX757 (Complaint Counsel). For example, respondents who used tax preparation software in the last three years were less likely to think they can file their taxes for free using TurboTax. (GX757 (Complaint Counsel) (50.9% vs. 56.8%. To calculate, filtering columns S120r1 for “1” (including respondents who indicated that they used a software provider in the last three years) and S130r1 for “0” (excluding respondents who used TurboTax) results in 279 respondents. Filtering column TAT240 for “1” (respondents who thought they could file for free) results in 142 respondents, or 50.9%. Conversely, filtering S120r for “0” (respondents who did not use online tax software in the last three years) results in 125 respondents. Filtering column TAT240 for “1” (respondents who thought they could file for free) results in 71 respondents, or 56.8%).

Moreover, of respondents who thought they could file for free using TurboTax, those that used a tax preparation software to file their taxes in the last three years were significantly less likely to attribute their misimpression to TurboTax advertising than respondents who exclusively used a non-software option, with 66.9% of those who did use online tax software attributing it to TurboTax ads, compared to 83% who had not used an online tax software. (GX757 (Complaint Counsel) (To calculate for those who used tax preparation software in the last three years,, filtering columns S120r1 for “1” (including respondents who indicated that they used a software provider in the last three years) and S130r1 for “0” (excluding respondents who used TurboTax)

results in 279 respondents. Filtering column TAT240 for “1” (respondents who thought they could file for free) results in 142 respondents. Filtering TAT255r1 and TAT255r2 for “1” (including respondents who listed both TurboTax ads or the TurboTax website as a source of their impression regarding free) results in 30 respondents, filtering TAT255r1 for “1” and TAT255r2 for “0” (including respondents who listed TurboTax ads but not the TurboTax website as a source of their impression regarding free) results in 35 respondents, and filtering TAT255r1 for “0” and TAT255r2 for “1” (including respondents who listed the TurboTax website but not TurboTax ads as a source of their impression regarding free) results in 30 respondents, for a total of 95 respondents, or 66.9%). To calculate for those who did not use a online tax software in the last three years, filtering columns S120r1 for “0” (respondents who did not use online tax software in the last three years) and S130r1 for “0” (excluding respondents who used TurboTax) results in 125 respondents. Filtering column TAT240 for “1” (respondents who thought they could file for free) results in 71 respondents. Filtering TAT255r1 and TAT255r2 for “1” (including respondents who listed both TurboTax ads or the TurboTax website as a source of their impression regarding free) results in 14 respondents, filtering TAT255r1 for “1” and TAT255r2 for “0” (including respondents who listed TurboTax ads but not the TurboTax website as a source of their impression regarding free) results in 19 respondents, and filtering TAT255r1 for “0” and TAT255r2 for “1” (including respondents who listed the TurboTax website but not TurboTax ads as a source of their impression regarding free) results in 26 respondents, for a total of 59 respondents, or 83%).

553. Thus, in multiple ways, Professor Novemsky designed his survey population to exclude respondents likely to be familiar with TurboTax’s products and advertising, while including respondents likely to be *unfamiliar* with TurboTax’s products and advertising. These features of Professor Novemsky’s survey raise serious concerns about the survey’s reliability.

Response to Finding No. 553:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the

evidentiary record.”). Moreover, Intuit has not put forward any evidence that shows that consumers who did not use TurboTax in the last three years were less likely to be familiar with TurboTax advertising. In fact, evidence shows that consumers who had not used TurboTax in the last three years were familiar with TurboTax advertising. (FF-483—FF-484, *see also* RFF-544 (discussing billions of impressions related to Intuit’s free ads, and Intuit’s dominant share of voice in free advertising)). And what is more, Professor Novemsky included a group of survey respondents who did have recent experiences and familiarity with TurboTax in Group B. (FF-486—FF-487; FF-519).

3. Survey Sample

554. Professor Novemsky’s survey population was also subject to potential biases that render the survey unreliable.

Response to Finding No. 554:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, the evidence shows that the perception survey included a reliable and unbiased population. (FF-510-FF-516).

555. One source of bias arises from respondents’ ability to opt out of the survey after being informed of its sponsor (the FTC) and purpose. (Hauser (Intuit) Tr. 903-904; GX303 (Novemsky Expert Report) App’x E at 11; RX1017 (Hauser Expert Report) ¶¶41-42).

Response to Finding No. 555:

Complaint Counsel disputes the Proposed Finding. Only a fraction of survey respondents (164 of 771) opted out, and there is no evidence that respondents who opted out were systematically different from remaining respondents in a way that would impact the results of the perception survey. (FF-543—FF-544). Moreover, the opt-out rate did not change any of the substantive conclusions for Professor Novemsky’s survey because, even if, for arguments sake, all opted out consumers belonged in Group A (the main group of interest) and did not have a misimpression about whether they could file for free (both of which are unrealistic assumptions),

survey results would still show that 37.5% of consumers who did not use TurboTax in the last three years were under the misimpression that they could use TurboTax for free even though they were not eligible. (FF-545).

556. Once participants completed their responses to Professor Novemsky's survey, they were informed that:

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.

(GX303 (Novemsky Expert Report) App'x E at 10-11). After being provided that information, participants were allowed to opt-out of the survey and have their submission deleted. (GX303 (Novemsky Expert Report) App'x E at 11).

Response to Finding No. 556:

Same response as RFF-558.

557. Of the 771 participants who completed Professor Novemsky's survey, 164 (or 21%) chose to opt out. (Novemsky (FTC) Tr. 463-464; GX303 (Novemsky Expert Report) ¶¶50-51; RX1392 (Novemsky (FTC) Dep.) at 112). Professor Novemsky did not retain these people's survey responses, and he knows nothing about them. (Novemsky (FTC) Tr. 464; RX1392 (Novemsky (FTC) Dep.) at 117-118).

Response to Finding No. 557:

Same response as RFF-558.

558. Providing survey participants the right to opt out after informing them of the survey's sponsor and purpose biases the results because participants who requested to opt out may differ substantially from respondents who do not opt out. (Hauser (Intuit) Tr. 903-904; RX1017 (Hauser Expert Report) ¶¶41-42). The FTC has acknowledged that "complete[] transparen[cy] about the nature or purpose of a survey," such as through the opt-out provided by Professor Novemsky, may "create bias in the consumers' decision to participate in the survey or potentially result in biased responses," which "would affect the accuracy and validity of the information collected and effectively nullify the survey." (RX89 (FTC) at -3919-3920).

Response to Finding No. 558:

Complaint Counsel disputes the Proposed Finding. There is no evidence that respondents who opted out were systematically different from remaining respondents in a way that would impact the results of the perception survey. (FF-543—FF-544). Moreover, the opt-out rate did not change any of the substantive conclusions for Professor Novemsky’s survey because, even if, for arguments sake, all opted out consumers belonged in Group A (the main group of interest) and did not have a misimpression about whether they could file for free (both of which are unrealistic assumptions), survey results would still show that 37.5% of consumers who did not use TurboTax in the last three years were under the misimpression that they could use TurboTax for free even though they were not eligible. (FF-545). Moreover, because the opt-out question came at the conclusion of the survey, after the main questionnaire, (GX303 (Novemsky Expert Report) ¶ 50) the structure of the perception survey ensured that the survey’s sponsor did not influence the main survey responses themselves.

559. For example, participants with more favorable views of TurboTax are much more likely than others to have opted out of Professor Novemsky’s survey after learning that the survey was designed to be used *against* Intuit. (Hauser (Intuit) Tr. 903; RX1017 (Hauser Expert Report) ¶41).

Response to Finding No. 559:

Complaint Counsel disputes the Proposed Finding. Professor Hauser’s speculative assumptions about respondents who opted out are not based on any evidence and is “baseless fantasy. (GX749 (Novemsky Rebuttal Expert Report) ¶ 73). As Professor Novemsky opined, “one can equally well make up a different story that those people are more likely to stay in to make sure their responses help TurboTax, but that would be speculation as well. Ultimately, there is no evidence of any of this, and most importantly, there is no evidence (or even a claim) that this hypothetical characteristic would systematically affect consumers’ perception as to whether they can use TurboTax for free.” (GX749 (Novemsky Rebuttal Expert Report) ¶ 73).

560. Another source of likely bias in Professor Novemsky’s survey is litigation awareness. (Hauser (Intuit) Tr. 905-906; RX1017 (Hauser Expert Report) ¶42).

Response to Finding No. 560:

Complaint Counsel disputes the Proposed Finding. There is no evidence of litigation aware consumers in the perception survey population and no basis to believe that litigation aware respondents would systematically differ from the others with respect to the extent of their misperceptions about TurboTax, and thus there is no reason to think that their existence would bias or negate the perception survey results. (FF-575). In fact, evidence shows that only one respondent in the perception survey indicated any litigation awareness, a vanishingly small number. (FF-575).

561. It is typical in surveys conducted for use in litigation to ask respondents if they are familiar with any investigations or litigation relating to the issues or parties involved in the case, because such awareness may influence survey respondents' behavior. (RX1017 (Hauser Expert Report) ¶42).

Response to Finding No. 561:

Complaint Counsel disputes the Proposed Finding. It is not necessarily typical to ask respondents about their litigation awareness. (RX1392 (Novemsky (Complaint Counsel) Dep.) 119 (“Q. Isn’t it typical in surveys for purposes of litigation to ask respondents if they are familiar with any litigation that relates to the issues addressed in the survey? A. Sometimes it is asked, sometimes it is not asked. Q. Why didn’t you do that here? A. One reason you would ask it is you would imagine that awareness of this litigation could bias responses in a particular direction and usually you have a hypothesis as to what that is. Here I had no hypothesis about whether being aware of this litigation would bias people to believe they can file for free or bias people to believe they can’t file for free, my main question of interest. And so without a hypothesis about a bias coming from that, I didn’t include it in the screening.”)).

562. Given the media coverage of the facts at issue in the FTC’s investigation into Intuit, and other disputes involving online tax-preparation companies, there is a substantial risk that the survey participants were aware of those disputes at the time of the survey. (RX1017 (Hauser Expert Report) ¶42 n.74; RX788 (Intuit)). Indeed, in a survey conducted by one of Intuit’s experts in this case, 24.4% of respondents indicated possible litigation awareness. (Hauser (Intuit) Tr. 905-906; RX1017 (Hauser Expert Report) ¶42 n.75).

Response to Finding No. 562:

Complaint Counsel disputes the Proposed Finding. As noted above, RFF-560—RFF-561, there is no evidence of litigation aware consumers in the perception survey population and no basis to believe that litigation aware respondents would systematically differ from the others with respect to the extent of their misperceptions about TurboTax, and thus there is no reason to think that their existence would bias or negate the perception survey results. (FF-575). In fact, evidence shows that only one respondent in the perception survey indicated any litigation awareness, a vanishingly small number. (FF-575). Moreover, while Intuit identifies “litigation awareness” rates from Professor Hauser’s surveys, those rates are overinclusive and entirely unreliable. Professor Hauser excluded as “litigation aware” all consumers who were “aware of any media reports, investigations, or lawsuits involving a tax preparation website / software provider or accounting company?” (RX1017 (Hauser Expert Report) C-2-9). This question would be hugely overinclusive, as it is not limited in time, and includes without limitation media reports (whether good or bad). By this metric, consumers who interacted with tax preparation review sites like those discussed at length by Intuit experts, that Intuit experts claim consumers engage with regularly (*see, e.g.*, GX1018 (Golder Expert Report) ¶¶ 148, 149), would be considered “litigation aware” and excluded from participating in the survey.

563. Professor Novemsky, however, did not ask any questions to screen out participants in his survey who were aware of litigation or investigations involving Intuit or its competitors. (Novemsky (FTC) Tr. 469; GX303 (Novemsky Expert Report) App’x E). Nor did he do any testing to determine whether “litigation aware” survey respondents would have responded differently to his survey questions. (Novemsky (FTC) Tr. 470).

Response to Finding No. 563:

Complaint Counsel has no specific response.

564. Thus, Professor Novemsky has no way of knowing whether litigation awareness amongst his survey participants affected his survey’s results. ((Hauser (Intuit) Tr. 905-906; RX1017 (Hauser Expert Report) ¶42).

Response to Finding No. 564:

Complaint Counsel disputes the Proposed Finding. Professor Novemsky's examination of open-ended survey responses revealed that only one survey respondent indicated any litigation awareness, showing that litigation awareness was unlikely to influence his survey results. (FF-575).

565. Together, Professor Novemsky's elimination of participants who chose to opt out after learning the survey's sponsor and purpose, and his potential inclusion of "litigation aware" participants, raise substantial concerns about whether his survey population was biased. (RX1017 (Hauser Expert Report) ¶43). These facts call the survey's reliability into even greater doubt.

Response to Finding No. 565:

Complaint Counsel disputes the Proposed Finding. As discussed above (RFF-555; RFF-558—RFF-564), the opt-out consumers were unlikely to bias the survey, and there was no evidence of litigation awareness in the survey population. The perception survey population was appropriate and unbiased. (FF-510-FF-516; FF-575—FF-577).

4. Question TAT240

566. Professor Novemsky's survey is scientifically invalid because the results were influenced by unreliable survey questions that led participants to provide answers favoring Complaint Counsel's allegations.

Response to Finding No. 566:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record."). Moreover, the questions Professor Novemsky asked were carefully worded and designed to avoid any bias, for example by conducting a pretest to ensure questions and answer choices were clear and that participants could not guess the purpose of the survey, by rotating answer options, by including quasi-filters like "don't know," and by carefully wording questions. (FF-523—FF-526).

567. One such question was “TAT240”—notably, the only question on which Professor Novemsky relied when he reported the percentages of his survey participants who were under a misimpression about their ability to file their taxes for free using TurboTax. (Novemsky (FTC) Tr. 427; Hauser (Intuit) Tr. 920; GX303 (Novemsky Expert Report) ¶¶68-69, App’x E at 7).

Response to Finding No. 567:

Complaint Counsel disputes the Proposed Finding to the extent it implies that “TAT240” was an unreliable question. Professor Novemsky carefully worded the question, pretested the question, and used other methods to ensure reliability, such as randomizing answer options and employing quasi filters. (FF-523—FF-526). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

568. TAT240 was a closed-ended question, meaning respondents were asked to choose from one of multiple response options. (GX303 (Novemsky Expert Report) App’x E at 7; Hauser (Intuit) Tr. 920). TAT240 stated, in full:

Based on your current information and understanding, which of the following best describes your understanding of filing your 2021 income taxes for free with TurboTax?

Select one only.

I think I can file my 2021 income taxes for free with TurboTax

I don’t think I can file my 2021 income taxes for free with TurboTax

I do not have enough information to say whether or not I can file my 2021 income taxes for free with TurboTax

I’m not sure.

(GX303 (Novemsky Expert Report) App’x E at 8 (emphasis in original)).

Response to Finding No. 568:

Complaint Counsel has no specific response.

569. Multiple aspects of TAT240 encouraged respondents to guess. (RX1017 (Hauser Expert Report) ¶46). By asking respondents to select the answer that “best describes” their “understanding,” TAT240 suggested to respondents that they were permitted to guess if they were unsure. (RX1017 (Hauser Expert Report) ¶46). Similarly, TAT240’s use of the phrases “I think” and “I don’t think” encouraged respondents who had doubts to select either “I think ... ” or “I don’t think ...” rather than “I do not have enough information,” which was phrased more

definitively and was not qualified with “I think.” (Hauser (Intuit) Tr. 922; RX1017 (Hauser Expert Report) ¶46).

Response to Finding No. 569:

Complaint Counsel disputes the Proposed Finding. Question TAT240 was designed to prevent guessing, for example by offering respondents the option to respond “I do not have enough information” or “don’t know/not sure.” (FF-524). If respondents were unsure about their ability to file for free, they would likely have chosen one those options. (GX749 (Novemsky Rebuttal Expert Report) ¶ 81). Professor Novemsky also instructed survey respondents not to guess and went a step further by requiring respondents to agree not to guess at survey responses. (FF-524, FF-587). Requiring respondents to agree not to guess is significant because “when people check a box and say yes, I’m going to do this thing that you just said, they are more likely to actually do it than if you just say, please do this thing” and is something “psychology suggests is even more powerful” than merely asking respondents not to guess. (Novemsky (Complaint Counsel) Tr. 392-393). Moreover, using phrases such as “I think” or “I don’t think” was a deliberate and thoughtful choice, intended to reflect the level of certainty in a consumer’s knowledge about the cost of filing with TurboTax does not need to be absolute for that consumer to try using TurboTax for free. (FF-526).

570. Moreover, Professor Novemsky’s decision to emphasize “for free” in TAT240 likely signaled to respondents that Professor Novemsky wanted them to answer indicating that they could file for free. (Hauser (Intuit) Tr. 922).

Response to Finding No. 570:

Complaint Counsel disputes the Proposed Finding. While Professor Hauser criticized the use of underlining and bolding in the perception survey for emphasis, he made use of the same technique in both of his surveys, belying the validity of any concerns regarding the perception survey’s reliability regarding the appearance of questions. (*See, e.g.*, RX1017 (Hauser Expert Report) C-3-9; C-3-15; C-3-26; D-3-5; D-3-6 (underlining and bolding the words “the research that you conducted” where whether or not respondents conducted any research was the main question at issue).

571. This leading effect—which scientists often refer to as a “demand artifact”—was intensified by other aspects of the survey that survey participants would have seen before reaching TAT240. (Hauser (Intuit) Tr. 924-926; RX1017 (Hauser Expert Report) ¶44). A demand artifact is any aspect of a survey or experiment that causes participants to perceive, interpret, and act on what they believe is expected of them by the designer. (RX1017 (Hauser Expert Report) ¶44; Hauser (Intuit) Tr. 924). When a survey does not adequately safeguard against demand artifacts, the results are unreliable because they cannot be extrapolated to a real-life situation, where the demand artifact would not exist. (RX713 (Intuit) at 21).

Response to Finding No. 571:

Complaint Counsel disputes that TAT240 was leading, or that anything else in the perception survey caused a demand artifact. The perception survey was designed to avoid any demand artifacts or bias, and TAT240 was designed thoughtfully to avoid demand artifacts, for example by carefully wording the question, pretesting the question, and using other methods to ensure reliability, such as randomizing answer options and employing quasi filters. (FF-523—FF-526). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

572. Respondents’ answers to TAT240 were affected by a demand artifact because the question was preceded by three others that signaled to respondents that the survey designer wanted them to answer that TurboTax is free:

- S140 (one of the screening questions) asked, in relevant part: “In the past 3 years, have you ever filed your income tax returns using a TurboTax product that was free?”
- TAT220, part of the main survey questionnaire, asked: “What is your understanding about whether or not there is a cost to filing your own income taxes using TurboTax online software?”
- TAT230—the question that immediately preceded TAT240—asked: “You may have already said this above, but please tell us again, in your understanding, who, if anyone, can file their taxes for free using TurboTax online software?”

(GX303 (Novemsky Expert Report), App’x E, at 6-7; Hauser (Intuit) Tr. 923-924; RX1017 (Hauser Expert Report) ¶¶44, 54).

Response to Finding No. 572:

Complaint Counsel disputes the Proposed Finding that survey responses were affected by any preceding questions or that the preceding questions signaled to respondents that the survey designer wanted them to answer that TurboTax is free. The only evidence Professor Hauser can point to regarding demand artifact are answers from six respondents in the perception survey. But these six amount to six of over 600 survey respondents, or less than 1%, and is not evidence of any pervasive demand artifacts (FF-589; Novemsky (Complaint Counsel) Tr. 524 (“Q. And what proportion of your total survey population are those six respondents? A. They are less than 1 percent. Q. And what does that proportion say to you about the reliability of your survey? A. It says the reliability is very good. They were asked directly why do you think this [that TurboTax is free], and if less than 1 percent say it was something about the survey, it suggests that the survey was not a substantial cause of this misperception.”)). Moreover, Professor Novemsky confirmed the reliability of the survey questions during pretesting. (FF-523). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

573. As Dr. Hauser explained, these other questions may have been “reasonable questions “by themselves,” but the “cumulative effect of asking about free” repeatedly was to signal to respondents that the researcher wanted them to choose “I think I can file ... for free” by the time they got to TAT240. (Hauser (Intuit) Tr. 923-924).

Response to Finding No. 573:

Complaint Counsel disputes the Proposed Finding. As noted above, (RFF-572), the only evidence Professor Hauser can point to regarding demand artifact are answers from six respondents in the perception survey. But these six amount to six of over 600 survey respondents, or less than 1%, and is not evidence of any pervasive demand artifacts (FF-589; Novemsky (Complaint Counsel) Tr. 524 (“Q. And what proportion of your total survey population are those six respondents? A. They are less than 1 percent. Q. And what does that proportion say to you about the reliability of your survey? A. It says the reliability is very good. They were asked directly why do you think this [that TurboTax is free], and if less than 1 percent say it was something about the survey, it suggests that the survey was not a substantial cause of

this misperception.”)). Moreover, Professor Novemsky confirmed the reliability of the survey questions during pretesting. (FF-523).

574. Several of Professor Novemsky’s survey participants confirmed that this was the case—when responding to TAT250, the question that immediately followed TAT240. (Hauser (Intuit) Tr. 924-925; RX1017 (Hauser Expert Report) ¶44).

Response to Finding No. 574:

Complaint Counsel disputes that that survey participants “confirmed that this was the case.” The survey respondents mentioned by Professor Hauser amount to six of over 600 survey respondents, or less than 1%, and is not evidence of any pervasive demand artifacts (FF-589; Novemsky (Complaint Counsel) Tr. 524 (“Q. And what proportion of your total survey population are those six respondents? A. They are less than 1 percent. Q. And what does that proportion say to you about the reliability of your survey? A. It says the reliability is very good. They were asked directly why do you think this [that TurboTax is free], and if less than 1 percent say it was something about the survey, it suggests that the survey was not a substantial cause of this misperception.”)).

575. TAT250 was an open-ended question, meaning that respondents were not asked to choose from a list of response options but instead had to answer in their own words. (GX303 (Novemsky Expert Report) App’x E at 8). TAT250 asked: “You may have already said this above, but please tell us again why you think you can file your 2021 income taxes for free using TurboTax online software?” (GX303 (Novemsky Expert Report) App’x E at 8).

Response to Finding No. 575:

Complaint Counsel has no specific response.

576. Six answers to TAT250 expressly revealed the existence of a demand artifact, i.e., that respondents believed they could file for free only because of the survey itself:

- Respondent ID 5708 answered: “It’s been said a few times now during survey that you can file for free using TurboTax.”
- Respondent ID 1610 answered: “It is evident form [sic] the past questions that it
- is free.”

- Respondent ID 1175 answered: “I think I can file for free because it was mentioned in this survey and I have seen advertising for this product.”
- Respondent ID 5783 answered: “Because you keep yelling [sic] me I can.”
- Respondent ID 10394 answered: “Because this survey is suggesting that I can file it for free.”
- Respondent ID 1836 answered: “Just to be told that I can. I’m assuming since this has been asked 4 times that it must be free.”

(GX757 (FTC); RX1017 (Hauser Expert Report) ¶44 n.80).

Response to Finding No. 576:

Complaint Counsel disputes the Proposed Finding to the extent it suggests a widespread demand artifact. In fact, the survey responses reveal an absence of a demand artifact, as only 6 respondents of over 600 attributed their impression regarding free to the survey instrument. (FF-589).

577. These six responses, moreover, strongly suggest that many other respondents were influenced in the same way but did not voice it. (RX1017 (Hauser Expert Report) ¶44; Hauser (Intuit) Tr. 925-926).

Response to Finding No. 577:

Complaint Counsel disputes the Proposed Finding. The survey respondents mentioned by Professor Hauser amount to six of over 600 survey respondents, or less than 1%, and is not evidence of any pervasive demand artifacts. (FF-589; Novemsky (Complaint Counsel) Tr. 524 (“Q. And what proportion of your total survey population are those six respondents? A. They are less than 1 percent. Q. And what does that proportion say to you about the reliability of your survey? A. It says the reliability is very good. They were asked directly why do you think this [that TurboTax is free], and if less than 1 percent say it was something about the survey, it suggests that the survey was not a substantial cause of this misperception.”)).

578. These six responses further confirm that Professor Novemsky’s survey did not reliably assess whether consumers are under a misimpression about their ability to file for free using TurboTax. (RX1017 (Hauser Expert Report) ¶44; Hauser (Intuit) Tr. 925-926).

Response to Finding No. 578:

Complaint Counsel disputes the Proposed Finding. The survey respondents mentioned by Professor Hauser amount to six of over 600 survey respondents, or less than 1%, and is not evidence of any pervasive demand artifacts (FF-589; Novemsky (Complaint Counsel) Tr. 524 (“Q. And what proportion of your total survey population are those six respondents? A. They are less than 1 percent. Q. And what does that proportion say to you about the reliability of your survey? A. It says the reliability is very good. They were asked directly why do you think this [that TurboTax is free], and if less than 1 percent say it was something about the survey, it suggests that the survey was not a substantial cause of this misperception.”)).

5. Blind Coding Of Responses To TAT220 And TAT230

579. Still more evidence of the unreliability of Professor Novemsky’s survey is in the answers to TAT220 and TAT230, the two open-ended questions that preceded TAT240. (GX303 (Novemsky Expert Report), App’x E, at 7-8; RX1017 (Hauser Expert Report) ¶54; Hauser (Intuit) Tr. 931-932, 934-935).

Response to Finding No. 579:

Complaint Counsel disputes the Proposed Finding. Rather, the responses to open-ended questions are consistent with other survey responses and Professor Novemsky’s opinions in this matter and illustrate the types of misimpressions survey respondents have about their ability to file for free with TurboTax, for example thinking everyone can file for free, or being mistaken about who can actually use TurboTax for free. (GX303 (Novemsky Expert Report) ¶¶ 72-76; *see also* 80-81).

580. Professor Novemsky did not consider responses to TAT220 and TAT230 in determining who had a misimpression. (Novemsky (FTC) Tr. 427; Hauser (Intuit) Tr. 920).

Response to Finding No. 580:

Complaint Counsel has no specific response, but notes that the perception survey was designed around closed-ended questions which are more suitable for assessing choices between well-identified options. (FF-529, RX709 (Intuit) at INTUIT-FTC-PART3-000608653) (Diamond, S.S., 2011, Reference Guide on Survey Research, “[C]losed-ended questions are more suitable

for assessing choices between well-identified options.”) *see also* Novemsky (Complaint Counsel) Tr. 387-388, 394, 446-447390-391 (“[C]losed-ended questions are standard practice when you want to get a specific categorical response.”)).

581. Dr. Hauser analyzed the responses to TAT220 and TAT230. (Hauser (Intuit) Tr. 926-928, 931; RX1017 (Hauser Expert Report) ¶53). To ensure objectivity and prevent bias in his own analysis, Dr. Hauser used a scientifically accepted process of having two blind coders who were not aware of the parties in this case, the hypotheses in this case, or respondents’ answers to TAT240 review the responses to TAT220 and TAT230. (Hauser (Intuit) Tr. 926-928, 931). At trial, Complaint Counsel suggested that Dr. Hauser’s coders “align[ed]” their coding for two of Professor Novemsky’s questions, but that critique “misstat[ed] what [the coders] did.” (Hauser (Intuit) Tr. 1015).

Response to Finding No. 581:

Complaint Counsel disputes the Proposed Finding that Complaint Counsel “misstated what the coders did” or that Professor Hauser’s coding exercise used a scientifically accepted process. In fact, the process employed by Professor Hauser was fatally flawed, as is illustrated by the many obvious instances of faulty coding by his “blind coders.” (FF-582—FF-583). As Intuit readily admits, the independent coders were given the responses to both TAT220 and TAT230 and provided categories “identical to the four closed-ended response options to TAT240,” IFF-582, that they were supposed to assign respondents to, based on their responses to TAT220 and TAT230. (RX1017 (Hauser Expert Report) E-2, E-3 (“you are being provided with the four initial categories below... you will independently review both open-ended answers from each respondent and assign each respondent to the relevant category (or categories, if appropriate))). While coders were allowed to add to the categories if they felt it was needed, the initial set of categories were precisely the answer options to TAT240. (RX1017 (Hauser Expert Report) E-2). In other words, coders were given responses to two different questions, and asked to consistently assign those responses to answer options to a third, different question. Moreover, as Professor Novemsky testified at trial, even employing blind coders, reviewing open ended responses in the manner Professor Hauser did could introduce bias into survey responses. (Novemsky (Complaint Counsel) Tr. 445).

582. Based on each respondent's answers, the coders assigned each respondent to one of six categories. (RX1017 (Hauser Expert Report) App'x E-2; Hauser (Intuit) Tr. 928-929). The first four categories were identical to the four closed-ended response options to TAT240: (1) "I think I can file my 2021 income taxes for free using TurboTax online software"; (2) "I don't think I can file my 2021 income taxes for free using TurboTax online software"; (3) "I do not have enough information to say whether or not I can file my 2021 income taxes for free using TurboTax online software"; and (4) "I'm not sure." (RX1017 (Hauser Expert Report) App'x E-2; GX303 (Novemsky Expert Report), App'x E at 8). The fifth and six categories were: (5) the respondent contradicted him- or herself, and (6) the respondent provided non-responsive open-ended responses. (Hauser (Intuit) Tr. 928).

Response to Finding No. 582:

Complaint Counsel has no specific response.

583. Following the assignments, the coders' categorizations were compared to each respondent's answer to TAT240. (Hauser (Intuit) Tr. 929; RX1017 (Hauser Expert Report) ¶54).

Response to Finding No. 583:

Complaint Counsel has no specific response.

584. In total, 44% of respondents to the survey (267 out of 607) provided answers to TAT220 and TAT230 that were inconsistent with their answer to TAT240. (Hauser (Intuit) Tr. 932-933; RX1017 (Hauser Expert Report) ¶54 & tbl. 1).

Response to Finding No. 584:

Complaint Counsel disputes the Proposed Finding. As an initial matter, as discussed above, Professor Hauser's methodology was fatally flawed and could not reliably measure differences between questions as he suggests it could. (*See* RFF-581; FF-582—FF-583). As Professor Novemsky testified, "open-ended questions are sometimes a little nonresponsive or vague or hard to interpret. And so when I have a categorical question I want to ask... it's better to do that in a closed-ended way." (Novemsky (Complaint Counsel) Tr. 394; *see also* FF-529). Moreover, in reviewing Professor Hauser's flawed coding, Professor Novemsky identified at least 161 instances in which Professor Hauser coded a response as clearly inconsistent when it was not, illustrating the flawed methodology of his coding. (FF-583—FF-584; GX749 (Novemsky Rebuttal Expert Report) ¶ 61). The inconsistencies Professor Hauser claims to have identified are artifacts of a faulty procedure, which included a disconnect between the specific instructions Professor Hauser provided to his coders and the manner in which he interpreted the

coding results. (RX749 (Novemsky Rebuttal Expert Report) ¶ 53). As a result, for many of the respondents Professor Hauser declared as having “inconsistent” answers, there is no evident inconsistency when open-ended and closed-ended answers are read in tandem. (RX749 (Novemsky Rebuttal Expert Report) ¶ 53).

For example, a primary category of respondents erroneously classified as inconsistent by Professor Hauser are those who indicated in open-ended responses to two questions (TAT220 and TAT230) their perception that “simple returns” are free. Professor Hauser’s coders classified many such responses under their “I’m not sure” category, presumably because the criteria they were given by Professor Hauser asked them identify whether the answers to only these two questions can be categorized as “I think [I don’t think] I can file my own 2021 income taxes for free using TurboTax online software,” and the coders did not find an explicit answer. (GX749 (Novemsky Rebuttal Expert Report) ¶ 54). The respondent cannot actually use TurboTax for free, and his understanding of “simple returns” is different than how TurboTax defines “simple returns,” but there is nothing inconsistent about his survey responses. (GX749 (Novemsky Rebuttal Expert Report) ¶ 55). Professor Novemsky identified a number of such examples in his Rebuttal Expert Report:

FIGURE 5

Respondents Who Indicated They Think They Can File for Free in Closed-Ended Responses to my TurboTax Perception Survey and Coded by Professor Hauser as Inconsistent Because They Stated Simple Filings Are Free

Respondent's Open-Ended Answers to the Novemsky Survey			
Group	Based on your current information and understanding, what can you tell us about whether there is a cost to filing your taxes with TurboTax?	Based on your current information and understanding, who, if anyone, is eligible to file taxes for free with TurboTax?	You may have already said this above, but please tell us again why you think you can file your 2021 income taxes for free with TurboTax
A	Free but if anything more than a basic filing is needed there will be a charge	Anyone	I would be using only the very basic of services
A	I believe a simple tax return would be free and a more complex tax return may incur a fee.	Yes. A simple tax return would be filed for free.	It is advertised as such. Free tax return filing for a simple tax return.
A	Some filings are free	Anyone with a simple return.	I have just simple income forms.
A	It's free for simple returns and cost for more complex	It must be a simple return for it to be free	It's free if your tax return is simple and from one job
A	Free in simplest form.	Anyone with reasonably uncomplicated tax status.	Out tax liability is straight forward.
B	no cost for simple returns	yes for simple returns	I have a simple return

Source: Hauser Backup Independent Coding (Free).xlsx

Note:

[1] Professor Hauser considers inconsistent respondents to be any respondents 1) who answer "I think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I think I can file my 2021 income taxes for free" or "non-responsive", or 2) who answer "I don't think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I don't think I can file my 2021 income taxes for free" or "non-responsive." Based on my review, some responses to open-ended questions were not truly inconsistent with the closed-ended responses as Professor Hauser identified.

(GX749 (Novemsky Rebuttal Expert Report) Figure 5; *see also* Figures 6 & 7).

Professor Hauser also coded as “inconsistent” responses where respondents expressed an (at times incorrect) understanding that whether TurboTax was free or not was based on special circumstances, for example the amount of income they had, which again is not clearly inconsistent with their response that they think they can file for free. (GX749 (Novemsky Rebuttal Expert Report) ¶ 60). For example, Professor Hauser coded the following respondents as inconsistent when they are not clearly inconsistent:

FIGURE 8

Respondents Who Indicated They Think They Can File for Free in Closed-Ended Responses to my TurboTax Perception Survey Coded by Professor Hauser as Inconsistent Because They Believe Some Filings Are Free and Are Therefore Not Inconsistent

Respondent's Open-Ended Answers to the Novemsky Survey			
Group	Based on your current information and understanding, what can you tell us about whether there is a cost to filing your taxes with TurboTax?	Based on your current information and understanding, who, if anyone, is eligible to file taxes for free with TurboTax?	You may have already said this above, but please tell us again why you think you can file your 2021 income taxes for free with TurboTax
A	I believe that it was free for a certain income bracket and a fee after that	People making less than a certain amount of money	I fall into the income bracket who can use it for free
A	Believe it is free, at least for a while.	Anyone who takes the std deduction.	TV commercial.
A	Free based on income then pay more as income increases	Up to certain income level	Based on advertising
A	My understanding is it depends on what kind of form you need to file and what software you use	Self	Because its a pretty basic tax return
A	not in some circumstances	people who meet income guidelines	low income
B	I believe there is a small fee if you want someone to help you file your taxes.	Anyone can. If they want help from a person from turbo tax they have to pay.	Because I'm doing them myself and not having anyone from TurboTax help me.

Source: Hauser Backup Independent Coding (Free).xlsx

Note:

[1] Professor Hauser considers inconsistent respondents to be any respondents 1) who answer "I think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I think I can file my 2021 income taxes for free" or "non-responsive", or 2) who answer "I don't think I can file my 2021 income taxes for free with TurboTax" to question TAT240, but whose open-ended responses were not coded as "I don't think I can file my 2021 income taxes for free" or "non-responsive." Based on my review, some responses to open-ended questions were not truly inconsistent with the closed-ended responses as Professor Hauser identified.

(GX749 (Novemsky Rebuttal Expert Report) Figure 8).

585. For example, Respondent ID 9900’s answers to TAT220 and TAT230 were, “There is a free option, but my filings require paid,” and “Anyone filing a basic 1040” can file for free using TurboTax. (GX757 (FTC); *see also* RXD6 at 43). But Professor Novemsky treats Respondent ID 9900 as being under a definitive misimpression that they can file for free because they answered “I think I can file ... for free” in response to TAT240. (GX757 (FTC); *see also* RXD6 at 43).

Response to Finding No. 585:

Complaint Counsel has no specific response, but notes that, as Professor Novemsky testified at trial, “[t]he problem with open-ended responses is sometimes they are very hard to interpret in isolation. So I like to look at more than one, if I can, from the same person.”

(Novemsky (Complaint Counsel) Tr. 445).

586. To take another example, Respondent 1306’s answers to TAT220 and TAT230 were “I will have to pay a small fee” and “myself can file free.” (GX757 (FTC)). Despite these

clearly contradictory responses, Professor Novemsky treats Respondent ID 1306 as being under a definitive misimpression that they can file for free because they answered “I think I can file ... for free” in response to TAT240. (GX757 (FTC)).

Response to Finding No. 586:

Complaint Counsel disputes the Proposed Finding that these responses are “clearly contradictory.” As Professor Novemsky testified, “[t]he problem with open-ended responses is sometimes they are very hard to interpret in isolation. So I like to look at more than one, if I can, from the same person.” (Novemsky (Complaint Counsel) Tr. 445). This particular respondent is illustrative of the importance of considering all answers. The respondent went on to say, in response to other open-ended questions (“please tell us again why you think you can file your 2021 income taxes for free using TurboTax online software) that the reason they think they can file for free is “i check [sic] and there is a possibility.” (GX757 (Complaint Counsel) (Row 79, Columns TAT250). This response shows that the respondent did not provide “clearly contradictory” responses.

587. For these and the other respondents who provided inconsistent open-ended answers, there is substantial reason to doubt the reliability of their response to TAT240. (Hauser (Intuit) Tr. 934-935; RX1017 (Hauser Expert Report) ¶69). They could have, for example, been guessing, or they could have been led to answer “I think I can file ... for free” by the demand artifact in Professor Novemsky’s survey. (*Supra* ¶¶569-578). Whatever the reason, it is scientifically inappropriate for Professor Novemsky to conclude with any degree of confidence that they are under a misimpression about their ability to file for free. (Hauser (Intuit) Tr. 934-935; RX1017 (Hauser Expert Report) ¶69).

Response to Finding No. 587:

Complaint Counsel disputes the Proposed Finding. As discussed above, there is no reliable evidence of any inconsistency between open and closed ended responses, and therefore no reason to doubt the reliability of TAT240. (RFF-581; RFF-584—RFF-586). Moreover, the perception survey took a number of reliable measures to avoid guessing or demand artifacts that might bias the survey. (RFF-569—RFF-574; RFF-576—RFF-579).

588. Once respondents’ open-ended answers to TAT220 and TAT230 are considered, the share of respondents who expressed a consistent belief that they could file for free is significantly lower (16.8%) than when one considers respondents’ closed-ended answers to TAT240 in isolation (43.2%). (RX1017 (Hauser Expert Report) ¶54 & tbl. 1); Hauser (Intuit) Tr.

932). These results reinforce that TAT240 was a scientifically invalid and unreliable means of measuring consumers' impressions. (RX1017 (Hauser Expert Report) ¶¶54; Hauser (Intuit) Tr. 934-935).

Response to Finding No. 588:

Complaint Counsel disputes the Proposed Finding. As discussed above, Professor Hauser's coding of open-ended responses is fundamentally flawed and should be given no weight. (RFF-581; RFF-584—RFF-586). What is more, in conducting his questionable recalculations of responses for TAT240, while Professor Hauser removes "inconsistent" responses from the answer options for the question, he inexplicably sets them aside in a separate group and keeps them in the denominator. (RX1017 (Hauser Expert Report) tbl. 1). If, as Professor Hauser claims, these responses are to be excluded from the numerator, they should be excluded from the denominator to avoid artificially lowering survey results. Moreover, in calculating these results, Professor Hauser combined results from Group A and Group B, which is inappropriate considering the different characteristics of those groups. (Novemsky (Complaint Counsel) Tr. 528 ("T]hey were sampled separately with different bases and they weren't sampled in proportion to the population either. So the combination of a group A plus group B is an arbitrary sum of two numbers. If you want to do an analysis of group A considering their characteristics, you would do that, and then separately you could do an analysis of group B, considering their characteristics. The sum of 200 from one group and 400 from the other represents nothing corresponding to reality or the marketplace."); *see also* FF-520). Therefore, Professor Hauser's flawed calculations do nothing to undermine the reliability of perception survey results.

589. Given that TAT240 was unreliable, the remainder of Professor Novemsky's survey results are also unreliable. Again, TAT240 was the sole question Professor Novemsky used to identify the population of respondents under a misimpression. Because Professor Novemsky's survey could not reliably assess that threshold question, it necessarily could not reliably assess the *source* of that misimpression. (Hauser (Intuit) Tr. 935).

Response to Finding No. 589:

Complaint Counsel disputes the Proposed Finding. TAT240 was not unreliable (RFF-569—RFF-574; RFF-576—RFF-579; RFF-581; RFF-584—RFF-587), and the remainder of the perception survey was reliable, including on the question regarding the source of respondents' misimpression. (RFF-590—RFF-591; RFF-593—RFF-598; RFF-600—RFF-607).

6. Question TAT255

590. Apart from TAT240's flaws, there are additional reasons Professor Novemsky's survey could not have reliably identified the source of the purported misimpression. (Hauser (Intuit) Tr. 940-948; RX1017 (Hauser Expert Report) ¶¶55-62). Not only was Professor Novemsky's survey unable to test causality (*supra* ¶¶530-538), but it also used unreliable questions that (again) led survey participants to provide answers favoring Complaint Counsel's allegations. (Hauser Intuit) Tr. 940-948; RX1017 (Hauser Expert Report) ¶¶55-62).

Response to Finding No. 590:

Complaint Counsel disputes the Proposed Finding. Professor Novemsky designed his survey in accordance with best practices, including framing question TAT255 in a way that was clear and not leading, and by providing quasi-filter answer options and instructing survey participants not to guess. (FF-590; GX749 (Novemsky Rebuttal Expert Report) ¶¶ 93-94; *see also* Novemsky (Complaint Counsel) Tr. 395 ("I also, of course, randomized the order of responses. So some people would see a TurboTax option at the top, some would see word of mouth at the top, as is shown here. So this random rotation was one important way to keep people from being biased toward particular options...So this question was also pretested, as with all my questions, and so if consumers thought there was something they didn't understand here, or that the answer set was incomplete in some way, they would have had a chance to say that. I don't recall a single consumer in the pretest suggesting that the answer options were incomplete in some way.")). As discussed above, Professor Novemsky was able to measure causality with his perception survey. (*See, e.g.*, RFF-530—RFF-532).

591. The only question that Professor Novemsky relied on to identify the source(s) of information that caused participants' purported misimpression was TAT255. (GX303 (Novemsky Expert Report) ¶¶77-78 & fig. 2; Novemsky (FTC) Tr. 362). But TAT255 was both leading on its

own and affected by a demand artifact created by other questions. (Hauser (Intuit) Tr. 940-948; RX1017 (Hauser Expert Report) ¶¶55-62).

Response to Finding No. 591:

Complaint Counsel disputes the Proposed Finding. TAT255 was not leading and did not suffer from demand artifact. TAT255 was drafted in a way that was clear and not leading (as pretesting confirmed) and provided quasi-filter answer options and instructed survey participants not to guess. (FF-523—FF-525; FF-590; GX749 (Novemsky Rebuttal Expert Report) ¶¶ 93-94; *see also* Novemsky (Complaint Counsel) Tr. 395).

592. TAT255 was a closed-ended multiple-choice question that read as follows:

You have stated that you think you can file your 2021 income taxes for free using TurboTax online software. Which of the following sources played a role in you forming that impression?

Select all that apply.

TurboTax advertisements

TurboTax website

Word-of-mouth (such as information from family, friends, etc.)

Advice from a financial professional (such as an accountant or a tax-preparer)

Information online not from TurboTax (such as articles on websites, blog posts, etc.)

Other

Don't know / Not sure

(GX303 (Novemsky Expert Report), App'x E, at 8).

Response to Finding No. 592:

Complaint Counsel has no specific response.

593. Thus, two of the five substantive answers to TAT255—“TurboTax advertisements” and “TurboTax websites”—conform to Complaint Counsel’s allegations in this case. (GX303 (Novemsky Expert Report) App'x E, at 8; Hauser (Intuit) Tr. 941).

Response to Finding No. 593:

Complaint Counsel disputes that two answers to TAT255 “conform to Complaint Counsel’s allegations in this case.” Rather, the answer options provided by Professor Novemsky were intentionally provided to most closely mirror language consumers use when they think about marketing materials. (Novemsky (Complaint Counsel) Tr. 529 (“I list [TurboTax advertising and the TurboTax website] separately because I wanted to use consumer language. In any consumer survey, you want to speak in the language consumers most understand, and consumers think about websites differently from advertisements typically, and so we would separate those because to us this might all be marketing, but to the consumers, they think about the website as one thing and an ad as something different typically.”)).

594. Moreover, respondents were particularly likely to select “TurboTax advertisements” and “TurboTax websites” because of still another demand artifact: Across the five questions that preceded TAT255 in the main questionnaire (that is, the portion after the screening questions), Professor Novemsky’s survey mentioned “TurboTax” 12 times. (GX303 (Novemsky Expert Report) App’x E at 1-8; Hauser (Intuit) Tr. 940; RX1017 (Hauser Expert Report) ¶57). The effect of this repetition was to suggest to survey participants that the survey writer wanted them to choose “TurboTax advertisements” and “TurboTax website” in response to TAT255. (Hauser (Intuit) Tr. 940-941; RX1017 (Hauser Expert Report) ¶57).

Response to Finding No. 594:

Complaint Counsel disputes the Proposed Finding. Professor Novemsky designed the perception survey in accordance with best practices, including framing the questions in a way that was clear and not leading. (FF-509; GX303 (Novemsky Expert Report) ¶ 19; GX749 (Novemsky Rebuttal Expert Report) ¶ 93). Professor Novemsky instructed respondents not to guess, included a clear set of choices including options such as “I do not have enough information” and “Other,” and used quasi-filters to reduce guessing. (FF-523—FF-524; FF-526; GX303 (Novemsky Expert Report) ¶ 58; GX749 (Novemsky Rebuttal Expert Report) ¶ 93). Pretests showed that respondents were unable to guess the sponsor or purpose of the survey, further reducing the potential for demand artifacts. (GX749 (Novemsky Rebuttal Expert Report) ¶ 93). Although Professor Hauser dismisses the use of such measures, he also followed each best

practice in designing his own surveys. (*See* RX1017 (Hauser Expert Report) Appendices C-2, D-2).

595. As noted (*supra* ¶539), if Professor Novemsky had used a control group with a fictional tax brand (or even other real tax brands), he could have measured the magnitude of this effect and removed it from his final results. (Hauser (Intuit) Tr. 948-949). But because Professor Novemsky did not use a control group, his results are infected by this survey noise. (Hauser (Intuit) Tr. 948-949).

Response to Finding No. 595:

Complaint Counsel disputes the Proposed Finding. As discussed above (RFF-539), as Professor Hauser acknowledged, surveys do not require controls to be reliable and are routinely found to be reliable without controls. (FF-534, *see also* FF-532, FF-780). Moreover, Professor Novemsky employed several measures that allowed him to reliably measure survey results and avoid “noise,” for example changing the order of questions to avoid “order effect,” employing quasi-filters, and pretesting his survey questions. (FF-523—FF-525). What is more, the perception survey results from open-ended questions show that the survey did not cause bias or noise: less than 1% of respondents mentioned the survey instrument, while many respondents offered thoughtful answers about eligibility for “free” TurboTax that showed that they were considering factors outside of the survey to answer the question. (FF-589; GX749 (Novemsky Rebuttal Expert Report) at Figures 5-8). For example, survey respondents said in open-ended question responses to the question about why they thought they could file for free that they thought they could file for free because they “fall into the income bracket who can use it for free.” (GX749 (Novemsky Rebuttal Expert Report) at Figures 8 Row 1), or “[b]ecause free. Free free free free. The commercial.” (GX303 (Novemsky Expert Report) ¶ 80). Moreover, Professor Hauser was unable to identify any plausible alternative causes. (FF-579).

596. TAT255 was also unreliable because the list of answer choices is incomplete. (Hauser (Intuit) Tr. 942-943; RX1017 (Hauser Expert Report) ¶58).

Response to Finding No. 596:

Complaint Counsel disputes the Proposed Finding. The list of answer options presented by TAT255 was complete and provided consumers with options that fit their situation. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 95-96; Novemsky (Complaint Counsel) Tr. 394 (“based on my experience doing these surveys for many years, I tried to pick the most plausible sources of a broad perception that they can file for free with TurboTax. And so I listed those here. I also included two options there to try to encourage people not to guess by saying, if none of these options work for you, here’s an other [sic], or you can say you don’t know or aren’t sure. Again, providing several of these options rather than just one really encourages people to say it’s appropriate to say if you don’t actually know what the source of this is.”)). Professor Novemsky confirmed this through pretesting the question, during no consumers indicating that any answer options were missing. (FF-591; Novemsky (Complaint Counsel) Tr. 395 (“if consumers thought there was something they didn’t understand here, or that the answer set was incomplete in some way, they would have had a chance to say that. I don’t recall a single consumer in the pretest suggesting that the answer options were incomplete in some way.”)).

597. When drafting a closed-ended question for a survey, the best practice is to perform open-ended, qualitative interviews with prospective survey participants, and use those interviews to inform the response options to provide in the final version of the closed-ended question. (Hauser (Intuit) Tr. 942). Professor Novemsky did not do so (for any of his questions). (Novemsky (FTC) Tr. 472-473). Instead, he stated, he “tried to list the sources that [he] knew of that were plausible.” (RX1392 (Novemsky (FTC) Dep.) at 166).

Response to Finding No. 597:

Complaint Counsel disputes the Proposed Finding that “the best practice is to perform open-ended, qualitative interviews with prospective survey participants, and use those interviews to inform the response options to provide in the final version of the closed-ended question.” Conducting qualitative interviews to create response options is not the best practice, but merely an option that can be used. (Novemsky (Complaint Counsel) Tr. 472). Moreover, Professor Hauser himself (though claiming that his survey responses were reliable) omitted from his Purchase Driver survey the answer option from a closed-ended question that respondents *most*

cited in their open-ended responses (search engine). (FF-794; RX1017 (Hauser Expert Report) Figure 14, Exhibit 11a, 11b; Hauser (Intuit) Tr. 965; RX1391 (Hauser (Intuit) Dep.) at 129-130 (“in fact, surprisingly, they did list Search engine and we didn’t get it into the category”). This inconsistency belies any true concerns Professor Hauser could have had with perception survey answer options, when his own survey omitted an answer option in closed-ended questions that was clearly one important to survey respondents. (RX1391 (Hauser (Intuit) Dep.) at 129-130). Complaint Counsel does not dispute the remainder of the Proposed Finding.

598. Professor Novemsky omitted multiple plausible sources, though: For example, TAT255 did not expressly include, as an answer choice, the respondent’s personal experience. (GX303 (Novemsky Expert Report) App’x E at 8; Novemsky (FTC) Tr. 500). Nor did it explicitly include the advertisements or websites of TurboTax’s competitors. (GX303 (Novemsky Expert Report) App’x E, at 8; Novemsky (FTC) Tr. 499-500).

Response to Finding No. 598:

Complaint Counsel disputes the Proposed Finding. TAT255 had a complete and reliable set of answer options. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 95-96; Novemsky (Complaint Counsel) Tr. 394 (“based on my experience doing these surveys for many years, I tried to pick the most plausible sources of a broad perception that they can file for free with TurboTax. And so I listed those here. I also included two options there to try to encourage people not to guess by saying, if none of these options work for you, here’s an other, or you can say you don’t know or aren’t sure. Again, providing several of these options rather than just one really encourages people to say it’s appropriate to say if you don’t actually know what the source of this is.”). Professor Novemsky confirmed this through pretesting the question, during no consumers indicating that any answer options were missing. (FF-591; Novemsky (Complaint Counsel) Tr. 395 (“if consumers thought there was something they didn’t understand here, or that the answer set was incomplete in some way, they would have had a chance to say that. I don’t recall a single consumer in the pretest suggesting that the answer options were incomplete in some way.”). What is more, answer options provided could encompass the answer options Intuit claims were missing, for example, a response of the “TurboTax website” could encompass a

respondents' prior filing on the website. (GX749 (Novemsky Rebuttal Report) ¶ 96). Further, it is unlikely that any respondents got impressions about whether they could file for free with TurboTax from TurboTax's competitors, given the dominant share of voice that TurboTax has in free advertising (*see, e.g.*, RFF-530), and considering that respondents who used TurboTax online competitors were less likely to think they could file for free and attribute that belief to TurboTax advertising. (*See, e.g.*, RFF-552).

599. That competitive advertising, moreover, has frequently mentioned TurboTax by name, and noted that TurboTax offers free tax software to certain consumers. H&R Block, for example, has run multiple ads saying: "More people can file free with H&R Block online than TurboTax." (RX1337 (Intuit)). H&R Block's website likewise has included a page titled "H&R Block Free Online vs. TurboTax Free Edition: Get more FREE with Block." (RX769 (Intuit)).

Response to Finding No. 599:

Complaint Counsel has no specific response.

600. These omissions are particularly concerning for TAT255's reliability because (as noted *supra* ¶551) 69% of the participants in Group A (Professor Novemsky's main survey group) had filed their taxes with TurboTax's competitors in the previous three tax years, including 28.7% with H&R Block. (Hauser (Intuit) Tr. 943; GX303 (Novemsky Expert Report) ¶7; RX Summary 1 (Intuit)). And 0% had filed their taxes using a TurboTax product in the last three years. (Hauser (Intuit) Tr. 943; RX Summary 1 (Intuit)).

Response to Finding No. 600:

Complaint Counsel disputes that "[t]hese omissions are particularly concerning for TAT255's reliability." In fact, Group A survey respondents who used Intuit's competitors in the last three years (other online software providers) were less likely to think they could file for free than those who used other methods to prepare their taxes, clearly indicating that online competitors are not a source of consumer misimpressions. (*See* RFF-552, GX757 (Complaint Counsel)). Of Group A survey respondents who thought they could file for free using TurboTax, those that used a tax preparation software to file their taxes in the last three years were *significantly less* likely to attribute their misimpression to TurboTax advertising than consumers who exclusively used a non-software option, with 66.9% of those who did use online tax

software attributing it to TurboTax ads, compared to 83% who had not used an online tax software. (See RFF-552, GX757 (Complaint Counsel)).

601. Members of Group A were thus especially likely to have been influenced by advertising from TurboTax competitors and their experience using those competitors, rather than by TurboTax advertising. (GX757 (FTC) at S120, S130; Hauser (Intuit) Tr. 908, 911; RX Summary 1 (Intuit)). That competitor advertising and those experiences may have led Group A participants to believe that the qualifications for TurboTax's free product were similar to other free products in the marketplace, and would permit them to file for free. (Hauser (Intuit) Tr. 908, 911; Yoeli (FTC) Tr. 1745).

Response to Finding No. 601:

Complaint Counsel disputes the Proposed Finding. Survey respondents who used Intuit's competitors in the last three years (other online software providers) were less likely to think they could file for free than those who used other methods to prepare their taxes. (See RFF-552, GX757 (Complaint Counsel)). And of Group A survey respondents who thought they could file for free using TurboTax, those that used a tax preparation software to file their taxes in the last three years were *significantly less* likely to attribute their misimpression to TurboTax advertising than consumers who exclusively used a non-software option, with 66.9% of those who did use online tax software attributing it to TurboTax ads, compared to 83% who had not used an online tax software. (See RFF-552, GX757 (Complaint Counsel)). Thus, the evidence directly contradicts Intuit's contention that experience with other software providers would have biased consumer responses. Quite the opposite, it appears that consumers who used Intuit's competitors were less likely to fall for Intuit's free advertising.

602. That TAT255 included "Other" as an answer choice does not cure these flaws, because survey participants are more likely to choose specific choices than a catchall response like "Other." (Hauser (Intuit) Tr. 945; RX1017 (Hauser Expert Report) ¶58).

Response to Finding No. 602:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the discussion of the purported infirmity of the "other" answer option is not contained in Professor Hauser's expert report. (See Chappell (ALJ) Tr. 889 (admonishing the parties that "anything that's in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in

the report will not be considered in any decision in this case.”). Moreover, TAT255 had a number of responses that respondents could select in addition to “other” that were not TurboTax-related, including “Word-of-mouth (such as information from family, friends, etc.)” “Advice from a financial professional (such as an accountant or a tax-preparer)” and “Information online not from TurboTax (such as articles on websites, blog posts, etc.)” GX303 (Novemsky Expert Report), App’x F at 21). Therefore, the “other” option was not the only option available to respondents in addition to TurboTax options.

603. Lastly, the answers to TAT255 are unreliable because survey participants cannot be expected to reliably answer the question from memory. (Hauser (Intuit) Tr. 945-946, 948; RX1017 (Hauser Expert Report) ¶¶56, 58-59, 61).

Response to Finding No. 603:

Complaint Counsel disputes the Proposed Finding. Survey questions that rely on respondents’ memory are common and considered reliable. Professor Novemsky opined that psychologists regularly ask respondents to record the source of their beliefs or impressions. (GX749 (Novemsky Rebuttal Expert Report) ¶ 91). While respondents might not always remember the source of their impressions, there is nothing indicating that they wouldn’t be able to indicate when they do not remember the source of their impressions, as they were able to in the perception survey by indicating “Don’t know.” (FF-592; GX749 (Novemsky Rebuttal Expert Report) ¶ 91; GX303 (Novemsky Expert Report) ¶ 78). Moreover, Intuit’s long running advertising campaign makes it less likely that consumers would have forgotten its advertising in this instance. (See GX749 (Novemsky Rebuttal Expert Report) ¶¶ 91; 15 (opining that Intuit’s long running and pervasive marketing campaign may compound the impact of ads and mitigate decay of impact)).

604. It is well-established that individuals commonly have “source amnesia,” meaning difficulty accurately recalling the source from which they obtained information. (Hauser (Intuit) Tr. 946-947; RX1017 (Hauser Expert Report) ¶59).

Response to Finding No. 604:

Complaint Counsel disputes the Proposed Finding. Survey questions that rely on respondents' memory are common and considered reliable. Professor Novemsky opined that psychologists regularly ask respondents to record the source of their beliefs or impressions and respondents are able to indicate when they do not remember the source of their impressions in these studies, as they were able to in the perception survey by indicating "Don't know." (FF-592; GX749 (Novemsky Rebuttal Expert Report) ¶ 91; GX303 (Novemsky Expert Report) ¶ 78). Moreover, Intuit's long running advertising campaign makes it less likely that consumers would have forgotten its advertising in this instance. (See GX749 (Novemsky Rebuttal Expert Report) ¶¶ 91; 15 (opining that Intuit's long running and pervasive marketing campaign may compound the impact of ads and mitigate decay of impact)).

605. Because of source amnesia, answers to questions about the source from which respondents obtained information are less reliable than answers to questions that ask what respondents *did* or *saw*. (Hauser (Intuit) Tr. 946).

Response to Finding No. 605:

Complaint Counsel disputes the Proposed Finding. Survey questions that rely on respondents' memory are common and considered reliable. Professor Novemsky opined that psychologists regularly ask respondents to record the source of their beliefs or impressions and respondents are able to indicate when they do not remember the source of their impressions in these studies, as they were able to in the perception survey by indicating "Don't know." (FF-592; GX749 (Novemsky Rebuttal Expert Report) ¶ 91; GX303 (Novemsky Expert Report) ¶ 78). Moreover, Intuit's long running advertising campaign makes it less likely that consumers would have forgotten its advertising in this instance. (See GX749 (Novemsky Rebuttal Expert Report) ¶¶ 91; 15 (opining that Intuit's long running and pervasive marketing campaign may compound the impact of ads and mitigate decay of impact)).

606. Rather than ask what respondents did or saw, TAT255 asked the source from which they learned something—it asked them to identify the "sources [that] played a role in you forming th[e] impression about their ability to file their taxes for free using TurboTax." (GX303

(Novemsky Expert Report) App'x E at 8; Hauser (Intuit) Tr. 946-947; RX1017 (Hauser Expert Report) ¶59). TAT255 is precisely the kind of question that individuals cannot be expected to answer accurately. (Hauser (Intuit) Tr. 945, 948; RX1017 (Hauser Expert Report) ¶¶56, 58, 61).

Response to Finding No. 606:

Complaint Counsel disputes the Proposed Finding. Survey questions that rely on respondents' memory are common and considered reliable. Professor Novemsky opined that psychologists regularly ask respondents to record the source of their beliefs or impressions and respondents are able to indicate when they do not remember the source of their impressions in these studies, as they were able to in the perception survey by indicating "Don't know." (FF-592; GX749 (Novemsky Rebuttal Expert Report) ¶ 91; GX303 (Novemsky Expert Report) ¶ 78). Moreover, Intuit's long running advertising campaign makes it less likely that consumers would have forgotten its advertising in this instance. (*See* GX749 (Novemsky Rebuttal Expert Report) ¶¶ 91; 15 (opining that Intuit's long running and pervasive marketing campaign may compound the impact of ads and mitigate decay of impact)).

607. Each of TAT255's flaws by itself rendered TAT255 unreliable, but the flaws likely compound one another. (RX1017 (Hauser Expert Report) ¶61). When presented with an unreliable memory test and an incomplete list of answer choices that emphasizes TurboTax, it is extremely unlikely that the participants in Professor Novemsky's survey would accurately recall the sources of their impressions about their ability to file their taxes for free using TurboTax. (Hauser (Intuit) Tr. 945, 948; RX1017 (Hauser) Report ¶62).

Response to Finding No. 607:

Complaint Counsel disputes the Proposed Finding. As discussed above, (RFF-590—RFF-602), question TAT255 was reliable, presenting a complete list of answer choices that did not bias the results. Moreover, questions regarding the source of consumer beliefs are commonly used and considered reliable by psychologists. (RFF-603—RFF-606).

7. Professor Novemsky Overstates His Survey Results

608. The final flaw in Professor Novemsky's analysis is that he substantially overstates his survey's findings. (Hauser (Intuit) Tr. 951-952); RX1017 (Hauser Expert Report) ¶¶68-70). According to Professor Novemsky, his survey shows that Intuit's marketing deceived "tens of millions" of consumers into thinking they could file for free. (Novemsky (FTC) Tr. 421).

Response to Finding No. 608:

Complaint Counsel disputes the Proposed Finding that Professor Novemsky “substantially overstates” his surveys’ findings. Professor Novemsky accurately reported data for both his main survey group of interest, Group A, and his secondary group of interest, Group B. (FF-480—FF-487; FF-496—FF-497; FF-518—FF-520; GX303 (Novemsky Expert Report) Figures 1-4). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

609. On their face, Professor Novemsky’s results are dubious: According to Professor Novemsky, his survey showed that 52.7% of his respondents mistakenly believed that they could file for free, and that 72% of those respondents attributed that belief to TurboTax ads and/or the TurboTax website. (Novemsky (FTC) Tr. 360-362, 420-421). But in Intuit’s TY20 Copy Test (*infra* ¶¶687-701)—a test Professor Novemsky himself relied on as evidence that the challenged ads cause viewers to believe “they can use TurboTax for free” (GX303 (Novemsky Expert Report) ¶97)—when respondents were, like Professor Novemsky’s survey participants, presented with only the TurboTax brand name and no ads, only 33% of respondents believed they could file for free. (GX460 (Intuit) at 28). Moreover, the TY20 Copy Test did not include any of the flaws that Professor Novemsky’s survey included: No one has disputed that the TY20 Copy Test was conducted reliably. (Novemsky (FTC) Tr. 501; Hauser (Intuit) 877-878). And the survey population in the TY20 Copy Test was broader than Professor Novemsky’s in that it included taxpayers who actually would qualify to file for free. (GX460 (Intuit) at 2; Ryan (Intuit) Tr. 736, 740).

Response to Finding No. 609:

Complaint Counsel disputes the Proposed Finding that “[o]n their face, Professor Novemsky’s results are dubious” or that Professor Novemsky’s survey included flaws, and that the TY20 Copy Test somehow indicates that perception survey results are “dubious.” Comparing perception survey results to results of the results of the TY20 Copy Test is inappropriate for a number of reasons. For one, respondents TY20 Copy Test were of a different age than the perception survey respondents, the timing of the surveys were different (the TY20 Campaign Copy Testing was not conducted during tax season when Intuit does the bulk of its advertising) and billions of “free” ad impressions occurred between the time of the Intuit study and the perception survey. (FF-595; GX750 (Novemsky Rebuttal Report Errata) ¶ 42 (correcting GX749 (Novemsky Rebuttal Report) ¶ 42 (discussing that the TY20 Campaign Copy Testing “had

different stimuli, different survey instruments, different measurement metrics, and a different survey design. All these differences render the comparison of the results from the two studies inappropriate.”). The TY20 Campaign Copy Test is limited to the incremental contribution of one additional ad exposure to subjects’ pre-existing beliefs and does not measure the impact of Intuit’s years-long marketing activities on overall impressions in the market, as the perception survey did. (*See* FF-567—FF-569).

What the TY20 Campaign Copy Test does show is that, at the time that the survey was conducted, for the survey population it was conducted for, one airing of a “free” TurboTax ad increased consumer perceptions that they could file for free a significant amount, showing that “TurboTax marketing is responsible for consumers’ perception that they can file for free.” (Novemsky (Complaint Counsel) Tr. 366; FF-562—FF-566).

610. Given that the TY20 Copy Test included taxpayers who actually qualified to file for free, one would expect the TY20 Copy Test to report a higher percentage of participants who believed they could file for free than Professor Novemsky’s survey. (Hauser (Intuit) Tr. 913-914). The fact that the opposite was true—that Professor Novemsky’s survey reported a substantially higher percentage of respondents believing they could file for free when compared to the TY20 Copy Test—is further evidence that Professor Novemsky’s methodological flaws influenced his survey’s results. (Hauser (Intuit) Tr. 913-914).

Response to Finding No. 610:

Complaint Counsel disputes the Proposed Finding. Because of the various differences between the perception survey and the TY20 Campaign Copy Test, (RFF-608; FF-595; GX750 (Novemsky Rebuttal Report Errata) ¶ 42 (correcting GX749 (Novemsky Rebuttal Report) ¶ 42)) one would not necessarily expect it to report a higher percentage of participants who believed they could file for free. Most notably, between the time that the TY20 Campaign Copy Test and the perception survey were conducted, for TV advertising alone, Intuit aired at least 35,194 free-themed ads, garnering over 7.5 billion impressions, so there is no reason to expect that the consumer perception about TurboTax being free would stay constant in the two years between the TY20 Campaign Copy Test Study and the perception survey. (FF-595; GX750 (Novemsky Rebuttal Report Errata) ¶ 42 (correcting GX749 (Novemsky Rebuttal Report) ¶ 42)).

611. Similarly, in Dr. Hauser's Disclosure Efficacy Survey (*infra* ¶¶722-745), which also included taxpayers who would qualify to file for free, roughly one third of all participants indicated that they would actually start in Free Edition. (Hauser (Intuit) Tr. 912-913). Dr. Hauser explained that his Disclosure Efficacy Survey was not measuring the exact same thing as Professor Novemsky, but the two surveys were measuring the same basic "construct," so a scientist would expect them to be "in about the same place," and yet they are not. (Hauser (Intuit) Tr. 913).

Response to Finding No. 611:

Complaint Counsel disputes the Proposed Finding. The calculation relied on by Professor Hauser was not contained in his expert report and is unreliable (RFF-743—RFF-745) and should be disregarded. (*See* Chappell (ALJ) Tr. 889 (admonishing the parties that "anything that's in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.")). Professor Hauser did nothing to determine which taxpayers did or did not qualify to file for free, so he cannot reliably determine the percentage in his survey that qualified for Free Edition, including whether those respondents overlap with the one third of respondents who indicated they would start in Free Edition. (RX1017 (Hauser Expert Report) C-1-26-28 (screening questions that did not include questions about income or tax situations that would allow any determination about whether respondents qualified for free). Moreover, whether survey respondents would start in Free Edition does not measure their impressions or misimpressions about whether they could file for free, and Professor Hauser did not ask them. (FF-746—FF-747; FF-754, *see also* Novemsky (Complaint Counsel) Tr. 1781 ("[H]e doesn't ask the key question, can you file for free or not, or do you think you can file for free or not, in his disclosure efficacy survey.")). It is entirely inappropriate and misleading to compare the results of the Disclosure Efficacy Survey to results of the perception survey in the manner that Professor Hauser did.

612. As Dr. Hauser put it at trial, Professor Novemsky's results do not pass the "smell test relative to the numbers we've seen elsewhere" and would make any reputable scientist "want to see if we have some good explanations as to why the 52.7% is just high relative to these other numbers." (Hauser (Intuit) Tr. 913-916).

Response to Finding No. 612:

Complaint Counsel disputes the Proposed Finding. Professor Hauser's speculative statements that something "seems" or "feels" high (Hauser (Intuit) Tr. 917; 920) is an unscientific assumption not based on any facts. Survey results do not become unreliable just because they are not the results desired by a party. Moreover, there are several plausible reasons why the perception survey results appear higher than the metrics Professor Hauser compares them to, and why the comparison is inappropriate in the first place. For example, the TY20 Copy Test respondents were of a different age than the perception survey respondents, the timing of the survey was different (the TY20 Campaign Copy Testing was not conducted during tax season when Intuit does the bulk of its advertising) and the billions of "free" ad impressions that occurred between the time of the Intuit study and the perception survey. (RFF-608; FF-595; GX750 (Novemsky Rebuttal Report Errata) ¶ 42 (correcting GX749 (Novemsky Rebuttal Report) ¶ 42 (discussing that the TY20 Campaign Copy Testing "had different stimuli, different survey instruments, different measurement metrics, and a different survey design. All these differences render the comparison of the results from the two studies inappropriate.")).

It is also inappropriate to compare perception survey results to the Disclosure Efficacy Survey results, as Professor Hauser did nothing to determine which taxpayers did or did not qualify to file for free, so he cannot reliably determine the percentage in his survey that qualified for Free Edition, including whether those respondents overlap with the one third of respondents who indicated they would start in Free Edition. (RFF-611; RX1017 (Hauser Expert Report) C-1-26-28 (screening questions that did not include questions about income or tax situations that would allow any determination about whether respondents qualified for free). Moreover, whether survey respondents would start in Free Edition does not measure their impressions or misimpressions about whether they could file for free, and Professor Hauser did not ask them. (FF-746—FF-747; FF-754, *see also* Novemsky (Complaint Counsel) Tr. 1781 ("[H]e doesn't ask the key question, can you file for free or not, or do you think you can file for free or not, in his disclosure efficacy survey. "). It is entirely inappropriate and misleading to compare the results

of the Disclosure Efficacy Survey to results of the perception survey in the manner that Professor Hauser did.

613. As discussed, the numerous flaws with Professor Novemsky's survey provide several explanations as to why his results are so different from the other evidence available in this case.

Response to Finding No. 613:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, as discussed above, the reason that results from other surveys differ from those in the perception survey is that they are entirely different surveys, with different design, different populations, different questions, and administered at different times. (RFF-608—RFF-612).

614. In addition to those flaws, a close examination of his survey data reveals that only a very small percentage of the respondents who attributed their misimpression to the TurboTax advertisements and/or website did so with any reasonable degree of reliability. (Hauser (Intuit) Tr. 951-952); RX1017 (Hauser Expert Report) ¶69).

Response to Finding No. 614:

Complaint Counsel disputes the Proposed Finding. As noted above, the coding exercise relied on by Professor Hauser to claim that survey results were unreliable (RX1017 (Hauser Expert Report) ¶ 69), was fatally flawed and should be disregarded, as is illustrated by the many obvious instances of faulty coding by his “blind coders.” (RFF-581; RFF-584, *see also* FF-582—FF-583; RFF-616).

615. As an initial matter, when reporting his results at trial, Professor Novemsky focused on only his Group A respondents. (Novemsky (FTC) Tr. 360-362, 411-413; GX303 (Novemsky Expert Report) figs. 1 & 2). When looking at the full survey population of 607 respondents, 190 of them (or 31.3%) both answered TAT240 that they believed they could file for free with TurboTax in Tax Year 2021 and chose either “TurboTax advertisements” or “TurboTax website” as a “source[]” of that belief in response to TAT255. (GX303 (Novemsky Expert Report) ¶79 & fig. 2; GX757 (FTC); RX1392 (Novemsky (FTC) Dep.) at 207).

Response to Finding No. 615:

Complaint Counsel has no specific response, but notes that as Professor Novemsky testified at trial, combining responses from both Groups A and B is inappropriate. (Novemsky (Complaint Counsel) Tr. 528 (“T]hey were sampled separately with different bases and they weren’t sampled in proportion to the population either. So the combination of a group A plus group B is an arbitrary sum of two numbers. If you want to do an analysis of group A considering their characteristics, you would do that, and then separately you could do an analysis of group B, considering their characteristics. The sum of 200 from one group and 400 from the other represents nothing corresponding to reality or the marketplace.”); *see also* FF-520).

616. Of those 190 participants, 116 provided inconsistent responses about their ability to file their taxes for free across the open-ended questions (TAT220/TAT230) and the closed-ended one (TAT240). (RX1017 (Hauser Expert Report) ¶69 & fig. 5; Hauser (Intuit) Tr. 952). As noted (*supra* ¶¶584-588), the TAT240 answers for those 116 people are not reliable and cannot be treated as valid evidence of deception. (RX1017 (Hauser Expert Report) ¶69; Hauser (Intuit) Tr. 934-935).

Response to Finding No. 616:

Complaint Counsel disputes the Proposed Finding. As noted above, the process employed by Professor Hauser for his coding exercise was fatally flawed and should be disregarded, as is illustrated by the many obvious instances of faulty coding by his “blind coders.” (FF-582—FF-583, *see also* RFF-581; RFF-584). As Intuit readily admits, the independent coders were given the responses to both TAT220 and TAT230 and provided categories “identical to the four closed-ended response options to TAT240,” IFF-582, that they were supposed to assign respondents to, based on their responses to TAT220 and TAT230. (RX1017 (Hauser Expert Report) E-2, E-3 (“you are being provided with the four initial categories below... you will independently review both open-ended answers from each respondent and assign each respondent to the relevant category (or categories, if appropriate))). While coders were allowed to add to the categories if they felt it was needed, the initial set of categories were precisely the answer options to TAT240. (RX1017 (Hauser Expert Report) E-2). In other words, coders were given responses to two different questions, and asked to consistently assign those responses to answer options to a third,

different question. Moreover, as Professor Novemsky testified at trial, even employing blind coders, reviewing open ended responses in the manner Professor Hauser did could introduce bias into survey responses. (Novemsky (Complaint Counsel) Tr. 445).

617. Of the 74 remaining participants in Professor Novemsky's survey, 40 also selected responses to TAT255 in addition to "TurboTax advertisements" and "TurboTax website." (RX1017 (Hauser Expert Report) ¶70 & fig. 5; Hauser (Intuit) Tr. 952).

Response to Finding No. 617:

Complaint Counsel disputes the Proposed Finding to the extent it relates to the flawed methodology Intuit uses to arrive at 74 "remaining participants." (See RFF-581; RFF-584; RFF-616). Complaint Counsel otherwise does not have a specific response.

618. As to those 40 participants who selected additional responses to TAT255 beyond "TurboTax advertisements" and "TurboTax website," Professor Novemsky did nothing to determine what was the principal source of the person's impression, or otherwise to disentangle the relative roles played by the multiple sources identified. (Novemsky (FTC) Tr. 459-460).

Response to Finding No. 618:

Complaint Counsel has no specific response.

619. The survey results for those 40 participants therefore are not reliable either, meaning they cannot be treated as evidence of deception. (Hauser (Intuit) Tr. 952; RX1017 (Hauser Expert Report) ¶70).

Response to Finding No. 619:

Complaint Counsel disputes the Proposed Finding. In order for respondents to be deceived by TurboTax advertising, it does not require those respondents to have relied solely on TurboTax. Whether TurboTax sources were the *only* source respondents consulted is entirely irrelevant, because even if respondents considered other sources, the TurboTax advertisements and website would still have played a role in informing consumers misimpressions that they could file for free using TurboTax. (GX749 (Novemsky Rebuttal Expert Report) ¶ 65). Moreover, respondents who did *not* select TurboTax ads or the TurboTax website as a source for their misimpression about being able to file for free, and who select other options like word of mouth, may have formed their misimpressions indirectly through TurboTax's ads or website to

the extent that the information contained in other sources is based on TurboTax advertising and the TurboTax website, therefore the results reported from the perception survey are a conservative measure of the number of consumers with a misimpression who formed that misimpression based on Intuit marketing. (FF-485).

620. This leaves only 34 of the participants who (1) answered TAT240 that they believed they could file for free with TurboTax in Tax Year 2021, (2) chose *only* “TurboTax advertisements” and/or “TurboTax website” as a “source[]” of that belief in response to TAT255, and (3) did not provide inconsistent responses about their ability to file their taxes for free. (RX1017 (Hauser Expert Report) ¶70 & fig. 5; Hauser (Intuit) Tr. 952).

Response to Finding No. 620:

Complaint Counsel disputes the Proposed Finding that consumers provided inconsistent responses about their ability to file for free with TurboTax. As discussed above (*see, e.g.*, RFF-581; RFF-584; RFF-616), Professor Hauser’s coding exercise was fatally flawed and should be disregarded. Complaint Counsel has no specific response to the remainder of the Proposed Finding.

621. Those 34 participants represent 5.6% of the 601 total participants who completed Professor Novemsky’s survey and chose not to opt out—and only 4.4% of the 771 total participants when opt-outs are included. (RX1017 (Hauser Expert Report) ¶70 & fig. 5; Hauser (Intuit) Tr. 952; Novemsky (FTC) Tr. 463).

Response to Finding No. 621:

Complaint Counsel disputes the Proposed Findings that support Intuit’s faulty and inappropriate calculations used to arrive at these results, including Professor Hauser’s coding exercise (*see, e.g.*, RFF-581; RFF-584; RFF-616), the notion that Group A and Group B respondents should be combined in any calculations (RFF-588), the notion that opt-out consumers should be included for purposes of these calculations (RFF-555; RFF-558—RFF-559), and the notion that respondents who relied on more than TurboTax sources in forming a misimpression about being able to file for free were somehow not deceived by Intuit. (RFF-619).

622. Given the numerous others flaws with Professor Novemsky’s survey (*supra* ¶¶530-621), the survey does not provide reliable evidence that even those 34 participants were misled or deceived by TurboTax advertising about their ability to file their income taxes for free using TurboTax. (Hauser (Intuit) Tr. 952-954). Given that Professor Novemsky did not use a

test-control design, he has no way of drawing causal inferences with respect to those 34 respondents. (Hauser (Intuit) Tr. 952-953). And without a control group in particular, he has no way of ensuring that the survey itself did not influence those 34 respondents' answers. (Hauser (Intuit) Tr. 952-953). Regardless, 4.4% (or even 5.6%) is not a significant minority of individuals. The survey simply does not show that any significant number of reasonable consumers were misled by the challenged ads into believing that they could file for free using TurboTax.

Response to Finding No. 622:

Complaint Counsel disputes the Proposed Finding. The perception survey was designed based on reliable principles to avoid bias and deliver reliable results. (RFF-529; RFF-540—RFF-545; RFF-548—RFF-549; RFF-551—RFF-554; RFF-558; RFF-560—RFF-562; RFF-564—RFF-567; RFF-569—RFF-574; RFF-576-RFF-781; RFF-584; RFF-586—RFF-591; RFF-593—RFF-598; RFF-600—RFF-607). As discussed above, test-control design is not the only way to measure causality, and the survey design used in the perception survey reliably measured the source of respondents' misimpressions about their ability to file for free. (RFF-530—RFF-532; RFF-534—RFF-537; RFF-539—RFF-540). In addition, Complaint Counsel disputes the various flawed calculations Intuit relies on to reach the numbers in the Proposed Finding. (RFF-621; RFF-555; RFF-558—RFF-559; RFF-581; RFF-584; RFF-588; RFF-616; RFF-619). What is more, the perception survey reliably shows that over 52% of respondents who had not used TurboTax in the last three years, a majority, who did not qualify to file for free with TurboTax, thought they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484). In addition, of respondents who had paid to use TurboTax in the last three years, 24.1% thought that they could use TurboTax for free even though they could not, with 73.5% identifying either TurboTax advertisements or the TurboTax website, or both, as a source of their misimpression. (FF-486—FF-487).

C. The Small Number Of Consumer Complaints Lodged Over Intuit's Advertising Proves That No Significant Minority Of Reasonable Consumers Was Deceived

623. The miniscule number of complaints identified and put forward by Complaint Counsel is strong evidence that the challenged ads were not likely to mislead a significant

minority of reasonable consumers about their ability to file for free using TurboTax. (RX1018 (Golder Expert Report) ¶84; Golder (Intuit) Tr. 1193-1196, 1208-1213).

Response to Finding No. 623:

Complaint Counsel disputes this Proposed Finding. An absence of consumer complaints is not a reliable measure of an absence of deception. (FF-725). There are several reasons that consumers who were deceived by a company would not complain. (FF-726—FF-732).

Complaint Counsel further disputes this Proposed Finding because it improperly seeks to use evidence of customer satisfaction as a defense against liability.

It is well established that evidence of customer satisfaction is not relevant to determining whether challenged advertising claims are deceptive. Because proof of actual deception is not necessary for purposes of Section 5 liability, evidence that some consumers were not injured or were satisfied with services received is not a defense to liability. Accordingly, evidence of such satisfaction may be excluded as irrelevant. Moreover, evidence of general consumer satisfaction does not rebut evidence of deception. Although evidence of actual deception is not required to prove liability under Section 5, such proof is highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances. However, consumer satisfaction does not necessarily indicate the absence of deception. As stated in the Commission's recent opinion denying Complaint Counsel's Motion for Summary Decision, “the fact that most customers who chose to use a TurboTax product were generally happy with that product does not render non-deceptive a particular ad that drove people to the TurboTax website.”

In re Intuit, Inc., 2023 WL 2609450, at *8–9 (F.T.C. Mar. 7, 2023) (order granting Complaint Counsel's Motion to Preclude Admission of Evidence of Customer Satisfaction) (Chappell, C.A.L.J.) (citations omitted) (quoting *In re Intuit Inc.*, 2023 WL 1778377, at *12 (F.T.C. Jan. 31, 2023) (Commission order denying summary decision)).

624. Consumers who expect to receive a product for free but ultimately have to pay for it would normally be angry, and such anger would manifest itself in a high rate of consumer complaints and low customer retention for the company in question. (Golder (Intuit) Tr. 1189-1191, 1213-1214). As an article cited by Complaint Counsel's rebuttal witness Erez Yoeli and written by Nobel Prize-winning economist George Akerlof explains, “Brand names” (like the TurboTax brand) “give the consumer a means of retaliation if the quality does not meet expectations,” including by “curtail[ing] future purchases.” (RX1370 (FTC) at 499-500; Yoeli (FTC) Tr. 1739-1740). Likewise, academic marketing literature explains that complaints are a “major source of information on the quality of products and companies.” (RX1552 (FTC) at 168). “Customer complaints ... represent critical turning points in [a] company's relationship

with its customers” and “are associated with a substantial increase in the probability that the customer stops buying.” (RX562 (Intuit) at 42).

Response to Finding No. 624:

Complaint Counsel disputes this Proposed Finding.

Baked into the premise “Consumers who expect to receive a product for free but ultimately have to pay for it would normally be angry, and such anger would manifest itself in a high rate of consumer complaints and low customer retention for the company in question,” are a number of assumptions for which Intuit fails to substantiate—either here or in Dr. Golder’s report. First, in order to be “angry,” the consumer would need to know that they were deceived, which they may not, and to attribute that deception to Intuit and not to, for example, their own misunderstanding of the offer. (FF-727—FF-730). Second, in order to complain, a consumer would both have to decide that making a complaint was worth the time and effort, and know where to complain. (FF-731-FF-732). Moreover,

(FF-733). Dr. Golder does not address either of these factors. Finally, while Dr. Golder assumes retention rates would be low, in fact, retention rates are not useful indicators of an absence of deception. (FF-737).

625. If consumers expected to file for free when they began using a TurboTax SKU but could not do so—particularly on account of what Complaint Counsel have called “a multi-year, multi-channel, multi-modal, multi-ad integrated marketing campaign”—they would express anger over that fact in reporting their experiences using the product, including in complaints, product reviews, and ratings. (Johnson (Intuit) Tr. 559-562, 678-679; Golder (Intuit) Tr. 1057-1058, 1193-1194, 1212-1213; RX1018 (Golder Expert Report) ¶¶25, 36-37, 50). Indeed, a meaningful volume of consumer complaints is a “clear signal” of deception. (Golder (Intuit) Tr. 1189-1191, 1193-1194, 1213-1214).

Response to Finding No. 625:

Complaint Counsel disputes this Proposed Finding.

In addition to those reasons set forth immediately above in RFF-623 and RFF-624, Complaint Counsel further disputes this Proposed Finding because it contains an expert opinion (namely, that “a meaningful volume of consumer complaints is a ‘clear signal’ of deception”) of Professor Golder that is not contained in his expert report, and should therefore be stricken. (*See* Chappell (ALJ) Tr. 889 (admonishing the parties that “anything that’s in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.”)).

626. The record does not show a meaningful volume of consumer complaints. (RX1018 (Golder Expert Report) ¶¶68, 83-84; Golder (Intuit) Tr. 1057-1058, 1189-1190).

Response to Finding No. 626:

Complaint Counsel disputes the Proposed Finding. The Proposed Finding is impermissibly vague, as Intuit has not defined or articulated what it considers to be a “meaningful” number of consumer complaints. Instead, the record reflects that Intuit was aware of complaints regarding its price (FF-619—FF-662), including over three thousand examples of negative customer feedback regarding Intuit’s free claims (*see* FF-662). Even if that were not the case, an absence of consumer complaints is not a reliable measure of an absence of deception. (FF-725). There are several reasons that consumers who were deceived by a company would not complain. (FF-726—FF-732). (*See also* RCL-94, RCL-96, RCL-97).

627. Seeking to carry their burden of proving that the challenged TurboTax ads are deceptive, Complaint Counsel have relied on complaints in the “Consumer Sentinel” database, an FTC database that collects complaints from consumers, as well as from state attorneys general, the Better Business Bureau (“BBB”), other federal agencies, and others. (Shiller (FTC) Tr. 144-145, 150; Baburek (FTC) Tr. 336).

Response to Finding No. 627:

Complaint Counsel disputes this Proposed Finding to the extent it is read to characterize, summarize, or explain Complaint Counsel’s strategy or position without specific reference to the pleadings or other statements by counsel, and because it is ambiguous and confusing.

Complaint Counsel agrees that “the ‘Consumer Sentinel’ database[is] an FTC database that collects complaints from consumers, as well as from state attorneys general, the Better Business Bureau (‘BBB’), other federal agencies, and others.”

628. The database collects complaints from a wide variety of sources to which consumers might complain. (Golder (Intuit) Tr. 1194-1195). Consumers can file complaints that end up in the database by, for example, submitting them online, calling the FTC, contacting their state attorney general’s office, or visiting the BBB website. (Shiller Tr. 145, 149-151).

Response to Finding No. 628:

Complaint Counsel has no specific response.

629. These methods for filing a complaint with the FTC are well-known and relatively easy for consumers to find. (Golder (Intuit) Tr. 1057, 1236-1237). That is especially true for a population of consumers sufficiently comfortable online to prepare their taxes online.

Response to Finding No. 629:

Complaint Counsel disputes the Proposed Finding. To the extent it relies on trial testimony of Dr. Golder, that opinion is not contained in his report and should be disregarded. (See Chappell (ALJ) Tr. 889 (admonishing the parties that “anything that’s in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.”)).

Complaint Counsel additionally disputes “That is especially true for a population of consumers sufficiently comfortable online to prepare their taxes online,” as the fact asserted does not cite as support any portion of the evidentiary record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”)

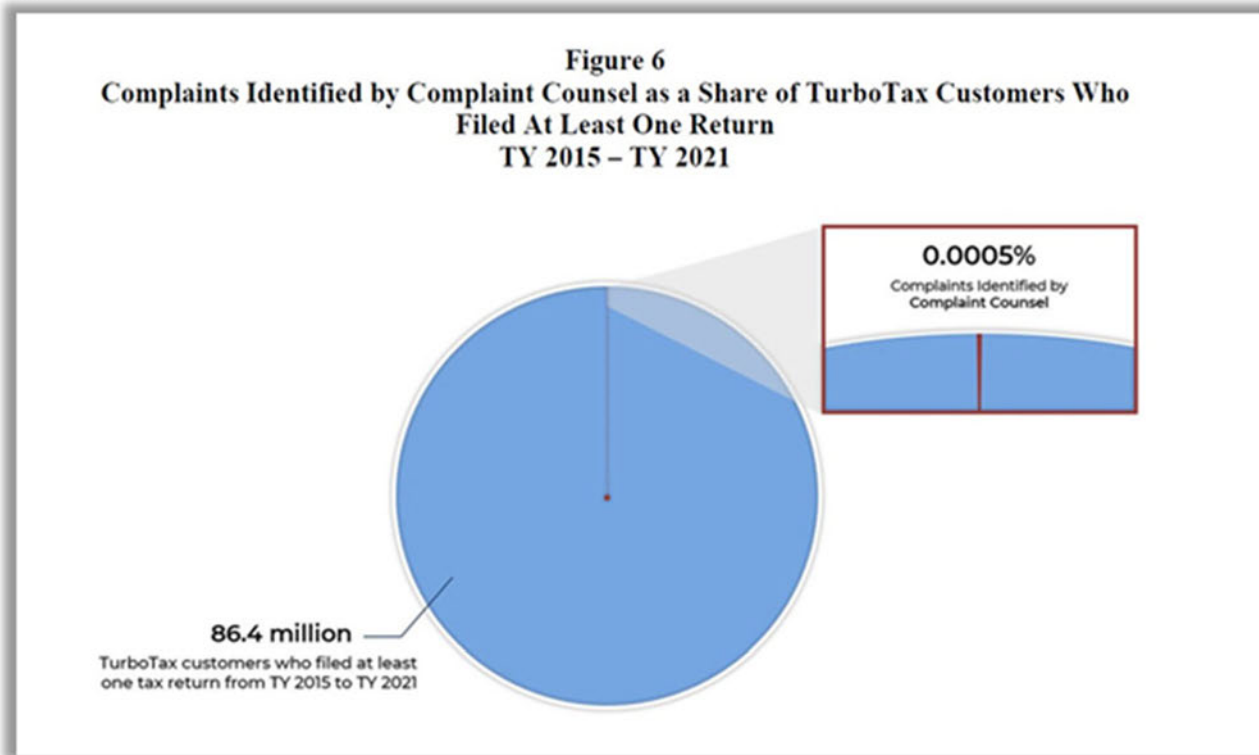
630. Despite the Sentinel database’s comprehensiveness and accessibility, Complaint Counsel have identified a miniscule number of complaints that support their allegations: As of December 2022, Complaint Counsel had identified 396 complaints that they contended were relevant to the allegations in this case—but by February 2023, Complaint Counsel had winnowed those 396 down to 228 complaints filed in the Sentinel database between January 1, 2016, and March 28, 2022. (RX277 (FTC) at 3; RX357 (FTC); Complaint Counsel’s Pretrial Brief at 25 (Feb. 17, 2023); Shiller (FTC) Tr. 270-271; RX1018 (Golder Expert Report) ¶¶68-69).

Response to Finding No. 630:

Complaint Counsel disputes this Proposed Finding to the extent it characterizes the Sentinel database as “comprehensive[] and accessibil[e],” or the number of Sentinel complaints identified by Complaint Counsel as “miniscule” or having been “winnowed.” These are not facts, but Intuit’s unsupported rhetoric.

Complaint Counsel further disputes this Proposed Finding, as it identified 218 relevant complaints filed in the Sentinel database between January 1, 2016, and March 28, 2022. (FF-766).

631. Even if all 396 complaints initially relied on by Complaint Counsel were relevant and reliable, they represent only 0.0005% of the 86.4 million TurboTax customers who filed at least one return from Tax Year 2015 to Tax Year 2021. (Golder (Intuit) Tr. 1195-1196; RX1018 (Golder Expert Report) ¶¶68, 82). A chart depicting the 396 complaints identified by Complaint Counsel compared to the total number of TurboTax customers who filed at least one return from Tax Year 2015 to Tax Year 2021 is provided below. (RX1018 (Golder Expert Report) ¶¶68-69, fig. 6).



Response to Finding No. 631:

Complaint Counsel does not dispute that 396 is 0.0005% of 86.4 million.

632. The 228 complaints ultimately offered by Complaint Counsel represent just 0.0003% of the 86.4 million TurboTax customers who filed at least one tax return from Tax Year 2015 to Tax Year 2021. (RX1018 (Golder Expert Report) ¶68; Golder (Intuit) Tr. 1195-1198).

Response to Finding No. 632:

Complaint Counsel does not dispute that 228 is 0.0003% of 86.4 million.

633. Although any customer complaints must be verified to be reliable, Complaint Counsel expended “minimal to nonexistent” effort to do so, as they did not confirm complainants’ identities, tax-filing history, or use of TurboTax. (Golder (Intuit) Tr. 1198-1200; RX1018 (Golder Expert Report) ¶78; RX1390 (Shiller (FTC) Dep.) at 20, 56-57, 115-116, 189-192).

Response to Finding No. 633:

Complaint Counsel disputes this Proposed Finding, which is not supported by the citations Intuit provides. For example, neither Professor Golder nor Ms. Schiller testified, and the cited portion of Golder’s expert report does not contain the assertion, that “any customer complaints must be verified to be reliable.” (Golder (Intuit) Tr. 1198-1200; RX1018 (Golder Expert Report) ¶78; RX1390 (Shiller (FTC) Dep.) at 20, 56-57, 115-116, 189- 192).

634. Many of the 228 complaints are not related to the challenged advertisements or are not based on the complainant’s personal knowledge. Complainants testified that they were not misled by any TurboTax advertising (GX123 (Lee (Consumer) Dep.) at 41-43), or that their beliefs about their ability to file for free using TurboTax were wholly unrelated to TurboTax’s advertising (GX136 (Schulte (Consumer) Dep.) at 71-72). One complainant even clarified that his complaint was “not about advertising for the TurboTax product” at all, stating, “I was not misled—through ads or otherwise—about whether I would qualify for TurboTax Free Edition.” (RX344 (Parvez (Consumer) Decl.) ¶¶8-9). Several other complaints focused on the IRS’s Free File program, a government program entirely separate from TurboTax’s Free Edition product. (GX136 (Schulte (Consumer) Dep.) at 19, 21-22; GX125 (Beck (Consumer) Dep.) at 60). And other complainants admitted to being inspired to complain by ProPublica’s mistaken reporting, merely parroting those allegations without describing any personal experiences using TurboTax that would suggest they were misled by TurboTax free advertising. (GX128 (Benbrook (Consumer) Dep.) at 51-52; GX138 (Adamson (Consumer) Dep.) at 46-47; *see also* Intuit’s Motion in Limine to Exclude Complaints at App’x G (Feb. 10, 2023) (identifying complaints referencing reporting about Intuit’s marketing practices, the FTC’s investigation, or litigation against Intuit); RX1018 (Golder Expert Report) ¶77 & fig. 7).

Response to Finding No. 634:

Complaint Counsel disputes this Proposed Finding, as the facts asserted are not supported by the testimony. For example, Intuit asserts that “Complainants testified that they were not

misled by any TurboTax advertising (GX123 (Lee (Consumer) Dep.) at 41-43).” This is false. When asked by Intuit’s counsel, “Intuit’s television advertisement did not cause you to file your taxes using TurboTax; right?” Mr. Lee answered “It might have had an influence. Yeah. At the time I started using it, it was word of mouth, people liked the product and services and I seen a few ads.” (GX123 (Lee (Consumer) Dep.) at 42). Later, Mr. Lee testified to seeing TurboTax ads and, when asked what impression they gave him, he testified, “[i]nitial impression would be it would be simple, easy and free to file. . . That would be my initial thoughts when I see their ad. It’s easy. It’s simple. It’s free to file.”

Intuit also posits that “Complainants testified that... their beliefs about their ability to file for free using TurboTax were wholly unrelated to TurboTax’s advertising (GX136 (Schulte (Consumer) Dep.) at 71-72.)” This is also false. While Mr. Schulte testified that in subsequent years he formed the impression he could file for free because he had been eligible to, and in fact did, file for free in the past, he said in those past years his free filing “worked just as advertised.” (GX136 (Schulte (Consumer) Dep.) at 72). Mr. Schulte also testified to having received TurboTax advertisements by email. (GX136 (Schulte (Consumer) Dep.) at 40-42).

In fact, Intuit does not appear to know which complaints are at issue. Although it asserts: “One complainant even clarified that his complaint was ‘not about advertising for the TurboTax product’ at all, stating, ‘I was not misled—through ads or otherwise—about whether I would qualify for TurboTax Free Edition.’ (RX344 (Parvez (Consumer) Decl.) ¶¶8-9),” Complaint Counsel no longer relies on the Complaint of Mr. Parvez in its count of the 218 relevant complaints. (*See* FF-676). This declaration, therefore, is immaterial.

More fundamentally, Intuit’s myopic dissection of the Sentinel complaints misses the forest through the trees. Of the just the more recent 26 complaints recorded in Sentinel between November 1, 2021, and March 28, 2022: (a) 26 of 26 consumers indicated that they believed, or TurboTax communicated, that filing taxes with TurboTax would be free; (b) 22 of 26 consumers mentioned advertising about a free TurboTax option; and (c) 20 of 26 consumers indicated they were charged for or paid for TurboTax. (FF-678).

635. And many of the 228 complainants offered testimony indicating that they understood both that free TurboTax SKUs were qualified and the phrase “simple tax returns.” (GX136 (Schulte (Consumer) Dep.) at 70; GX124 (Bodi (Consumer) Dep.) at 15-16, 39; GX128 (Benbrook (Consumer) Dep.) at 28-29, 56; GX130 (Tew (Consumer) Dep.) at 21, 37-39, 46, 54; GX137 (Dukatz (Consumer) Dep.) at 64, 67-68; GX123 (Lee (Consumer) Dep.) at 28-29; GX135 (Phyfer (Consumer) Dep.) at 66, 80; GX138 (Adamson (Consumer) Dep.) at 44, 69-70; *see also* RX71 (Rozar (Consumer) Dep.) at 43, 60; RX70 (Beckett (Consumer) Dep.) at 74-77; RX72 (Harford (Consumer) Dep.) at 161).

Response to Finding No. 635:

Complaint Counsel disputes this Proposed Finding, as it is not supported by the evidentiary record or the testimony cited (and in fact, is directly contradicted by it. For example, rather than “understand[ing]... the phrase ‘simple tax return,’” at the cited page Mr. Schulte testified:

Q. Let me ask it a different way. So seeing that it says for simple tax returns, you saw that on several of the emails; is that right?

A. Yes.

Q. Seeing that, what do you think that means?

A. Essentially in a tax situation where your tax situation's not overtly complicated, I mean, that's the basic explanation I have. Like essentially that you're not some huge investor where you have, you know, funds sitting in all these different like locations that's going to basically give you a stack of different documents that you're going to have to submit. Like that would be an example of a non simple tax return, if that comparison helps clarify what I believe the simple tax return would be.

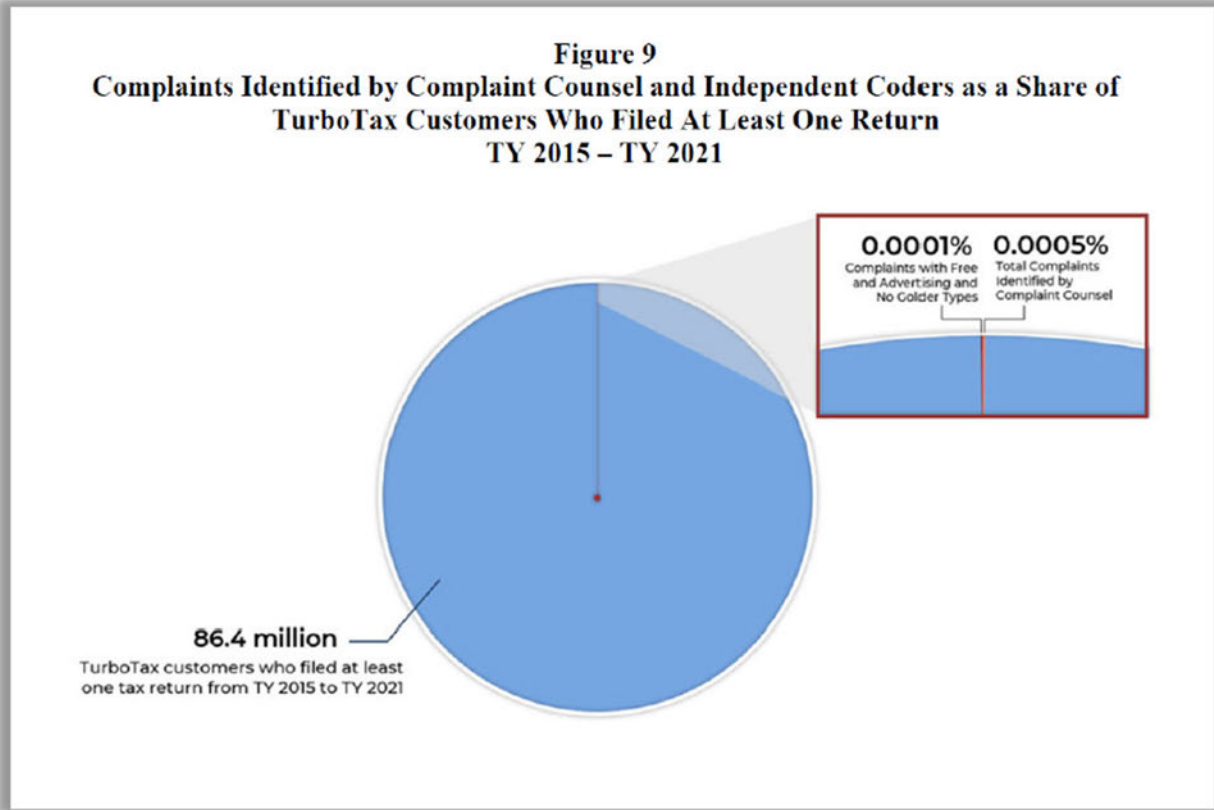
Q. Reading simple tax return, would you understand that some people do not have simple tax returns?

A. Yes.

(GX136 (Schulte (Consumer) Dep.) at 70). Rather than showing that Mr. Schulte knew the claim was qualified and understood the qualifications at the time he received the offer, Intuit’s counsel established that after reading the “for simple tax returns,” language, Mr. Schulte agreed he saw it and understood you couldn’t be “some huge investor to qualify.” (GX136 (Schulte (Consumer) Dep.) at 70)—hardly Intuit’s definition of a “simple tax return.”

636. Professor Golder, through independent coders who were blind to the hypotheses in this case, analyzed the complaints identified by Complaint Counsel and found that only 120 were

potentially relevant to Complaint Counsel’s allegations in this case. (Golder (Intuit) Tr. 1199-1201, 1207-1208; *see also* RX1018 (Golder Expert Report) ¶¶71-82). This represents only 0.0001% of the TurboTax customers during the six-year period of complaints. (Golder (Intuit) Tr. 1207-1208; RX1018 (Golder Expert Report) ¶¶68, 82). A chart depicting the 120 potentially relevant complaints compared to the total number of TurboTax customers who filed at least one return from Tax Year 2015 to Tax Year 2021 is provided below. (RX1018 (Golder Expert Report) ¶82, fig. 9).



Response to Finding No. 636:

Complaint Counsel disputes this Proposed Finding. Dr. Golder both overestimates the denominator and underestimates the numerator, rendering his Figure 9 largely meaningless.

First, with respect to the denominator, Professor Golder does not restrict his universe of tax filers to the relevant set of consumers: those who thought they could file for free with TurboTax but were ineligible to do so (and nor could he, as an unknown number of deceived customers may have opted out of ever filing with TurboTax once they learned that they could not file for free). (GX749 (Novemsky Rebuttal Report) ¶ 218).

Second, Professor Golder’s numerator is almost surely too small. As an initial matter, in order to complain, consumers would need to be aware that they had been deceived and would also have to attribute the deception to TurboTax rather than themselves. (FF-726—FF-729; *see* FF-841—FF-842). And consumers would have to believe that Intuit deceived them on purpose in order to be motivated to complain. (FF-730). Moreover, consumer face barrier to complaining. For example, consumers would have to decide that making a complaint was worth the time and effort, and would have to know where to complain. (FF-731—FF-732). “Consumers may not know to complain to the Better Business Bureau or other law enforcement agencies like the FTC. (GX749 (Novemsky Rebuttal Report ¶ 218 n. 328). The most reliable and likely place consumers may complain about Intuit is Intuit itself. (FF-724). Moreover, Professor Golder’s review of Sentinel complaints was fundamentally flawed, as he excluded many complaints from consumers who could very well have been deceived by Intuit advertisements. For example, Professor Golder excluded complaints from consumers who thought they could file for free because of their low income. (RX1017 (Golder Expert Report) ¶ 76). But as the perception survey shows, many consumers have a misunderstanding about whether they can use TurboTax for free because they think “simple returns” is related to the amount of income they have. (*See* GX303 (Novemsky Expert Report) ¶ 88).

637. However counted, the number of complaints is microscopic compared to the number of views, impressions, and clicks that the challenged ads received: Two TurboTax Free Edition YouTube ads alone received over 15 million views in total. (Shiller (FTC) Tr. 272). Likewise, in Tax Years 2020 and 2021, TurboTax Free Edition ads generated over 15 *billion* impressions and were clicked on over 130 million times. (Baburek (FTC) Tr. 338). Over that same period, only 44 Sentinel complaints were filed. (Baburek (FTC) Tr. 338; Complaint Counsel’s Pretrial Brief at 25 (Feb. 17, 2023)). Even considering only the advertisement clicks from Tax Years 2020 and 2021, and ignoring consumers who would have seen ads through other mediums in other years, the full set of 228 complaints amounts to just 0.000175% of those who clicked on a TurboTax ad.

Response to Finding No. 637:

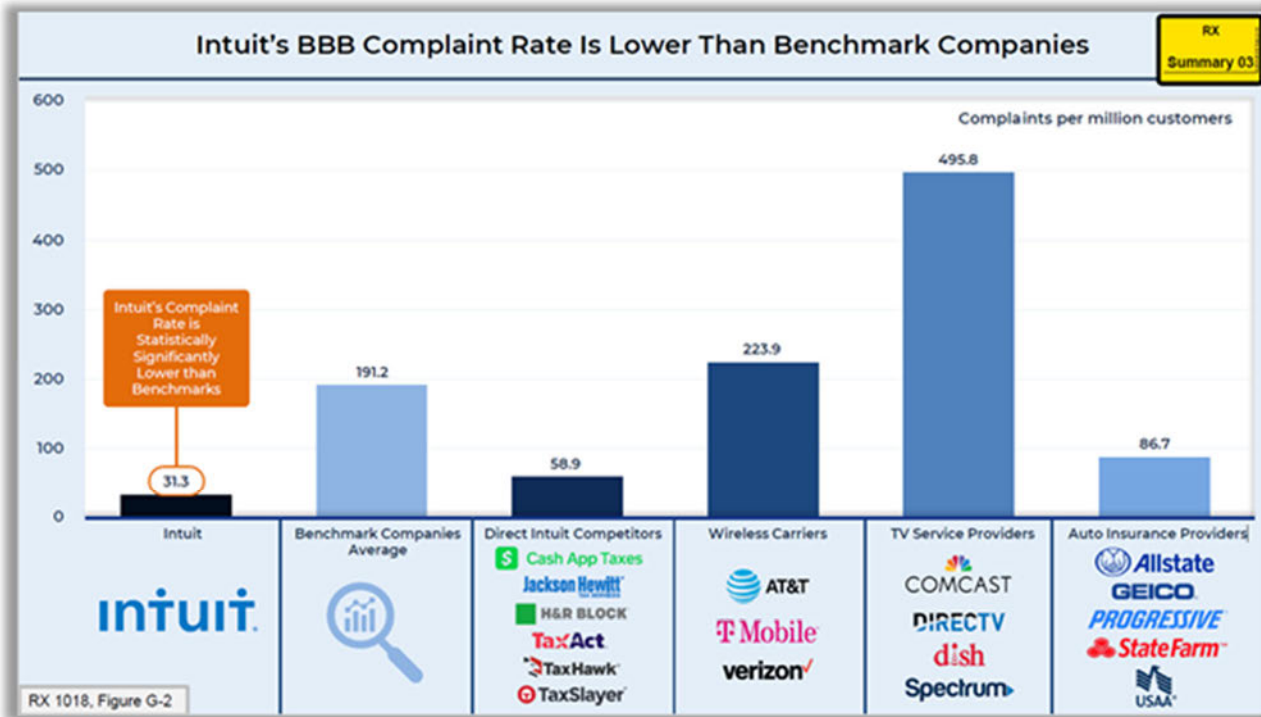
Complaint Counsel disputes the portion of the Proposed Finding “However counted, the number of complaints is microscopic compared to the number of views,

impressions, and clicks that the challenged ads received,” as this rhetoric is not supported by the evidentiary record. For example, there is no expert report or testimony on which this opinion is based. This portion of the finding should therefore be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel does not dispute that “Two TurboTax Free Edition YouTube ads alone received over 15 million views in total” or in Tax Years 2020 and 2021, TurboTax Free Edition ads generated over 15 billion impressions and were clicked on over 130 million times.”

Complaint Counsel disputes that “Over that same period [Tax Years 2020 and 2021], only 44 Sentinel complaints were filed.” 43 relevant Sentinel complaints were recorded between January 1, 2021, and March 28, 2022, and 26 were recorded between November 1, 2021, and March 28, 2022. (FF-677).

638. Intuit’s rate of BBB complaints (31.3 complaints per million customers) is also statistically significantly less than the complaint rate of 18 benchmark companies (including TurboTax competitors H&R Block, TaxAct, TaxSlayer, FreeTaxUSA, and Cash App Taxes), who incurred an average of 191.2 complaints per million customers. (Golder (Intuit) Tr. 1211; RX1018 (Golder Expert Report) ¶¶86-89, fig. 10, App’x G, fig. G-2). A chart depicting TurboTax’s complaint rate compared to benchmark companies is provided below. (RX Summary 3 (Intuit); RX1018 (Golder Expert Report) ¶89, fig. 10, App’x G, fig. G-2).



Response to Finding No. 638:

Complaint Counsel disputes the Proposed Finding.

In comparing Intuit’s complaint rate against the complaint rate of other companies, Professor Golder included the portfolio of Intuit’s products, like Mint and QuickBooks, which inappropriately dilutes and masks any effect of complaints related to TurboTax. (FF-734). Additionally, comparing complaint rates from companies in different industries, for example wireless carriers, TV service providers, and auto insurance providers, is not informative about whether there was any deception related to TurboTax. (FF-735).

639. If, as Complaint Counsel contended, Intuit engaged in a multi-year, multi-channel, multi-modal scheme to deceive customers, the number of consumer complaints would be many orders of magnitude greater. (Golder (Intuit) Tr. 1211; RX1018 (Golder Expert Report) ¶89, fig. 10).

Response to Finding No. 639:

Complaint Counsel disputes this Proposed Finding. There is no credible evidence in the record as to what the magnitude of consumer complaints actually is. In his complaint analysis, Professor Golder only considered complaints in Consumer Sentinel placed into evidence by

Complaint Counsel or that were made to the Better Business Bureau. (FF-722). The most reliable and likely place consumers may complain about Intuit, however, is Intuit itself. (FF-724). Still, outside of his aggregate consideration of customer reviews, when considering key words related to complaints made to the Better Business Bureau, that analysis showed that at Intuit had the highest complaint rates in all but one category as compared to its competitors (FF-736), Professor Golder did not consider complaints made directly to Intuit. (FF-723). Professor Golder's count, then, is almost surely an undercount. (*See* GX749 (Novemsky Rebuttal Report) ¶217).

More fundamentally, however, an absence of consumer complaints is not surprising or particularly informative. (*See* FF-725). There are several reasons that consumers who were deceived by a company would not complain; for example, consumers would need to be aware that they had been deceived and would also have to attribute the deception to TurboTax rather than themselves, even though consumers may attribute the difference between the price they expected and the price they paid to their own tax situation, not Intuit's deception, particularly considering the language used by Intuit on its hard stop screens. (FF-726—FF-729; *see* FF-841—FF-842). Consumers would also have to believe that Intuit deceived them on purpose in order to be motivated to complain. (FF-730). Consumers would also have to decide that making a complaint was worth the time and effort, and would have to know where to complain. (FF-731—FF-732)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (FF-733).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their

beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694).

640. Intuit’s rate of BBB complaints is similarly much less when compared to well-known instances of recent deception, which yielded “substantially higher” complaint rates. (Golder (Intuit) Tr. 1212-1213; RX1018 (Golder Expert Report) ¶¶89-90, fig. 10). For example, Chime Financial—which has faced public allegations of defrauding customers—has a rate of 589.8 BBB complaints per million customers, compared to Intuit’s rate of 31.3. (Golder (Intuit) Tr. 1212-1213; RX1018 (Golder Expert Report) ¶90).

Response to Finding No. 640:

Complaint Counsel disputes the Proposed Finding to the extent it suggests that a comparison between complaint rates across various frauds is relevant or informative here. “[R]esearch has shown that consumers self-select to complain in ways that are not well understood, lower propensities to complain can be present along demographic lines, and that consumers’ willingness to complain to government entities can vary as well, suggesting that any set of complaints, and particularly a set of complaints collected by a government entity, may be unreflective of consumer sentiments to an unknown degree.” (GX749 (Novemsky Rebuttal Report ¶ 217).

641. The complaint rate here also pales in comparison to that found in other FTC consumer protection cases. (RX1552 (FTC) at 171; Yoeli (FTC) Tr. 1750-1751). An article cited by Dr. Yoeli and written by Devesh Raval while working at the FTC’s Bureau of Economics calculates the complaint rate for nine FTC consumer-protection cases by comparing Sentinel Network complaints to the population of consumers allegedly harmed by the unlawful conduct. (RX1552 (FTC) at 168-171; GX743 (Yoeli Expert Report) ¶130; Yoeli (FTC) Tr. 1746-1749). The article, entitled “Whose Voice Do We Hear in the Marketplace? Evidence from Consumer Complaining Behavior,” calculated the rate for those nine cases as between 0.35 and 143.8 complaints per 1,000 victims. (RX1552 (Intuit) at 171; Yoeli (FTC) Tr. 1750).

Response to Finding No. 641:

Complaint Counsel disputes the Proposed Finding to the extent it suggests that a comparison between complaint rates across various frauds is relevant or informative here. “[R]esearch has shown that consumers self-select to complain in ways that are not well understood, lower propensities to complain can be present along demographic lines, and that consumers’ willingness to complain to government entities can vary as well, suggesting that any

set of complaints, and particularly a set of complaints collected by a government entity, may be unreflective of consumer sentiments to an unknown degree.” (GX749 (Novemsky Rebuttal Report ¶ 217).

In fact, Dr. Yoeli described one example of how the rate of consumer complaints (besides being vastly undercounted, as explained, e.g., in RFF-636—RFF-639) could be depressed by Intuit’s own conduct. For example, by framing its initial promise through the use of industry-specific jargon which can be explained in the course of the upsell, for example having promised free tax preparation of “simple” returns to a consumer base that is largely unequipped to know intuitively what that means, Intuit could leverage the customer’s ignorance to create uncertainty about whether there was a deception or merely a misunderstanding. (FF-841—FF-842).

642. As Dr. Yoeli conceded, if one accepted Professor Novemsky’s assertion that a little more than half of TurboTax’s 24 million paying customers each year were deceived, Intuit’s complaint rate per 1,000 customers over the course of seven years would be 0.0025, far below the *lowest* number of complaints in any of the cases cited in Dr. Raval’s analysis. (Yoeli (FTC) Tr. 1750-1751; *see also* Novemsky (FTC) Tr. 420-421).

Response to Finding No. 642:

Complaint Counsel disputes this Proposed Finding, which is not supported by the testimony and which mischaracterizes, and over simplifies, of Professor Novemsky’s opinions, which are laid out in detail in his report. Specifically, there is no support for the phrase: . The phrase “if one accepted Professor Novemsky’s assertion that a little more than half of TurboTax’s 24 million paying customers each year were deceived.” Instead, at the cited pages Professor Novemsky testified in relevant part as follows:

Q. And that leaves us with 119 million tax filers, right?

A. Sounds about right.

Q. And according to you, 52.7 percent of them had a misimpression, right?

A. Roughly speaking, yes.

Q. Okay. So 52.7 percent of 119 million, that's about 60 million people a year that, according to you, had a misimpression, right?

A. I mean, you would subtract out a few other groups. People who use an accountant, people who would never consider using online software. So there are some other exclusions, but you may be in the right ballpark. I don't know how big each of those exclusions is, I would have to go back to the data.

Q. So roughly speaking, what's your estimate as to how many people a year in the United States had a misimpression about the filing of TurboTax based on the results of your study?

A. It's clearly in the tens of millions. I would say -- you know, without any work, I would say somewhere between 30 and 55 million people. I don't have a more exact number at the top of my head.

(Novemsky (FTC) Tr. 420-421). Because Professor Novemsky never acceded to Intuit's framing that his findings can simply be applied in a rote way to "paid filers," and never provides the 24 million number, the rest of this Proposed Finding applying additional arithmetic is also meaningless.

643. If one accepted Professor Novemsky's assertion that a little more than half of the approximately 100 million U.S. taxpayers who do not qualify to file for TurboTax's free SKUs were deceived each year, Intuit's complaint rate per 1,000 customers over seven years would be 0.0006 (i.e., 228 complaints out of 368.9 million supposed instances of deception). (Novemsky (FTC) Tr. 420-421).

Response to Finding No. 643:

Complaint Counsel disputes this fact. While Complaint Counsel does not dispute Intuit's arithmetic in Intuit's hypothetical world where the only complaints that matter for determining a rate of complaints are those residing in Sentinel and identified by Complaint Counsel, it disputes this Proposed Finding to the extent it suggests or implies that Intuit's assertion of what the complaint rate is accurate, relevant or probative. *See* RFF-636—RFF-641. The most likely place

a consumer would complain about Intuit is to Intuit itself. (FF-724). And no Intuit expert has looked very hard for those complaints.

644. And even if one took Professor Novemsky's most conservative estimate that 30 million total consumers were deceived, Intuit's complaint rate per 1,000 consumers would be .0076, still far lower than the lowest rate cited in Dr. Raval's analysis. (Novemsky (FTC) Tr. 420-421; RX1552 (Intuit) at 171).

Response to Finding No. 644:

Complaint Counsel disputes this fact. While Complaint Counsel does not dispute Intuit's arithmetic in Intuit's hypothetical world where the only complaints that matter for determining a rate of complaints are those residing in Sentinel and identified by Complaint Counsel, it disputes this Proposed Finding to the extent it suggests or implies that Intuit's assertion of what the complaint rate is accurate, relevant or probative. *See* RFF-636—RFF-641. The most likely place a consumer would complain about Intuit is to Intuit itself. (FF-724). And no Intuit expert has looked very hard for those complaints.

645. Dr. Yoeli conceded that based on his presumption that at least 100 million consumers could have been deceived, Intuit's complaint rate would be so low that he "can't keep track of the zeros." (Yoeli (FTC) Tr. 1752).

Response to Finding No. 645:

Complaint Counsel disputes this fact. While Complaint Counsel does not dispute Intuit's arithmetic in Intuit's hypothetical world where the only complaints that matter for determining a rate of complaints are those residing in Sentinel and identified by Complaint Counsel, it disputes this Proposed Finding to the extent it suggests or implies that Intuit's assertion of what the complaint rate is accurate, relevant or probative. *See* RFF-636—RFF-641. The most likely place a consumer would complain about Intuit is to Intuit itself. (FF-724). And no Intuit expert has looked very hard for those complaints.

646. That Intuit's complaint rate in this case is substantially lower than the rate in other FTC consumer-protection cases is strong evidence that consumers were not misled or deceived by Intuit's free TurboTax advertising. (Golder (Intuit) Tr. 1184-1197, 1208-1213; RX1018 (Golder Expert Report) ¶¶21, 68-93; *see also* Yoeli (FTC) Tr. 1749-1752; RX1552 (FTC) at 4).

Response to Finding No. 646:

Complaint Counsel disputes this fact. While Complaint Counsel does not dispute Intuit's arithmetic in Intuit's hypothetical world where the only complaints that matter for determining a rate of complaints are those residing in Sentinel and identified by Complaint Counsel, it disputes this Proposed Finding to the extent it suggests or implies that Intuit's assertion of what the complaint rate is accurate, relevant or probative. *See* RFF-636—RFF-641. The most likely place a consumer would complain about Intuit is to Intuit itself. (FF-724). And no Intuit expert has looked very hard for those complaints.

647. The Court agrees with Intuit's Vice President Jack Rubin, who testified that "if Intuit had run a multiyear, multi-ad, multichannel, multimodal, integrated marketing campaign that was deceptive," it would "be a nightmare" for Intuit because it "would be overwhelmed with complaints, in every channel," and the company "would go out of business trying to pay to handle all of [them]," neither of which has happened. (Rubin (Intuit) Tr. 1647-1649).

Response to Finding No. 647:

Complaint Counsel disputes this Proposed Finding. There is no support that "The Court agrees" with anything Mr. Rubin said. Instead, those cited pages reflect Mr. Rubin's testimony, and the only words spoken by Judge Chappell during the relevant exchange are "Any further cross?" and "I will allow that question." (Chappell (ALJ) Tr. 1648-1649). Intuit, then, appears to fabricate the opinion of the Court.

D. TurboTax Data Concerning Consumers' Experiences Reflect That Reasonable Consumers Were Not Deceived

648. Other metrics of consumer feedback beyond complaints further underscore Complaint Counsel's failure to prove its case.

Response to Finding No. 648:

Complaint Counsel disputes the Proposed Finding, which can hardly be read as a "fact." Beyond improperly calling for a legal conclusion, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.")

649. If Complaint Counsel's deception theory were true, consumers who felt deceived by ads for free TurboTax SKUs into believing that all TurboTax products were free or that TurboTax was free for them when it was not would be less likely to use TurboTax again. (Johnson (Intuit) Tr. 629; Golder (Intuit) Tr. 1057, 1059-1060, 1189-1190, 1213-1214; RX1018 (Golder Expert Report) ¶¶20, 47-51; Yoeli (FTC) Tr. 1738).

Response to Finding No. 649:

Complaint Counsel disputes this proposed finding to the extent it suggests or implies that Intuit's retention rate is evidence of a lack of deception. Retention rates are not useful indicators of an absence of deception. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 205, 208-210; Novemsky (Complaint Counsel) Tr. 1775-1776; *see* RFF-665). In fact, a strategy of consumer retention not only does preclude deception, but it can even increase the benefit from deception. (GX743 (Yoeli Expert Report) ¶70).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694).

650. However, the retention rate for users of paid TurboTax SKUs (83%) is higher than that for users of free products, even though those would be the consumers necessarily deceived under Complaint Counsel's theory. (RX57-A (Intuit) at 2; Johnson (Intuit) Tr. 628; RX36 (Intuit); RX50 (Intuit) at 8; RX795 (Intuit) at 9; RX1018 (Golder Expert Report) ¶¶47-50; GX152 (Johnson (Intuit) IHT) at 133).

Response to Finding No. 650:

Complaint Counsel disputes this Proposed Finding, as "though those would be the consumers necessarily deceived under Complaint Counsel's theory" mischaracterizes contentions or arguments made by Complaint Counsel. Complaint Counsel further disputes this proposed finding to the extent it suggests or implies that Intuit's retention rate is evidence of a lack of deception. Retention rates are not useful indicators of an absence of deception. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 205, 208-210; Novemsky (Complaint Counsel) Tr. 1775-

1776; *see* RFF-665). In fact, a strategy of consumer retention not only does preclude deception, but it can even increase the benefit from deception. (GX743 (Yoeli Expert Report) ¶70).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694).

651. TurboTax's high paid retention rate demonstrates that the price these customers are paying is consistent with their expectations, and that there is no unfulfilled expectation among TurboTax customers about their ability to file for free—i.e., those customers are not deceived. (Johnson (Intuit) Tr. 628-629; RX1018 (Golder Expert Report) ¶67).

Response to Finding No. 651:

Complaint Counsel disputes this Proposed Finding. Retention rates are not useful indicators of an absence of deception. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 205, 208-210; Novemsky (Complaint Counsel) Tr. 1775-1776; *see* RFF-665). In fact, a strategy of consumer retention not only does preclude deception, but it can even increase the benefit from deception. (GX743 (Yoeli Expert Report) ¶70).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Peter Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694).

652. Still other routinely tracked consumer-feedback metrics, such as product recommendation scores, and customer ratings and reviews, similarly reflect that consumers' experiences with TurboTax met or exceeded their expectations, and they derived value from TurboTax SKUs. (Johnson (Intuit) Tr. 559-562; Rubin (Intuit) Tr. 1556-1557; RX1018 (Golder Expert Report) ¶¶36, 43-46, 48; GX150 (Goode (Intuit) IHT) at 120-121, 130-131). If consumers were deceived, one would expect widespread consumer frustration to be reflected in

those metrics. (Rubin (Intuit) Tr. 1530-1531, 1556-1557, 1648; Golder (Intuit) Tr. 1057-1058, 1193-1194, 1212-1213; RX1018 (Golder Expert Report) ¶¶31-32, 36-37, 50, 228).

Response to Finding No. 652:

Complaint Counsel disputes this Proposed Fact, as evidence of customer satisfaction, such as “product recommendation scores, and customer ratings and reviews,” is not admissible to prove a lack of deception.

It is well established that evidence of customer satisfaction is not relevant to determining whether challenged advertising claims are deceptive. Because proof of actual deception is not necessary for purposes of Section 5 liability, evidence that some consumers were not injured or were satisfied with services received is not a defense to liability. Accordingly, evidence of such satisfaction may be excluded as irrelevant. Moreover, evidence of general consumer satisfaction does not rebut evidence of deception. Although evidence of actual deception is not required to prove liability under Section 5, such proof is highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances. However, consumer satisfaction does not necessarily indicate the absence of deception. As stated in the Commission's recent opinion denying Complaint Counsel's Motion for Summary Decision, “the fact that most customers who chose to use a TurboTax product were generally happy with that product does not render non-deceptive a particular ad that drove people to the TurboTax website.”

In re Intuit, Inc., 2023 WL 2609450, at *8–9 (F.T.C. Mar. 7, 2023) (order granting Complaint Counsel's Motion to Preclude Admission of Evidence of Customer Satisfaction) (Chappell, C.A.L.J.) (citations omitted) (quoting *In re Intuit Inc.*, 2023 WL 1778377, at *12 (F.T.C. Jan. 31, 2023) (Commission order denying summary decision)).

Assuming, *arguendo*, that this evidence is admissible, it is not useful. “Consumer-feedback metrics, such as product recommendation scores, and customer ratings and reviews” are not reliable metrics of deception. Taking customer reviews, for example, it is possible for a customer to leave no review or a good review and still have been deceived into believing that TurboTax was free for them. (See GX743 (Yoeli Expert Report) ¶129). In fact, the customer reviews that Intuit relies are only come for those customers that *completed* filing their taxes with TurboTax, which excludes millions of consumers—precisely those millions who would be most likely to be dissatisfied with TurboTax. (See GX743 (Yoeli Expert Report) ¶129). Moreover, Mr.

Johnson testified on cross examination that he couldn't recall reviewing, or instructing employees who worked for him to review, Intuit's customer reviews for feedback regarding its free advertising (Johnson (Intuit) Tr. at 668). Those reviews, however, demonstrate that Intuit received a significant volume of negative customer feedback regarding its free advertising. (FF-630—FF-634; FF-630—FF-634; FF-642—FF-662).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694).

653. During Tax Year 2021, hundreds of thousands of customer reviews of TurboTax's products available on the TurboTax website generated average ratings between 4.4 and 4.9 out of 5 stars. (RX1532 (Intuit); Rubin (Intuit) Tr. 1504, 1571; Johnson (Intuit) Tr. 667-668, 678-679; *see also* RX1018 (Golder Expert Report) ¶44, fig. 3). One would not expect to see any of this favorable customer feedback if Intuit's advertising was deceiving customers about their ability to file for free with TurboTax. (Johnson (Intuit) Tr. 559-562, 574-576; Rubin (Intuit) Tr. 1556-1557; RX1018 (Golder Expert Report) ¶¶44-46, 48).

Response to Finding No. 653:

Complaint Counsel disputes that "One would not expect to see any of this favorable customer feedback if Intuit's advertising was deceiving customers about their ability to file for free with TurboTax." As an initial matter, this Proposed Finding should be struck because evidence of customer satisfaction is not admissible to prove a lack of deception.

It is well established that evidence of customer satisfaction is not relevant to determining whether challenged advertising claims are deceptive. Because proof of actual deception is not necessary for purposes of Section 5 liability, evidence that some consumers were not injured or were satisfied with services received is not a defense to liability. Accordingly, evidence of such satisfaction may be excluded as irrelevant. Moreover, evidence of general consumer satisfaction does not rebut evidence of deception. Although evidence of actual deception is not required to prove liability under Section 5, such proof is highly probative to show that a practice is likely to mislead consumers acting reasonably under the

circumstances. However, consumer satisfaction does not necessarily indicate the absence of deception. As stated in the Commission's recent opinion denying Complaint Counsel's Motion for Summary Decision, “the fact that most customers who chose to use a TurboTax product were generally happy with that product does not render non-deceptive a particular ad that drove people to the TurboTax website.”

In re Intuit, Inc., 2023 WL 2609450, at *8–9 (F.T.C. Mar. 7, 2023) (order granting Complaint Counsel's Motion to Preclude Admission of Evidence of Customer Satisfaction) (Chappell, C.A.L.J.) (citations omitted) (quoting *In re Intuit Inc.*, 2023 WL 1778377, at *12 (F.T.C. Jan. 31, 2023) (Commission order denying summary decision)).

Assuming, *arguendo*, that this evidence is admissible, it is not useful. It is possible for a customer to leave no review or a good review and still have been deceived into believing that TurboTax was free for them. (*See* GX743 (Yoeli Expert Report) ¶129). In fact, the customer reviews that Intuit relies are only come for those customers that *completed* filing their taxes with TurboTax, which excludes millions of consumers—precisely those millions who would be most likely to be dissatisfied with TurboTax. (*See* GX743 (Yoeli Expert Report) ¶129). Moreover, Mr. Johnson testified on cross examination that he couldn't recall reviewing, or instructing employees who worked for him to review, Intuit's customer reviews for feedback regarding its free advertising (Johnson (Intuit) Tr. at 668). Those reviews, however, demonstrate that Intuit received a significant volume of negative customer feedback regarding its free advertising. (FF-630—FF-634; FF-630—FF-634; FF-642—FF-662).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694).

654. TurboTax's consistently high customer ratings and positive reviews suggest that TurboTax SKUs are meeting or exceeding customer expectations regarding the price of TurboTax. (Johnson (Intuit) Tr. 559-562; Rubin (Intuit) Tr. 1556-1557; RX1018 (Golder Expert

Report) ¶¶44-46, 48). The volume of positive reviews for TurboTax was notable compared to the few cherry-picked examples Complaint Counsel provided of negative reviews. (*Compare* GX475, *with* Johnson (Intuit) Tr. 669-671; Deal (Intuit) Tr. 1418-1419, 1422-1425). At trial, Complaint Counsel notably highlighted a single negative review when the surrounding 20 reviews visible on the screen were nearly all positive. (Johnson (Intuit) Tr. 669-671; GX475). Complaint Counsel cannot meet their burden of proof by pointing to the proverbial needle in a haystack.

Response to Finding No. 654:

Complaint Counsel disputes this Proposed Finding, which should be struck because evidence of customer satisfaction is not admissible to prove a lack of deception.

It is well established that evidence of customer satisfaction is not relevant to determining whether challenged advertising claims are deceptive. Because proof of actual deception is not necessary for purposes of Section 5 liability, evidence that some consumers were not injured or were satisfied with services received is not a defense to liability. Accordingly, evidence of such satisfaction may be excluded as irrelevant. Moreover, evidence of general consumer satisfaction does not rebut evidence of deception. Although evidence of actual deception is not required to prove liability under Section 5, such proof is highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances. However, consumer satisfaction does not necessarily indicate the absence of deception. As stated in the Commission's recent opinion denying Complaint Counsel's Motion for Summary Decision, "the fact that most customers who chose to use a TurboTax product were generally happy with that product does not render non-deceptive a particular ad that drove people to the TurboTax website."

In re Intuit, Inc., 2023 WL 2609450, at *8–9 (F.T.C. Mar. 7, 2023) (order granting Complaint Counsel's Motion to Preclude Admission of Evidence of Customer Satisfaction) (Chappell, C.A.L.J.) (citations omitted) (quoting *In re Intuit Inc.*, 2023 WL 1778377, at *12 (F.T.C. Jan. 31, 2023) (Commission order denying summary decision)).

Complaint Counsel additionally disputes this Proposed Finding to the extent that it mischaracterizes the evidentiary record. The Finding alleges that "at trial, Complaint Counsel notably highlighted a single negative review when the surrounding 20 reviews visible on the screen were nearly all positive." Instead, Complaint Counsel walked Mr. Bruce Deal through numerous examples of negative customer reviews taken from Intuit's customer ratings, while the

screen showed a demonstrative filled with negative customer reviews. (*See, e.g.*, Deal (Intuit) Tr. 1446-1453; 1480-1484; GX Demonstrative 4, GX Demonstrative 6).

Assuming, *arguendo*, that this evidence is admissible and accurate, it is not useful. It is possible for a customer to leave no review or a good review and still have been deceived into believing that TurboTax was free for them. (*See* GX743 (Yoeli Expert Report) ¶129). In fact, the customer reviews that Intuit relies are only come for those customers that *completed* filing their taxes with TurboTax, which excludes millions of consumers—precisely those millions who would be most likely to be dissatisfied with TurboTax. (*See* GX743 (Yoeli Expert Report) ¶129). Moreover, Mr. Johnson testified on cross examination that he couldn't recall reviewing, or instructing employees who worked for him to review, Intuit's customer reviews for feedback regarding its free advertising (Johnson (Intuit) Tr. at 668). Those reviews, however, demonstrate that Intuit received a significant volume of negative customer feedback regarding its free advertising. (FF-630—FF-634; FF-630—FF-634; FF-642—FF-662).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Professor Golder who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Professor Golder (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694).

655. Another metric that provides strong evidence that customers are not deceived by Intuit's advertising for free TurboTax SKUs is its customer-abandonment rates, which measure the rate at which TurboTax customers do not complete their tax returns after they start preparing them with TurboTax. (Rubin (Intuit) Tr. 1586-1587). Complaint Counsel have tried to suggest that consumers starting but not finishing using TurboTax Free Edition is evidence of deception. (Evans (FTC) Tr. 58). But that argument is not supported by the evidence.

Response to Finding No. 655:

Complaint Counsel objects to this Proposed Finding to the extent that it does not set forth a factual assertion supported by the evidentiary records, but instead mischaracterizes contentions or arguments made by Complaint Counsel.

Complaint Counsel further disputes this Proposed Finding, which is premised on the faulty idea that Intuit’s customer-abandonment rates “provides strong evidence that customers are not deceived by Intuit’s advertising for free TurboTax SKUs.” Mr. Rubin’s unsubstantiated speculation regarding what he would expect the abandonment rate to be if Intuit’s free advertising was deceptive is hardly credible evidence. In fact, even a consumer who has been deceived may not abandon TurboTax, for example if the consumer lacks certainty about whether they were deceived (FF-841; *see also* RX1345 (Novemsky Expert Report) ¶207) or because of status quo bias. (RX1345 (Novemsky Expert Report) ¶205). “Retention rates for tax providers should not be taken at face value as evidence of customer satisfaction or lack of deception.” (RX1345 (Novemsky Expert Report) ¶206). As Dr. Yoeli explained,

The fact that consumers can defect does not inform us as to the advantage gained by Intuit prior to this defection, as a consequence of the fact that the consumer has ‘sunk’ time and energy into entering their taxes into TurboTax, and, in deciding to switch, is comparing a product for which they would not have to put in this time and energy again (TurboTax) to one in which the consumer would need to expend additional time and energy to, for example, create an account, familiarize themselves with the product, and either manually reenter their information or transfer it.

(GX743 (Yoeli Expert Report) ¶ 81).

As two TurboTax customers expressed: “I would prefer to change companies, but stick with the devil I know” and “[s]ince they know me and have been doing my taxes for years, I just stick with them.” (RX38-A (Intuit) at 22-23).

656. TurboTax Free Edition has an abandonment rate of 22%, and TurboTax’s paid products also have an abandonment rate of 22%. (Rubin (Intuit) Tr. 1587).

Response to Finding No. 656:

Complaint Counsel has no specific response.

657. The fact that the abandonment rate for TurboTax Free Edition is the same as the rate for all other TurboTax SKUs demonstrates that consumers are abandoning TurboTax for a reason (or reasons) common to all products—such as losing confidence in their ability to file their return and cross-shopping—not because they expect to file for free but are then informed that they must pay to file with TurboTax, which is a reason specific to Intuit’s free products. (Rubin (Intuit) Tr. 1585-1588, 1610-1611; RX52 (Intuit) at 4; *see also* RX1018 (Golder Expert

Report) ¶59). If consumers were abandoning TurboTax Free Edition because they felt deceived, the product's abandonment rate would be higher than that of its paid products. (Rubin (Intuit) Tr. 1587-1588, 1610-1611; Johnson (Intuit) Tr. 575, 629).

Response to Finding No. 657:

Complaint Counsel disputes this Proposed Finding. Retention rates are not useful indicators of an absence of deception. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 205, 208-210; Novemsky (Complaint Counsel) Tr. 1775-1776; *see* RFF-665). In fact, a strategy of consumer retention not only does preclude deception, but it can even increase the benefit from deception. (GX743 (Yoeli Expert Report) ¶70).

658. The *reasons* consumers typically abandon confirm this. Consumers typically abandon TurboTax because they lose confidence in their ability to file on their own, because they are only using the software to double-check what their outside tax provider told them, and/or because they are comparing different tax-preparation products. (Rubin (Intuit) Tr. 1585-1588, 1610). None of those reasons for abandonment is specific to TurboTax's free products—and none indicates deception. (Rubin (Intuit) Tr. 1585-1588).

Response to Finding No. 658:

Complaint Counsel disputes this Proposed Finding. Intuit's characterization of the "typical" consumers abandon TurboTax ignores the evidence in this case. For example,

(FF-621). Intuit tracked that in 2019, among consumers who left TurboTax,

(FF-622). A different 2019 study noted,

" (FF-623).

659. Intuit's data show that, each year, . (Rubin (Intuit) Tr. 1618-1620; RX765-A (Intuit) at 5; RX57-A (Intuit) at 2). In Tax Year 2018, for example, . (Rubin (Intuit) Tr. 1619; RX765-A (Intuit) at 5). And in Tax Year 2020,) did so. (RX57-A (Intuit) at 2; Rubin (Intuit) Tr. 1620).

Response to Finding No. 659:

Complaint Counsel has no specific response.

660. The fact that [REDACTED] indicates that Intuit is successful in its efforts to reach taxpayers who qualify for that product and that there is no deception from the challenged ads. (Rubin (Intuit) Tr. 1620-1621). It certainly undercuts Complaint Counsel’s argument that it is appropriate to examine the percentage of all taxpayers without simple tax returns and conclude from that fact alone that the ads are deceptive.

Response to Finding No. 660:

Complaint Counsel has no specific response to [REDACTED]
[REDACTED] Complaint Counsel otherwise disputes this Proposed Finding, which calls for a legal conclusion without adequate support, makes gross generalizations about the record, does not cite to any portion of the record, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

661. Moreover, data show that most consumers—[REDACTED] between Tax Years 2014 and 2021—start and finish in the same SKU. (RX820 (Intuit); RX821 (Intuit); RX1018 (Golder Expert Report) fig. 37; *see also* Rubin (Intuit) Tr. 1552-1553 (only 14% of TurboTax customers saw an upgrade screen in Tax Year 2021)).

Response to Finding No. 661:

Complaint Counsel has no specific response.

662. The high rate of consumers who start and finish in the same product refutes Complaint Counsel’s notion that consumers are being deceived into upgrading to paid TurboTax products. (RX260 (FTC) ¶¶6, 59). These percentages are especially impressive given that third-party review websites like the New York Times’ Wirecutter recommend that consumers “should start with Free Edition” even if they know they do not qualify. (RX505 (Intuit) at 3; RX80 (Intuit) at 2; RX1497 (Intuit) at 2).

Response to Finding No. 662:

Complaint Counsel disputes this Proposed Finding.

The only evidence Intuit cites to support its contention that “[t]he high rate of consumers who start and finish in the same product refutes Complaint Counsel’s notion that consumers are being deceived into upgrading to paid TurboTax products,” is the Complaint in this case. Because there is citation or support for this purported fact, this Proposed Finding can be disregarded.

Complaint Counsel additionally disputes that the retention rates are “especially impressive given that third- party review websites like the New York Times’ Wirecutter recommend that consumers ‘should start with Free Edition’ even if they know they do not qualify.” The only citations that Intuit provides—RX505, RX80, and RX1497—are three versions of the Wirecutter article itself (*see* JX-2 (providing descriptions of RX505, RX80, and RX1497), that hardly stand for the proposition that Intuit rates of consumers who start and finish in the same product are “especially impressive.”

663. The absence of widespread deception is also borne out by Intuit’s customer-level data. When economist Bruce Deal examined the actual behavior of those consumers most susceptible to the deception alleged by Complaint Counsel—i.e., new TurboTax Free Edition customers who found the product through a TurboTax advertisement, paid to file, and did not have prior experience with the product evidencing either familiarity with Intuit’s paid offerings or a preference inconsistent with an expectation of filing for free—the customer-level data showed no direct evidence that consumers believed they had been deceived. (Deal (Intuit) Tr. 1294, 1296, 1322, 1324-1325). In fact, Mr. Deal concluded that the customer-level data for only 510 TurboTax customers—out of over 55 million Tax Year 2021 customers analyzed—were even potentially consistent with the deception alleged by Complaint Counsel. (Deal (Intuit) Tr. 1368, 1372-1373; RX1027 (Deal Expert Report) ¶¶161-162).

Response to Finding No. 663:

Complaint Counsel disputes this Proposed Findings.

As described in more detail below, Mr. Deal’s analysis of Intuit’s customer-level data vastly undercounts the number of potentially deceived consumers. (*See* FF-889 (*citing* GX743 (Yoeli Expert Report) ¶ 134 and Figure 6)).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

664. The first phase of Mr. Deal’s empirical analysis began by looking at the approximately 55.5 million individuals (the “TY21 Customer Base”) that either logged into existing TurboTax accounts or created new accounts during Tax Year 2021. (Deal (Intuit) Tr. 1326; RX1027 (Deal Expert Report) ¶98).

Response to Finding No. 664:

Complaint Counsel has no specific response.

665. First, Mr. Deal identified 13.4 million customers who filed their federal and state tax returns for free. (Deal (Intuit) Tr. 1341-1342; RX1027 (Deal Expert Report) ¶¶108-110). By definition, those 13.4 million customers could not have been deceived because, to the extent they had an expectation about filing their tax returns for free, their expectations were met. (Deal (Intuit) Tr. 1342).

Response to Finding No. 665:

Complaint Counsel does not dispute that 13.4 million consumers filed their federal and state tax returns for free using TurboTax in TY21.

Complaint Counsel disputes, however, that those consumers were “by definition” not deceived. For example, they might have been deceived in a prior year, but not in TY21. (GX743 (Yoeli Expert Report) ¶ 27 n 14).

666. Second, Mr. Deal identified 17.6 million customers for whom the data was inconsistent with deception because they either (1) never began a tax return in a TurboTax SKU (6.8 million), or (2) began a tax return but did not complete that return with TurboTax (10.8 million). (Deal (Intuit) Tr. 1331-1332; RX1027 (Deal Expert Report) ¶101). None of those 17.6 million customers paid Intuit to file their tax returns in 2021. (Deal (Intuit) Tr. 1332, 1334; RX1027 (Deal Expert Report) ¶¶101, 103). These customers also understood they had a choice not to use TurboTax and, in fact, they exercised that choice. (Deal (Intuit) Tr. 1331).

Response to Finding No. 666:

Complaint Counsel does not dispute that Mr. Deal “identified 17.6 million customers” who “either (1) never began a tax return in a TurboTax SKU (6.8 million), or (2) began a tax return but did not complete that return with TurboTax (10.8 million).” Complaint Counsel does not dispute that “none of those 17.6 million customers paid Intuit to file their tax returns in 2021.” Complaint counsel does not dispute that those consumers “understood they had a choice not to use TurboTax and, in fact, they exercised that choice.”

Complaint Counsel disputes this Proposed Finding to the extent it states or implies a conclusion that the data for these 17.6 million consumers is “inconsistent with deception.” It is possible that any of these customers came to TurboTax’s F expecting to file their taxes for free and on discovering, at any point in the funnel, that was the case, left TurboTax. (GX743 (Yoeli

Expert Report) ¶¶ 102-104 and 108; GX749 (Novemsky Rebuttal Expert Report) ¶ 284 (“Mr. Deal sets these 17.6 million consumers aside even though ... it may be that the only reason they did not ultimately file is because they arrived with the false notion that they could file for free, based on TurboTax advertisements, and switched away from TurboTax either before or after starting their return because they realized that they could not actually file for free with TurboTax.”); *see also* Novemsky (Complaint Counsel) Tr. 1792-1993 (“So the idea that that pattern that somehow rules out deception, again, just defies logic for me. I don’t understand how he’s drawing that conclusion from that assumption or observation.”)).

By his own admission, Mr. Deal cannot rule out that any of the consumers in this group were deceived, Mr. Deal’s analysis does not rule out that any of these 17.6 million consumers were deceived. (Deal (Intuit) Tr. 1401). This result is unsurprising, since for those 17.6 million consumers Mr. Deal “do[es]n’t know whether they saw any Intuit ads,” “didn’t look” to test whether the consumer saw any Intuit ads, and doesn’t know whether the consumers “expected TurboTax to be free for them.” (Deal (Intuit) Tr. 1404-1405; *see* RX1395 (Deal (Intuit) Dep. at 104 (Q. “But you don’t know for any given person in that 17.6 million whether they expected TurboTax to be free for them? A. I mean, if you’re asking, have I done any individual inquiry of what’s inside each person’s head and exactly what they saw and what their history was, no, obviously I haven’t done that. I’m using the available data for my analysis.”))).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

667. Mr. Deal observed that the 10.8 million customers who began a return in TurboTax Free Edition but did not complete their taxes using TurboTax could have selected an alternative form of tax preparation for any number of reasons. (Deal (Intuit) Tr. 1332-1333). These might include customers who begin using a DIY tax-preparation product but due to fear, uncertainty, and doubt (or “FUD”) decide to switch to an assisted tax-preparation method (e.g., a CPA); customers who are testing multiple software options; or customers who were using

TurboTax to “double-check[]” tax returns prepared by their CPA, to name a few. (Deal (Intuit) Tr. 1333-1334).

Response to Finding No. 667:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies consumers actually did select an alternative form of tax preparation for any reason other than having been deceived. This Proposed Finding relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not survey consumers to determine whether those consumers left TurboTax only after learning that they did not qualify for to file their taxes for free, and “can’t speak to what any individual consumer might do or perceive.” (FF-811; FF-821—FF-822).

668. Mr. Deal also concluded that in the event these 10.8 million customers abandoned TurboTax Free Edition after being informed they were not eligible to file for free, the data showed they did not invest a significant amount of time using the product before receiving that message. (Deal (Intuit) Tr. 1335-1342). It takes most consumers 30 minutes or less after starting their tax forms in TurboTax Free Edition to learn that their tax situation is not covered and that they need to switch. (*Supra* ¶450; Rubin (Intuit) Tr. 1541; RX1027 (Deal Expert Report) ¶105, fig. 12; Deal (Intuit) Tr. 1334-1340). That 30-minute figure likely overstates how long consumers were actively using the website, as it simply reflects how long the website was open on a consumer’s web browser. (Deal (Intuit) Tr. 1336-1338; RX1027 (Deal Expert Report) ¶¶82, 106). For example, if a consumer stepped away for a ten-minute phone call without closing her browser, those ten minutes would have counted towards the elapsed time. (RX1027 (Deal Expert Report) ¶106). Thus, in the event these customers came to the website under the false impression that they would be able to file for free, there is no evidence that it would have taken them any material amount of time to learn otherwise. (Rubin (Intuit) Tr. 1541; Deal (Intuit) Tr. 1338).

Response to Finding No. 668:

Complaint Counsel disputes this Proposed Finding.

Mr. Deal’s conjecture that consumers did not invest a “significant” or “material” amount of time is little more than guesswork by a paid expert who lacks any education or expertise in consumer psychology. (FF-810—FF-812). Mr. Deal, who did not survey consumers, never established that 30 minutes is not a meaningful amount of time to consumers. (GX743 (Yoeli Expert Report) ¶ 47; GX749 (Novemsky Rebuttal Expert Report) ¶ 296 (“Mr. Deal fails to offer

any evidence to support the assumption that a time investment of 15 or 30 minutes is sufficiently low that a customer would not be inclined to honor that sunk cost by continuing with TurboTax.”)). Mr. Deal does not “know how any individual consumer” whose data he analyzed would respond to the length of time they spent on the TurboTax website before learning that they are not qualified to use TurboTax Free Edition. (Deal (Intuit) Tr. 1408–09).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

669. Finally, Mr. Deal identified an additional 24.4 million customers who paid to file their federal and/or state tax returns with TurboTax. (Deal (Intuit) Tr. 1342; RX1027 (Deal Expert Report) ¶99). Of those 24.4 million, 23.1 million fell into one of three overlapping categories that are inconsistent with Complaint Counsel’s theory of deception, which together can be summarized as having sufficient experience with the TurboTax suite of products and/or their own personal tax situations to have not been deceived into believing that TurboTax would be free for them. These consumers either (1) were on notice from their previous experience with TurboTax that TurboTax in fact was *unlikely* to be free for them; (2) preferred paid features, evidencing they did not have an expectation of filing for free; and/or (3) qualified to use TurboTax Free Edition but made a choice to pay instead. (Deal (Intuit) Tr. 1342; RX1027 (Deal Expert Report) ¶111, fig. 13).

Response to Finding No. 669:

Complaint Counsel disputes this Proposed Finding to the extent Mr. Deal concludes that the data for these 24.4 million consumers is “inconsistent with Complaint Counsel’s theory of deception.” The factual basis for Complaint Counsel’s disagreement with this Proposed is laid out in detail below, (RFF-670—RFF-682), but, at a high level, Mr. Deal cannot rule out deception for these groups. (*See* FF-871—FF-889).

Notably, Mr. Deal does not foreclose that any number of these consumers were deceived. *See* (RX1027 (Deal Expert Report) ¶ 111 (explaining that the evidence “*suggests*” the consumers were not deceived) (emphasis added)); Deal (Intuit) Tr. 1432-1433 (“Q. Okay. So it’s your -- is it your opinion that in this last slice of the -- of the pie, these 23.1 million people who paid to file,

that no one in this bucket was deceived? A. No.”); Deal (Intuit) Tr. 1438 (For these people in these buckets, are you saying none of them were deceived? A: No.”); see also GX749 (Novemsky Rebuttal Expert Report) ¶¶ 285-287; Novemsky (Complaint Counsel) Tr. 1790-1792).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

Complaint Counsel does not dispute, however, the fact that Mr. Deal did characterize the data as described above.

670. Within the set of 23.1 million paying customers, 22.1 million were on notice from their previous experience with TurboTax that TurboTax in fact was *unlikely* to be free for them, meaning (a) they received a recommendation for or started a return in a paid product in Tax Year 2021; (b) they used a paid TurboTax SKU and paid to file in either of the two preceding tax years (i.e., Tax Year 2019 and/or Tax Year 2020); (c) they started in a paid TurboTax SKU in either of the two preceding tax years; and/or (d) they encountered an upgrade screen and were told their tax situation was not eligible for TurboTax Free Edition in either of the two preceding tax years. (Deal (Intuit) Tr. 1345-1350; RX1027 (Deal Expert Report) ¶¶125-141, fig. 15).

Response to Finding No. 670:

Complaint Counsel disputes this Proposed Finding. Circumstances surrounding a specific consumer’s experiences, such as their tax filing status, when they saw ads, and what ads they saw when they went to the TurboTax website, all could influence that consumer’s expectation about whether TurboTax was free for them. Mr. Deal, however, did not “consider[] any of those subjective components” in his data analysis. (Deal (Intuit) Tr. 1460 (“Q. So isn’t it fair to say that a consumer’s specific circumstance around their tax filing status, when they saw ads, what ads they saw when they went to the TurboTax website, all could influence their expectation about whether TurboTax was free for them? A. Certainly there’s a subjective view of that, yes. Q. You haven’t considered any of those subjective components, right? A. I’m modeling

what a rational consumer would know.”)). None of the four categories that Mr. Deal presents exclude the possibility of deception. (GX743 (Yoeli Expert Report) ¶¶113-116; *see* RFF-671).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

671. These 22.1 million customers’ past experiences with TurboTax paid products indicate that they could not have reasonably believed they could file for free with TurboTax in Tax Year 2021. (Deal (Intuit) Tr. 1348-1351). These consumers would understand at a minimum that they would need to determine whether they qualified for a free TurboTax SKU in a given year. (RX1395 (Deal (Intuit) Dep. Tr.) at 132-133). As Mr. Novemsky testified, consumers who “used TurboTax in the last three years ... probably have a good sense of whether [they] have to pay or not because [they] either paid [for TurboTax] or [they] got it for free.” (Novemsky (FTC) Tr. 380; Deal (Intuit) Tr. 1348-1349).

Response to Finding No. 671:

Complaint Counsel disputes the Proposed Findings.

As an initial matter, the proposition that “These consumers would understand at a minimum that they would need to determine whether they qualified for a free TurboTax SKU in a given year” is not contained in Mr. Deal’s expert report and should therefore be disregarded. (*See* Chappell (ALJ) Tr. 889 (admonishing the parties that “anything that’s in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.”)).

More importantly, Mr. Deal has not, and cannot, show that the “22.1 million customers’ past experiences with TurboTax paid products indicate that they could not have reasonably believed they could file for free with TurboTax in Tax Year 2021.” (GX743 (Yoeli Expert Report) at Part VI.B.3.). Importantly, Mr. Deal can’t say whether any consumer remembers the interactions on which he now places so much weight, (*see* Deal (Intuit) Tr. 1439-1440 (“Q. Right, because you don’t know what any one of these millions of consumers remembers, right?

A. Correct.”)), nor did he conduct any consumer surveys to test whether consumers would remember their prior, brief experience using TurboTax. (Deal (Intuit) Tr. 1439–40 (“Q. And you didn’t conduct any surveys ...to determine what people remembered about their past interactions on the TurboTax website, right? A. Correct.”). Even a consumer who remembers their past experience using TurboTax could have experienced a change in tax filing status between TY19 or TY20 and TY21 that would impact their expectation that TurboTax would be free for them, yet Mr. Deal ignored this in his analysis. (See Deal (Intuit) Tr. 1442-1444). Additionally, tax regulations, Intuit’s policies, and consumers tax situations are not static. A consumer who believed these might have changed—and Intuit’s ads may well have prompted them to believe this—could have expected Turbo Tax to be free for them in a given year, even if it hadn’t been in past years. (GX743 (Yoeli Expert Report) ¶ 114). Mr. Deal ignores all of these factors, and his analysis of a “reasonable consumer” is therefore erroneous.

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

The citation to Dr. Novemsky is misplaced; Dr. Novemsky, by the plain text, is opining on the specific group of consumers that completed their tax filing with TurboTax in a previous tax year, whereas Mr. Deal’s analysis would include, for example, any consumer who in TY19 started their tax filing process, got a couple minutes into the process, and abandoned after hitting an upgrade screen in TY19. (Deal (Intuit) Tr. 1438-1439; see GX743 (Yoeli Expert Report) ¶ 113 (“Deal assumes that, for instance, a customer who saw an upgrade screen in 2019 could not have been deceived because two years Mr. Deal does not establish that reasonable consumers who characterizes).

672. Within the set of 23.1 million paying customers, 7.3 million customers exhibited a preference for paid add-on features or functionalities, meaning they (a) purchased optional add-

on bundles; (b) paid for TurboTax expert assistance; and/or (c) paid for features available only in paid TurboTax SKUs. (Deal (Intuit) Tr. 1351-1353; RX1027 (Deal Expert Report) ¶¶116-127, fig. 14). This behavior is inconsistent with deception as well, because if a reasonable consumer expected to file their tax return for free but then discovered otherwise, it would make little sense for them to then voluntarily pay even more than the minimum required. (Deal (Intuit) Tr. 1352-1353). Many of the 7.3 million customers identified by Mr. Deal who elected to purchase additional optional, paid TurboTax services were also part of the 22.1 million customers who had previously used or been recommended to use a paid TurboTax product in the prior two tax years. (Deal (Intuit) Tr. 1351-1353; RX1027 (Deal Expert Report) ¶¶116-127, Figure 14). As Mr. Deal explained, there is “a lot of overlap among these categories.” (Deal (Intuit) Tr. 1352).

Response to Finding No. 672:

Complaint Counsel disputes this Finding of Fact. A willingness to pay for an add-on product has no bearing on the question of deception. (GX743 (Yoeli Expert Report) ¶ 112). Mr. Deal conflates a willingness to pay for service B with what customers expected to pay for service A, but that does not inform us about whether they expected to be able to use Turbo Tax Free Edition for free. (GX743 (Yoeli Expert Report) ¶ 112).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

673. Within the set of 23.1 million paying customers, 4 million customers were eligible to file using TurboTax Free Edition but made a choice to use a paid TurboTax SKU in order to claim additional deductions or credits on Schedule A or Schedule 3 (but did not attach any other schedules). (Deal (Intuit) Tr. 1354-1355; RX1027 (Deal Expert Report) ¶¶113-114). Rather than being deceived about their ability to file for free, these 4 million customers made the rational choice to decrease their tax liability by, on average, \$500 to \$1,500—far more than the amount they paid Intuit to use a paid TurboTax SKU. (Deal (Intuit) Tr. 1355-1356; RX1027 (Deal Expert Report) ¶114). This demonstrates an awareness of their personal tax situation that casts doubt that these consumers believed they had simple tax returns or were motivated to use TurboTax because of a belief that they would be able to file their taxes for free. (Deal (Intuit) Tr. 1355-1356; RX1027 (Deal Expert Report) ¶115).

Response to Finding No. 673:

Complaint Counsel disputes this Proposed Finding. A consumer's subsequent decision to pay for TurboTax products does not mean that these customers were not deceived into initial engagement with product offerings. (GX743 (Yoeli Expert Report) ¶ 109).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

674. Altogether, then, in the first phase of his analysis Mr. Deal found that 97.6% of the 55.5 million TY21 Customer Base either did not pay to file, had prior experience with paid TurboTax SKUs, or evinced a preference for paid products. (Deal (Intuit) Tr. 1358-1360; RX1027 (Deal Expert Report) ¶¶ 12, 98, 142).

Response to Finding No. 674:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that any of the 97.6% of consumers that Mr. Deal described as “the 55.5 million TY21 Customer Base [that] either did not pay to file, had prior experience with paid TurboTax SKUs, or evinced a preference for paid products” were not deceived. As Mr. Deal acknowledged, he cannot say whether any of those 97.6% consumers were actually deceived. (FF-856 (citing Mr. Deal's testimony that it would be “too strong” to say “that none of those [97.6%] consumers were deceived.”)).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

675. In the second phase of his analysis, Mr. Deal further examined the remaining 1.3 million individuals in the TY21 Customer Base to determine whether there was any direct

evidence of deception among the group that most closely aligned to Complaint Counsel's allegations. (Deal (Intuit) Tr. 1357-1358; RX1027 (Deal Expert Report) ¶¶145; RX1395 (Deal (Intuit) Dep.) at 153-154).

Response to Finding No. 675:

Complaint Counsel disputes this Proposed Finding to the extent it suggests that Mr. Deal's methodology is "aligned to Complaint Counsel's allegations." Mr. Deal, for example, eliminates 17.6 million consumers who abandoned TurboTax even though they demonstrated behavior consistent with how a deceived consumer might act. FF-858—FF-859. He eliminated these consumers even though he "do[es]n't know whether they saw any Intuit ads," "didn't look" to test whether the consumer saw any Intuit ads, and doesn't know whether the consumers "expected TurboTax to be free for them." FF-860. Mr. Deal's methodology, therefore, can hardly be said to "align" to Complaint Counsel's theory of the case.

676. To identify this group of customers, Mr. Deal focused his second-phase analysis on the approximately 535,000 customers who, based on the available data, arrived at the TurboTax website from a TurboTax advertisement, regardless of whether it was an ad for TurboTax free products. (Deal (Intuit) Tr. 1359-1360; RX1027 (Deal Expert Report) ¶¶149-150).

Response to Finding No. 676:

Complaint Counsel disputes this Proposed Finding. IPFF-675 and IPFF-676 gloss over how Mr. Deal arrived at 535,000 customers, down from the 1.3 million customers he was left with at the end of his phase one analysis: Mr. Deal subtracted from his count of potentially deceived customers 776,000 consumers who he claims arrived at the Turbo Tax website from some means other than directly from a clickable Intuit advisement (such as a banner ad or email, e.g.). (FF-884). This analysis ignores, for example, consumers who saw a TurboTax advertisement on television and went directly to TurboTax's website. (FF-885).

677. Among those roughly 535,000 customers, Mr. Deal further narrowed his analysis to focus on the approximately 135,000 customers who had *not* used TurboTax in the previous two tax years (i.e., Tax Year 2019 and/or Tax Year 2020). (Deal (Intuit) Tr. 1362-1364; RX1027 (Deal Expert Report) ¶¶151-152). These new customers may be less familiar with TurboTax SKUs, including the qualifications for TurboTax Free Edition, due to their experiences from previous tax years and accordingly arguably be more susceptible to the deception alleged by Complaint Counsel. (Deal (Intuit) Tr. 1361-1363; RX1027 (Deal Expert Report) ¶¶149-151).

Response to Finding No. 677:

Complaint Counsel disputes this Proposed Finding, which inaccurately described Mr. Deal's methodology which, even if correctly recited, is not supportable. The asserted fact "Among those roughly 535,000 customers, Mr. Deal further narrowed his analysis to focus on the approximately 135,000 customers who had *not* used TurboTax in the previous two tax years (i.e., Tax Year 2019 and/or Tax Year 2020)," is simply wrong. Instead, Mr. Deal looked back as far as seven years, to TY14, to exclude three quarters of the remaining customers. (See FF-882). Specifically, in order to eliminate the roughly 400,000 more customers (or *three quarters* of the remaining consumers), Mr. Deal concludes that there is allegedly not evidence of deception for (1) [REDACTED] customers who logged into Turbo Tax accounts, but either did not start a return or abandoned a partial or fully prepared return at least once between TY14 and TY20; (2) more than [REDACTED] customers who filed their taxes using TurboTax at least once in TY14-19 and "skipped" at least one year of filing on TurboTax before returning in TY21; and (3) [REDACTED] who used the IRS free file program. (FF-882). Mr. Deal's analysis excludes even those consumers whose past experience filing with TurboTax was exclusively related to the use of Free Edition. (FF-883). "[Mr. Deal's] analysis, however, confuses how switching costs work, makes assumptions about what consumers remember, presumes that the consumers expectation around the free product or their tax filing status is stagnant, and omits the effect of sunk costs." (FF-882).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

678. Among new TurboTax customers who arrived via an advertisement, Mr. Deal next focused his analysis on the 43,776 customers who had spent at least 60 minutes of elapsed time (including possible inactive time) using TurboTax before encountering an upgrade screen. (Deal (Intuit) Tr. 1363-1364; RX1027 (Deal Expert Report) ¶152). Mr. Deal identified these customers

as a focus for his analysis because, consistent with his understanding of Complaint Counsel's allegations of deception, these customers may have invested sufficient time using the product that they could feel less able to switch to an alternative method of tax preparation. (Deal (Intuit) Tr. 1363-1365).

Response to Finding No. 678:

Complaint Counsel disputes this Proposed Finding. 60 minutes is not a talisman for deception, though Mr. Deal (who notably has no background in consumer psychology) certainly treats it like one, applying a 60-minute cut without any rationale. (FF-886—FF-887). Even at trial, Mr. Deal could offer no empirical evidence that 60 minutes is a significant amount of time to consumers. (FF-888).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

679. But when Mr. Deal examined those customers who may have been most susceptible to the deception alleged by Complaint Counsel for direct evidence of deception, he found just 510 of these 43,776 customers who even potentially viewed themselves to have been deceived. (Deal (Intuit) Tr. 1365-1368; RX1027 (Deal Expert Report) ¶161).

Response to Finding No. 679:

Complaint Counsel disputes this Proposed Finding. As described at RFF-664—RFF-679 and RFF-681—RFF-682, Mr. Deal's methodology is flawed and operates from a misunderstanding of Complaint Counsel's theory and the facts of the case. Complaint Counsel further disputes the assertion that "43,776 customers" "potentially viewed themselves to have been deceived," which is not in Mr. Deal's report. Moreover, Mr. Deal did not survey any consumers to learn about their perceptions (FF-821) and "can't speak to what any individual consumer might do or perceive." (FF-822).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the

work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

680. To identify such direct evidence, Mr. Deal considered three indicators that customers had unfavorable experiences using TurboTax: (1) complaints identified by Complaint Counsel; (2) low product recommendation scores; and/or (3) low customer ratings. (Deal (Intuit) Tr. 1366-1368; RX1027 (Deal Expert Report) ¶¶160-161). As noted (*supra* ¶¶624-625, 639, 647, 649, 652-655), given the nature of the alleged deception in this case, customers who believed themselves to be deceived would be expected to voice their disapproval through complaints and other consumer feedback metrics. (Rubin (Intuit) Tr. 1556; RX1018 (Golder Expert Report) ¶¶36-37, 50). Thus, the fact that only 510 of the 43,776 customers ultimately did voice such disapproval suggests that the vast majority of those customers were not deceived. (Deal (Intuit) Tr. 1365, 1368).

Response to Finding No. 680:

Complaint Counsel disputes the Proposed Finding, which relies on the kind of evidence that has been excluded and is not properly before the Court. Evidence of customer satisfaction, such as product recommendation scores and/or low customer ratings, is not admissible as evidence of a lack of deception.

It is well established that evidence of customer satisfaction is not relevant to determining whether challenged advertising claims are deceptive. Because proof of actual deception is not necessary for purposes of Section 5 liability, evidence that some consumers were not injured or were satisfied with services received is not a defense to liability. Accordingly, evidence of such satisfaction may be excluded as irrelevant. Moreover, evidence of general consumer satisfaction does not rebut evidence of deception. Although evidence of actual deception is not required to prove liability under Section 5, such proof is highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances. However, consumer satisfaction does not necessarily indicate the absence of deception. As stated in the Commission's recent opinion denying Complaint Counsel's Motion for Summary Decision, "the fact that most customers who chose to use a TurboTax product were generally happy with that product does not render non-deceptive a particular ad that drove people to the TurboTax website."

In re Intuit, Inc., 2023 WL 2609450, at *8–9 (F.T.C. Mar. 7, 2023) (order granting Complaint Counsel's Motion to Preclude Admission of Evidence of Customer Satisfaction) (Chappell,

C.A.L.J.) (citations omitted) (quoting *In re Intuit Inc.*, 2023 WL 1778377, at *12 (F.T.C. Jan. 31, 2023) (Commission order denying summary decision)).

Assuming, *arguendo*, that this evidence is admissible, Complaint Counsel disputes this Proposed Finding. As an initial matter, the mechanics by which Mr. Deal actually arrives at his 510 number is murky. (See GX743 (Yoeli Expert Report) ¶¶ 130-131). The Proposed Finding should be struck on that basis alone.

Moreover, Mr. Deal's application of customer review scores and PRS scores is at odds with consumer psychology and the evidentiary record. It is possible, for example, for a customer to leave no review or a good review and still have been deceived into believing that TurboTax was free for them. (See GX743 (Yoeli Expert Report) ¶129). In fact, the reviews that Mr. Deal analyzes are only for those customers that *completed* filing their taxes with TurboTax, which excludes millions of consumers—precisely those millions who would be most likely to be dissatisfied with TurboTax. (See GX743 (Yoeli Expert Report) ¶129). The evidentiary record, in fact, demonstrates that the text of Intuit's customer reviews contained a significant volume of negative customer feedback regarding its free advertising from consumers who would be excluded by Mr. Deal's analysis. (See FF-662 (identifying over three thousand examples of negative customer feedback regarding its free advertising, including many of whom left a customer review of 2 through 5). Mr. Deal, moreover, did *not* analyze Intuit's customer service records for complaints made directly to Intuit (*compare* RFF-624—FF-629, FF-645—FF-641 to (RX1027 (Deal Expert Report) Section VII.C.), even though the most reliable and likely place consumers may complain about Intuit is Intuit itself, (FF-724).

Complaint Counsel further disputes this Proposed Finding because it partially relies on the testimony and opinion of Mr. Deal who does not have the expertise and has not done the work necessary to understand the perceptions of reasonable consumers. Mr. Deal (who is not a psychologist) did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax. (FF-811; FF-821—FF-822).

681. Having not identified meaningful direct evidence of deception among those customers whose experiences most closely resemble Complaint Counsel's theory of deception, there is no reason to believe that any customer group excluded earlier in Mr. Deal's funnel (e.g., customers who did not arrive via a TurboTax advertisement, or customers who did not pay to file using TurboTax) would evidence any greater rate of unfavorable experiences showing deception. (RX1395 (Deal (Intuit) Dep.) at 160-162, 165).

Response to Finding No. 681:

Complaint Counsel disputes this Proposed Finding, which is not contained in Mr. Deal's report and should be excluded.

682. In total, Intuit's customer-level data are even *potentially* consistent with the type of deception alleged by Complaint Counsel for less than 0.0009% of the 55.5 million individuals (or 1 in 100,000) in the TY21 Customer Base. (Deal (Intuit) Tr. 1368, 1375-1376; RX1027 (Deal Expert Report) ¶¶161-162).

Response to Finding No. 682:

Complaint Counsel disputes this Proposed Finding. Mr. Deal's analysis of Intuit's customer-level data vastly undercounts the number of potentially deceived consumers. (*See* FF-889 (*citing* GX743 (Yoeli Expert Report) ¶ 134 and Figure 6); RFF-664—RFF-681; FF-851—FF-889 (setting forth in detail flaws in Mr. Deal's analysis of Intuit's customer level data).

E. Reliable Consumer Testing And Survey Evidence Reflects That Reasonable Consumers Were Not Deceived

683. In contrast to Complaint Counsel's reliance on Professor Novemsky's flawed "perception study" as the sole basis for assessing the claims Intuit's ads conveyed and the likelihood that consumers were deceived, Intuit presented credible and scientifically sound evidence, from both fact and expert witnesses, regarding the effect the company's advertising had on consumers' understanding and behavior. This evidence shows that Intuit's advertising did not deceive reasonable consumers.

Response to Finding No. 683:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record."). In addition to the perception survey, Complaint Counsel has relied on a variety of evidence, including TurboTax ads, internal Intuit documents, consumer complaints, consumer testimony, and more, for assessing the claims Intuit's ads conveyed and the likelihood

that consumers were deceived. (*See, e.g.*, FF-11—FF-30; FF-47—FF-466; FF-596—FF-623; FF-635—FF-678; FF-804—FF-806). Complaint Counsel also disputes that Intuit’s expert and fact witnesses showed that shows that Intuit’s advertising did not deceive reasonable consumers. (RFF-684—RFF-760).

1. Copy Testing

684. The survey evidence in this case that *is* reliable uniformly indicates that consumers are not under a misimpression about their ability to file their taxes for free using TurboTax. (*Infra* ¶¶685-766).

Response to Finding No. 684:

Complaint Counsel disputes that survey evidence referenced by Intuit is all reliable, and that it shows that consumers are not under a misimpression that they can file for free. (RFF-685—RFF-766).

685. Chief among that evidence is copy testing that Intuit commissioned on its TurboTax television ads (in the regular course of business) to understand consumer perception of and consumer reaction to the ads. (GX460 (Intuit); RX1543 (Intuit); Ryan (Intuit) Tr. 701; Hauser (Intuit) Tr. 880). Unlike Professor Novemsky’s survey, these copy tests showed consumers ads before soliciting feedback. (Novemsky (FTC) Tr. 354, 405-406; Ryan (Intuit) Tr. 701; GX460 (Intuit); RX1543 (Intuit)).

Response to Finding No. 685:

Complaint Counsel disputes the Proposed Finding to the extent it suggests that Intuit’s copy testing showed that consumers were not under a misimpression about their ability to file for free. Instead, the studies showed the opposite: the likelihood of TurboTax ads deceiving consumers. (FF-599—FF-610). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

686. The results of Intuit’s copy tests are inconsistent with consumers being misled or deceived by the ads. (*Infra* ¶¶694-699, 701, 703, 710, 713).

Response to Finding No. 686:

Complaint Counsel disputes the Proposed Finding. The results of the copy tests are entirely consistent with consumers being misled or deceived by the ads. (FF-561—FF-566; FF-599—FF-610; *see also* RFF-694-RFF-699; RFF-701; RFF-703; RFF-710; RFF-713).

a. TY20 Copy Test

687. The copy test discussed most extensively at trial was the “TY20 Test,” which was conducted in September 2020, in advance of the Tax Year 2020 filing season. (GX460 (Intuit); Novemsky (FTC) Tr. 364-366, 499-508; Ryan (Intuit) Tr. 735-740, 821-825; Hauser (Intuit) Tr. 876-892).

Response to Finding No. 687:

Complaint Counsel has no specific response.

688. This test was conducted by Ipsos, a market research and consulting firm. (Hauser (Intuit) Tr. 877-878). Complaint Counsel have not disputed that the TY20 Test was conducted reliably and that its results were reported reliably. (Novemsky (FTC) Tr. 501; Hauser (Intuit) Tr. 877-878).

Response to Finding No. 688:

Complaint Counsel has no specific response.

689. The survey population for the TY20 Test was taxpayers who (1) had filed taxes the previous year, (2) considered themselves the “Tax decision maker” for their household, and (3) were between the ages of 18 and 49. (GX460 (Intuit) at 2; Ryan (Intuit) Tr. 736). Within that population, 64% of test participants were between the ages of 18 and 39. (GX460 (Intuit) at 35).

Response to Finding No. 689:

Complaint Counsel has no specific response.

690. Given that people with simple tax returns tend to skew younger, *supra* ¶¶85, 193, it is likely that many participants in the TY20 Test qualified for TurboTax Free Edition—greater than the roughly 33% of all U.S. taxpayers who qualify. (Ryan (Intuit) Tr. 736, 740; Rubin (Intuit) Tr. 1597).

Response to Finding No. 690:

Complaint Counsel disputes the Proposed Finding. Intuit did not ask any of the participants in the TY20 Test about their income in a way that would allow Intuit to determine if any of the survey respondents did or did not qualify for free TurboTax. (*See* GX460 (Intuit) at CC-00009537 (describing “target specs” that do not include income situations)). Therefore, it cannot reliably say how many participants of the TY20 Test qualified for free TurboTax.

691. The TY20 Test’s survey population was divided into one control group and four test groups; each group had roughly 200 participants. (GX460 (Intuit) at 28). The control group was given the TurboTax brand name but not shown any TurboTax ads. (GX460 (Intuit) at 36;

Hauser (Intuit) Tr. 878). The test groups were shown, within a cluttered multimedia environment, one of four draft TurboTax Free Edition ads that were being considered for the Tax Year 2020 filing season: “Auctioneer,” “Dance Class,” “Young Love,” and “Spelling Bee.” (GX460 (Intuit) at 2-6, 28; Ryan (Intuit) Tr. 735, 738-739; Hauser (Intuit) Tr. 878-879).

Response to Finding No. 691:

Complaint Counsel objects to the Proposed Finding that all four ads were draft ads. As established at trial, the “Spelling Bee” ad that was shown was a final version of an ad that was disseminated the prior tax year. (*See* IFF-699 stating that “[t]he ‘Spelling Bee’ ad tested was the Tax Year 2018 version.”).

692. After exposure to the brand name or one of the draft ads, the TY20 Test participants were asked questions about TurboTax, including, for example, whether it “Is a “good value,” “Has clear and honest pricing,” and “Is changing the way we do taxes.” (GX460 (Intuit) at 28; Ryan (Intuit) Tr. 738).

Response to Finding No. 692:

Complaint Counsel has no specific response.

693. Among the questions posed to study participants was whether TurboTax “Allows me to file my taxes for free.” (GX460 (Intuit) at 28; Ryan (Intuit) Tr. 738-739).

Response to Finding No. 693:

Complaint Counsel has no specific response.

694. Responses to that question in both the control group and the test groups suggest that consumers were not misled or deceived by TurboTax advertising about their ability to file their income taxes for free using TurboTax. (Ryan (Intuit) Tr. 739-740; Hauser (Intuit) Tr. 881-885).

Response to Finding No. 694:

Complaint Counsel disputes the Proposed Finding. The results from the test show that after exposure to a single ad during the TY20 Campaign Copy Testing, 45% to 57% of consumers took away the free message. (FF-604; GX460 (Intuit) at CC-00009563). These results indicate that TurboTax free advertising causes consumers to think they can use TurboTax for free. (*See* FF-566). It is unlikely that up to 57% of the survey population did not qualify for free TurboTax, and what is more, Intuit’s free advertising disseminated thousands of times on the TV was not shown only to consumers of a certain age. (*See e.g.*, RFF-192—RFF-193).

695. In the control group, 33% of respondents were reported as believing that TurboTax “Allows me to file my taxes for free.” (GX460 (Intuit) at 28). That percentage matches the approximately 33% of all taxpayers who do in fact qualify to use TurboTax Free Edition, and is likely lower than the percentage of respondents who actually were eligible to use Free Edition, given that the survey population, as noted, skewed younger, and younger people are relatively likely to have simple tax returns. (GX460 (Intuit) at 2, 35; Ryan (Intuit) Tr. 739-740; Rubin (Intuit) Tr. 1597). Similarly, the 33% figure is lower than the roughly 50% of consumers that are in the market for online tax-preparation product who qualify for TurboTax Free Edition. (Johnson (Intuit) Tr. 592-593, 657; Ryan (Intuit) Tr. 739; RX814 (Intuit) at -6784).

Response to Finding No. 695:

Complaint Counsel disputes that 33% “is likely lower than the percentage of respondents who actually were eligible to use Free Edition, given that the survey population, as noted, skewed younger, and younger people are relatively likely to have simple tax returns.” As noted above, Intuit did not ask any of the participants in the TY20 Test about their income in a way that would allow Intuit to determine if any of the survey respondents did or did not qualify for free TurboTax. (See RFF-690; GX460 (Intuit) at CC-00009537 (describing “target specs” that do not include income situations)). Therefore, it cannot reliably say how many participants of the TY20 Test qualified for free TurboTax. In addition, the percentage measure for the control group is for “Top Box” responses, and it isn’t clear whether the percentages are in fact for the entire survey population, (GX460 (Intuit) at CC-00009537) so Intuit may not be able to extrapolate from that data to the entire survey population. Moreover, the TY 20 Test has no evidence that there is any overlap between potential survey respondents who qualified for free TurboTax and those who qualified, further undermining any implication that none of the survey respondents had a misimpression about their ability to file for free. Complaint Counsel also disputes the Proposed Finding to the extent it suggests Intuit’s free ads were intended to be targeted only at prior online tax filers, as the evidence directly refutes this. (See, e.g., RX578 (Intuit) at INTUIT-FTC-PART3-000601552) (“For those users that switch within/to the DIY category, TT has fared well over the years, grabbing nearing 80% of the returns coming from Assisted to DIY”)

696. The results from the TY20 Test control group indicates that, as of September 2020—multiple years after Intuit had begun advertising its free tax software—TurboTax marketing either had not reached many consumers who qualify to file for free, or had not successfully persuaded many of those consumers that they qualify. (Hauser (Intuit) Tr. 883;

RX1017 (Hauser Expert Report) ¶79). That is not what one would expect to see if TurboTax's advertising was deceptive in the manner alleged. (Hauser (Intuit) Tr. 883; RX1017 (Hauser Expert Report) ¶79).

Response to Finding No. 696:

Complaint Counsel disputes the Proposed Finding. As noted above, Intuit presents no evidence regarding which survey respondents did or did not qualify for free TurboTax, and therefore cannot draw conclusions about those consumers in the survey sample. (RFF-690). Moreover, the survey was conducted outside of tax filing season, when Intuit was unlikely to have been running ads (FF-05 (discussing that Intuit's sales and revenue regarding tax preparation are typically concentrated in the period from November through April), and when tax filing is not top of mind for consumers. (FF-515).

697. In the test groups, the percentage of respondents reported as believing that TurboTax "Allows me to file my taxes for free" were not substantially higher than in the control group, and did not cause Intuit to believe that the respondents in the test groups had a misimpression about their ability to file for free. (GX460 (Intuit) at 28; Ryan (Intuit) Tr. 739-740).

Response to Finding No. 697:

Complaint Counsel disputes that the percentage of respondents reported as believing that TurboTax "Allows me to file my taxes for free" were not substantially higher in the test group than in the control group. In the test group, respondents indicated that at a rate of between 45-57%, they believed that TurboTax "Allows me to file my taxes for free," up from 33% in the control group. (FF-604; GX460 (Intuit) at CC-00009563). That is an increase of up to 24%, which is a significant increase, and which even Intuit tagged as "[s]ignificantly different from benchmark. (GX460 (Intuit) at CC-00009563). Complaint Counsel does not have a specific response to the remainder of the Proposed Finding.

698. Nothing in the results suggests that a significant number of participants in the TY20 Test were under a misimpression that they could file for free using TurboTax. (Ryan (Intuit) Tr. 740; Hauser (Intuit) Tr. 884).

Response to Finding No. 698:

Complaint Counsel disputes the Proposed Finding. Up to 57% of survey respondents exposed to one of TurboTax's free ads thought they could file for free using TurboTax. (FF-604). Even taking into account Intuit's flawed argument that more than 33% of the survey population likely qualified for free TurboTax (*see* RFF-690), it is highly unlikely that 57% of the survey population did, suggesting that a portion of survey respondents who watched the ad and indicated that they thought they could use TurboTax for free did not qualify and therefore were under a misimpression.

699. The results are particularly notable because the ads used in the TY20 Test were not the final versions that ran during the Tax Year 2020 filing season. (Ryan (Intuit) Tr. 736- 738, 740; RX1496 (Bennett (WK) Decl.) ¶¶4-7). The "Spelling Bee" ad tested was the Tax Year 2018 version. (Ryan (Intuit) Tr. 736-737; RX1496 (Bennett (WK) Decl.) ¶4; RX1491 (Intuit); GX460 (Intuit) at 6). The "Auctioneer," "Dance Class," and "Young Love" ads were drafts that included no written disclosure at all. (Ryan (Intuit) Tr. 737-738; RX1496 (Bennett (WK) Decl.) ¶¶5-7; RX1492 (Intuit); RX1493 (Intuit); RX1494 (Intuit); RX1495 (Intuit); GX460 (Intuit) at 3-5). The TY20 Test results are thus consistent with Intuit's broader argument that even without any disclosures, the challenged ads are not deceptive.

Response to Finding No. 699:

Complaint Counsel disputes the Proposed Finding that "the TY20 Test results are thus consistent with Intuit's broader argument that even without any disclosures, the challenged ads are not deceptive." As discussed above, the ads caused between 45% to 57% of survey respondents to think they could file their taxes for free with TurboTax, when that was likely not the case for all survey respondents. (*See* RFF-698). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

700. The TY20 Test's results also depict only the *short-term* effects of TurboTax advertising, effects that typically decay over time. (Hauser (Intuit) Tr. 881-882, 884-885; RX1017 (Hauser Expert Report) ¶80). The only evidence of *long-term* effects that the TY20 Test provides is the control group results—which, again, show that up until the time the TY20 Test was administered, consumers were underestimating their ability to file for free. (Hauser (Intuit) Tr. 883; RX1017 (Hauser Expert Report) ¶79).

Response to Finding No. 700:

Complaint Counsel disputes that the TY20 Test shows that consumers were underestimating their ability to file for free, because it is based on unsupported and faulty assumptions regarding the survey population. (RFF-690; RFF-695). Moreover, Intuit’s “free” marketing messages were reinforced over time, across different tax seasons. (FF-567) Repeat advertising reinforces marketing messages, compounding their impact and mitigating decay of impact, (FF-568) thus making it less likely that Intuit’s “free” messaging would decay.

701. If anything, then, the results from the TY20 Test’s test groups may overstate the lasting impact the tested ads had on actual consumers. (Hauser (Intuit) Tr. 881-882, 884-885; RX1017 (Hauser Expert Report) ¶¶80, 82). Regardless, the results do not suggest that TurboTax ads misled consumers who do not qualify for TurboTax Free Edition into believing that they can file for free with TurboTax or into believing that all TurboTax SKUs are free. (Ryan (Intuit) Tr. 739-740; Hauser (Intuit) 881-885; RX1017 (Hauser Expert Report) ¶¶80, 82).

Response to Finding No. 701:

Complaint Counsel disputes the Proposed Finding. Intuit’s “free” marketing messages were reinforced over time, across different tax seasons. (FF-567). Repeat advertising reinforces marketing messages, compounding their impact and mitigating decay of impact, (FF-568) thus making it less likely that Intuit’s “free” messaging would decay. Moreover, there were likely survey participants who took away a message of “free TurboTax” when they did not qualify for free. (See RFF-698—RFF-699). More fundamentally the TY20 Copy Test showed a direct causal relationship between Intuit’s free ads (FF-566) which were widely disseminated (*see, e.g.*, FF-151—FF-160 (dissemination information for the Spelling Bee ad)), and which were not necessarily targeted only to consumers who were eligible to file for free. (*See, e.g.*, RFF-192—RFF-193).

b. TY22 Copy Test

702. During the Tax Year 2022 filing season, Intuit commissioned another copy test (the “TY22 Test”) of [REDACTED]. (RX1543 (Intuit); Ryan (Intuit) Tr. 771-775).

Response to Finding No. 702:

Complaint Counsel has no specific response.

703. Like the results of the TY20 Test, the results from the TY22 Test suggest that consumers were not misled or deceived by TurboTax advertising about their ability to file their taxes for free using TurboTax. (Ryan (Intuit) Tr. 775; RX1543 (Intuit) at 19).

Response to Finding No. 703:

Complaint Counsel disputes the Proposed Finding. As noted below, the TY22 Test was unreliable [REDACTED]. (See RFF-706; RFF-709).

704. Like the TY20 Test, the TY22 Test was [REDACTED]. (RX1543 (Intuit) at 1).

Response to Finding No. 704:

Complaint Counsel has no specific response.

705. The survey population for the TY22 Test was taxpayers [REDACTED]. (RX1543 (Intuit) at 2; Ryan (Intuit) Tr. 773).

Response to Finding No. 705:

Complaint Counsel has no specific response.

706. Given that people with simple tax returns tend to skew younger, *supra* ¶¶ 85, 193, and given that the TY22 Test participants considered their tax returns not complicated, [REDACTED]. (Ryan (Intuit) Tr. 773, 740; Rubin (Intuit) Tr. 1597; RX1543 (Intuit) at 2).

Response to Finding No. 706:

Complaint Counsel disputes the Proposed Finding. Intuit did not ask any survey participants [REDACTED]. (See RX1543 (Intuit) at INTUIT-FTC-PART3-000638649).

707. The TY22 Test’s survey population was [REDACTED] (RX1543 (Intuit) at 3, 4, 19; Ryan (Intuit) Tr. 772-773). [REDACTED] (Ryan (Intuit) Tr. 772-773). [REDACTED] (RX1543 (Intuit) at 3, 19; Ryan (Intuit) Tr. 772-773).

Response to Finding No. 707:

Complaint Counsel has no specific response.

708. After exposure to the ads, the TY22 Test asked [REDACTED] (RX1543 (Intuit) at 19; Ryan (Intuit) Tr. 774).

Response to Finding No. 708:

Complaint Counsel has no specific response.

709. [REDACTED] (RX1543 (Intuit) at 19; Ryan (Intuit) Tr. 774). [REDACTED] (RX1543 (Intuit) at 19). [REDACTED] (RX1543 (Intuit) at 19). [REDACTED] (RX1543 (Intuit) at 19).

Response to Finding No. 709:

Complaint Counsel disputes the Proposed Finding. As Professor Novemsky testified at trial, [REDACTED] (Novemsky (Complaint Counsel) Tr. 517 [REDACTED]). Moreover, the TY22 Test was seriously flawed and therefore unreliable [REDACTED] (RX1543 (Intuit) at INTUIT-FTC-PART3-000638666 ([REDACTED])); Novemsky (Complaint Counsel) Tr. 519; *see also* RFF-531).

710. These results suggest that reasonable consumers were not misled or deceived by TurboTax’s advertising about their ability to file their taxes for free. (Ryan (Intuit) Tr. 775). [REDACTED]

[REDACTED] (Ryan (Intuit) Tr. 739; Johnson (Intuit) Tr. 657; GX654 (Intuit)).

Response to Finding No. 710:

Complaint Counsel disputes the Proposed Finding. As discussed above, [REDACTED]
[REDACTED]
[REDACTED] (See RFF-709).

711. Moreover, [REDACTED] . (Ryan (Intuit) Tr. 774-775; RX1543 (Intuit) at 2).

Response to Finding No. 711:

Complaint Counsel disputes the Proposed Finding. Intuit did not ask [REDACTED]
[REDACTED]
[REDACTED] . (See RFF-706; RX1543 (Intuit) at INTUIT-FTC-PART3-000638649).

712. Professor Novemsky’s survey provides no evidence of consumer impression about the ads tested in the TY22 Test (or any other Tax Year 2022 ads), because [REDACTED] (Novemsky (FTC) Tr. 510; Ryan (Intuit) Tr. 771-772).

Response to Finding No. 712:

Complaint Counsel has no specific response.

713. The TY22 Test, however, does provide evidence of consumer impression [REDACTED] (Ryan (Intuit) Tr. 775).

Response to Finding No. 713:

Complaint Counsel disputes the Proposed Finding. As noted above, [REDACTED]
[REDACTED]

[REDACTED] (See RFF-709).

2. TY20 NPS Survey

714. Additional evidence indicating an absence of deception can be found in a “Net Promoter Score” survey from Tax Year 2020 (the “TY20 NPS Survey”). (GX665 (Intuit)).

Response to Finding No. 714:

Complaint Counsel disputes this Proposed Finding. On its face GX665, the TY20 NPS Survey, does not provide any support for the fact that there is “evidence indicating an absence of deception.” Moreover, NPS scores are a limited metric intended to distill customer sentiment into a single value and, importantly, mask the number of detractors that comprise it. (GX749 (Novemsky Rebuttal Expert Report) ¶ 200).

715. Intuit relies on NPS surveys to assess consumers’ experiences with TurboTax SKUs and the likelihood that consumers will recommend those products to others. (Rubin (Intuit) Tr. 1531; RX1018 (Golder Expert Report) ¶38).

Response to Finding No. 715:

Complaint Counsel has no specific response.

716. In the TY20 NPS Survey, over 2,000 consumers who had used TurboTax online products that tax year were asked: “[REDACTED]” (Rubin (Intuit) Tr. 1532; GX665 (Intuit) at 43).

Response to Finding No. 716:

Complaint Counsel has no specific response.

717. Less than half of survey respondents (48%) responded that they were aware of Intuit’s free TurboTax offering. (Rubin (Intuit) Tr. 1532; GX665 (Intuit) at 43). That is barely higher than the 44% of survey respondents who had actually filed their taxes with TurboTax Free Edition that year. (GX665 (Intuit) at 44; Rubin (Intuit) Tr. 1532-1533).

Response to Finding No. 717:

Complaint Counsel disputes this Proposed Finding. The assertion that “less than half of survey respondents (48%) responded that they were aware of Intuit’s free TurboTax offering” misstates the question posed to consumers. Instead, consumers were [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. (GX665 (Intuit) at 43, 44).

718. If TurboTax advertising was misleading consumers into believing they could file for free, one would instead expect a large disparity between those two percentages. (Rubin (Intuit) Tr. 1533-1534; GX665 (Intuit) at 43-44).

Response to Finding No. 718:

Complaint Counsel disputes this Proposed Finding.

Intuit does not provide any credible evidence to support this purported fact. For example,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Moreover, because this sample necessarily includes consumers who did file their taxes with TurboTax, there is no reason to believe it is a representative sample because, for example, consumers who were misled may have defected before filing so they would not show up in these results. Mr. Rubin's conclusory (and self-serving) statement about the import of the TY20 NPS Survey isn't credible, and he isn't qualified as an expert to opine about whether the TY20 NPS Survey results evidence deception. What is more, respondents of the survey had completed their tax filing and therefore already know (with certainty) whether or not they can use TurboTax for free. Including such respondents in a survey does not reliably measure consumer deception from TurboTax advertisements, which are aimed at consumers who have not yet filed their taxes. (See FF-513; FF-518)

719. The TY20 NPS Survey also reported that only [REDACTED] of respondents who had used a paid TurboTax SKU had even been aware that TurboTax had a free offering when they began their tax return. (GX665 (Intuit) at 44; Rubin (Intuit) Tr. 1534).

Response to Finding No. 719:

Complaint Counsel disputes this Proposed Fact. As above, the asserted fact misrepresents the survey, [REDACTED]

[REDACTED] (GX665 (Intuit) at 43, 44).

720. That only [REDACTED] of respondents who used a paid TurboTax SKU had even been aware that TurboTax had a free offering underscores that Intuit is successful in targeting consumers with simple tax returns who qualify to use free TurboTax SKUs with its free TurboTax advertisements. (Rubin (Intuit) Tr. 1534-1535; GX665 (Intuit) at 44). It also indicates that Intuit has similar success communicating with its paying customers about the products available to them—and avoiding the misleading message that those customers can file for free. (Rubin (Intuit) Tr. 1534-1535; GX665 (Intuit) at 44). Again, if Complaint Counsel’s theory were accurate, one would expect to see most paid consumers at least *aware* of the existence of the free product. (Rubin (Intuit) Tr. 1534-1535).

Response to Finding No. 720:

Complaint Counsel disputes this Proposed Finding.

As above, the asserted fact misrepresents the survey, [REDACTED]

[REDACTED]

[REDACTED] (GX665 (Intuit) at 43, 44).

Complaint Counsel also disputes this Proposed Finding because it relies on the testimony of Mr. Rubin, who has not been qualified as an expert, to establish how consumers would behave.

Complaint Counsel also disputes this Proposed Finding to the extent it asserts that Intuit “target[s] consumers with simple tax returns who qualify to use free TurboTax SKUs with its free TurboTax advertisements.” While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603). Additionally, an internal

Intuit document shows that “[w]orriers is a primary target for Free” and simple filers are secondary. (RX597 (Intuit) at INTUIT-FTC-PART3-000601646).

721. Thus, the TY20 NPS Survey results demonstrate that consumers who visit the TurboTax website expecting to file for free *are* filing for free, while consumers who visit the TurboTax website expecting to pay to file their taxes are finding TurboTax’s paid offerings. (Rubin (Intuit) Tr. 1534-1535). The results, again, are inconsistent with deception. (Rubin (Intuit) Tr. 1534-1535).

Response to Finding No. 721:

Complaint Counsel disputes the Proposed Finding, which is unsupported rhetoric that can’t be sustained on the evidentiary record. As explained above, RFF-714—RFF-721, Intuit is misconstruing the results of the TY20 NPS Survey. Now, Intuit builds on that faulty ground to take another leap – entering the territory of fantasy – to say that this limited TY21 NPS Survey shows “that consumers who visit the TurboTax website expecting to file for free are filing for free” and “expecting to pay to file their taxes are finding TurboTax’s paid offerings.” The best evidence on whether consumers’ expectations about whether they could file for free are being met is the consumer perception survey done by Professor Novemsky, which shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; see also FF-486—FF-487).

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include such a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601;

FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

3. Disclosure Efficacy Survey

722. The “Disclosure Efficacy Survey” that Dr. Hauser designed, implemented, and analyzed provides further evidence of an absence of deception. (Hauser (Intuit) Tr. 846-875; RX1017 (Hauser Expert Report) ¶¶86-100). In short, the Disclosure Efficacy Survey shows that changing TurboTax’s marketing to address Complaint Counsel’s allegations would have no effect on consumer behavior. (Hauser (Intuit) Tr. 875).

Response to Finding No. 722:

Complaint Counsel disputes the Proposed Finding. Contrary to Intuit and Professor Hauser’s contention, the Disclosure Efficacy survey shows nothing about an absence of deception, and at best, is a comparative measure between two similarly flawed sets of disclosures. (FF-749—FF-751). Professor Hauser did not ask his survey respondents whether

they thought they could file for free and did not determine whether any of his survey participants actually could file for free. (FF-754).

723. The survey was a test-control experiment, which (as noted *supra* ¶¶531-532) is the scientifically accepted method for assessing causality. (Hauser (Intuit) Tr. 847-848; RX1017 (Hauser Expert Report) ¶86).

Response to Finding No. 723:

Complaint Counsel does not dispute that the survey was a test-control experiment, or that test-control experiments are a scientifically accepted method for assessing causality. Complaint Counsel disputes the Proposed Finding that test-control experiments are the only scientifically accepted method for assessing causality. (Novemsky (Complaint Counsel) Tr. 492).

724. The participants included both taxpayers who qualified for TurboTax Free Edition and those who did not. (Hauser (Intuit) Tr. 855). Each participant, irrespective of their tax situation, was randomly assigned to one of two groups: the “Original Disclosures Group” or the “Revised Disclosures Group.” (Hauser (Intuit) Tr. 852; RX1017 (Hauser Expert Report) ¶86).

Response to Finding No. 724:

Complaint Counsel has no specific response.

725. Each group of participants was shown three types of material designed to replicate Intuit’s TurboTax marketing communications: (1) a video advertisement, (2) a website homepage, and (3) a products & pricing webpage. (Hauser (Intuit) Tr. 856; RX1017 (Hauser Expert Report) ¶87).

Response to Finding No. 725:

Complaint Counsel has no specific response.

726. To ensure participants’ objectivity and avoid contaminating the results with any predispositions participants could have about TurboTax, Dr. Hauser replaced the Intuit and TurboTax brands in the material shown to both groups with a disguised brand name, “Vertax.” (Hauser (Intuit) Tr. 855; RX1017 (Hauser Expert Report) ¶87).

Response to Finding No. 726:

Complaint Counsel has no specific response.

727. Apart from replacing the brand name with Vertax, the materials shown to the Original Disclosures Group were materially identical to TurboTax marketing materials in Tax Year 2021. (RX1017 (Hauser Expert Report) ¶90).

Response to Finding No. 727:

Complaint Counsel disputes the Proposed Finding. Professor Hauser's report appendices describe a number of ways in which the Vertax materials shown to the Original Disclosure Group were different from TurboTax marketing materials, for example in the video materials, Vertax disclosures were on the screen for 5 instead of 4 seconds (RX1017 (Hauser Expert Report) C-1-6 n.16). Professor Hauser also made a number of additional changes on the "homepage" Vertax stimulus (RX1017 (Hauser Expert Report) at C-1-8), and the "products and pricing" Vertax stimulus (RX1017 (Hauser Expert Report) at C-1-15 & C-1-16).

728. The materials shown to the Revised Disclosures Group, meanwhile, were designed to account for revisions advocated for in Complaint Counsel's complaint, and to conform with Intuit's settlement with the state attorneys general. (Hauser (Intuit) Tr. 857-859, 862-863, 1018-1027; RX1017 (Hauser Expert Report) ¶90).

Response to Finding No. 728:

Complaint Counsel disputes the Proposed Finding. As an initial matter, Professor Hauser displayed a gross misunderstanding and false assumptions about Complaint Counsel's allegations in this matter when he selected the "Fish" ad for the Revised Disclosure Group, writing in his report that "I selected an Absolute Zero advertisement as the stimuli for the Revised Disclosures Group because the word 'free' was mentioned less frequently in the Absolute Zero campaign. To the extent Complaint Counsel have alleged that the Absolute Zero campaign is deceptive, it is based on the 'Free Guaranteed' language, which is not included in the stimuli shown to the Revised Disclosures Group." (RX1017 (Hauser Expert Report) C-1-4 n.10). Complaint Counsel has alleged that the advertising is deceptive because of its representation that TurboTax is free, without limiting that representation to any kind of "guarantee." (*See, e.g.*, Complaint Counsel's Post-Trial Brief at 10 (discussing free claims contained in the Absolute Zero campaign). Moreover, the Revised Disclosure Group materials did not account for a significant number of aspects of Intuit's deceptive advertising. (RFF-755).

For example, with the video stimuli, the "Revised Disclosure Group" video advertising shows a disclaimer for eight seconds rather than 5 seconds in the original stimulus, but Professor

Hauser provides no evidence that this is a meaningful change that would have an impact on consumer misimpressions. (FF-756). The font of the disclaimer is slightly larger than the font in the Original Disclosure Group video, but the disclosure text remains smaller than the text emphasizing that the service is free, which is still more prominent, and Professor Hauser provides no evidence that this adjustment is meaningfully different and would generate a different reaction from survey respondents. (FF-759). Additionally, the Revised Disclosure Group video included (in writing and in a voiceover) the phrase “[f]or simple returns only,” but the revised stimuli do not include any more indication as to what should be understood by “simple” (as used by TurboTax) (FF-760), which the evidence shows is an ineffective disclosure. (See RFF-138; FF-491—FF-492; FF-670; FF-636; FF-639; FF-655 (“Such false advertising. You state free for simple returns, but over \$100 later, that is not the case at all. Every year it is the same crap. False advertising. I will not use you again moving forward.”)). Most significantly the Revised Disclosure Group video makes free claims: five sentences are spoken (before the disclosure), two of which are “at least your taxes are free,” and the other three do not relate to any other aspect of TurboTax. (FF-757; *see also* Novemsky (Complaint Counsel) Tr. 1785 (“They’re both two ads that are basically saying nothing but free.”)).

The website Revised Disclosure Group stimuli similarly include aspects of deceptive TurboTax advertising. The Revised Disclosure Group website stimuli includes prominent claims of “FREE,” “\$0” and “File for \$0.” (FF-761—FF-762). The revised homepage stimulus only includes additional information about what “simple tax returns” are behind a hyperlink, and Professor Hauser did not measure how many, if any, respondents clicked on the hyperlink, and importantly whether his revisions increased the number of consumers clicking on the hyperlink to review terms and conditions, meaning he could not measure whether consumers were seeking out additional information about “free” qualifications. (FF-763).

729. The Original Disclosures Group was shown a Vertax-branded version of the Tax Year 2021 “Dance Class” video ad. (RX1548 (Intuit); Hauser (Intuit) Tr. 859; RX1017 (Hauser Expert Report) ¶90). In that ad, the spoken dialogue consisted entirely of a dance instructor repeating the word “free” twelve times. (RX1548 (Intuit); Hauser (Intuit) Tr. 860). The ad then

concluded with a voiceover stating, “That’s right, Vertax Free Edition is free. See details at vertax.com.” (RX1548 (Intuit)). The ad’s end card also included a written disclosure stating, “Vertax Free Edition is for simple U.S. returns only. See if you qualify at vertax.com. Offer subject to change.” (RX1548 (Intuit)).

Response to Finding No. 729:

Complaint Counsel has no specific response.

730. The Revised Disclosures Group was shown a Vertax-branded version of the Tax Year 2017 “Fishing” video ad. (RX1549 (Intuit); Hauser (Intuit) Tr. 861; RX1017 (Hauser Expert Report) ¶90). In contrast to the “Dance Class” ad, the “Fishing” ad repeats the word “free” only twice, and there is other non-free-related dialogue. (RX1549 (Intuit); Hauser (Intuit) Tr. 861-862). Dr. Hauser also modified the voiceover from the original “Fishing” ad so that the ad shown to survey respondents stated: “Vertax Free Edition is for simple returns only. Not all taxpayers qualify to file for free. See if you qualify at vertax.com.” (RX1549 (Intuit); Hauser (Intuit) Tr. 861-862). And he made several modifications to the written disclosures shown on the end card in the Vertax-branded “Fishing” ad. Specifically, the disclosures:

- stated: “For simple returns only. Not all taxpayers qualify for Free Edition. See if you qualify at Vertax.com.” (RX1549 (Intuit));
- were in larger and brighter font than in the modified “Dance Class” ad. (RX1548 (Intuit); RX1549 (Intuit); Hauser (Intuit) Tr. 863; RX1017 (Hauser Expert Report) at C-1-6); and
- appeared on the screen for 8 seconds, which is longer than in the “Dance Class ad,” and roughly twice as long as the typical disclosure for a 30-second video ad. (RX1548 (Intuit); RX1549 (Intuit); Hauser (Intuit) Tr. 864; RX1017 (Hauser Expert Report) at C-1-6).

Response to Finding No. 730:

Complaint Counsel disputes the Proposed Finding that 8 seconds is roughly twice as long as typical disclosures for a 30-second video ad, as the source Intuit cites to do not support that Proposed Finding. Moreover, while the “Fish” ad contained non-free related dialogue, that dialogue was not related to any TurboTax feature (FF-757; GX749 (Novemsky Rebuttal Expert Report) ¶ 124 n. 191 (the three other lines of dialogue are “Oh, man. It’s my lucky shirt,” “What happened?” “It’s his lucky shirt.”)). Professor Hauser did not empirically test whether and to what extent the changes he made to the original stimuli in his survey had any effect on

consumers' misimpression that they could file their taxes for free when that was not the case.

(FF-754). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

731. Complaint Counsel contend that the ad shown to the Revised Disclosures Group was as deceptive as the ad shown to the Original Disclosures Group. (Hauser (Intuit) Tr. 991; Complaint Counsel's Pretrial Brief at 19 n.21 (Feb. 17, 2023)). The revised ad was not deceptive, however, because it contained repeated, explicit, and prominent qualifying statements. (RX1549 (Intuit); RX1017 (Hauser Expert Report) at C-1-6; RX1018 (Golder Expert Report) ¶¶131-135; Golder (Intuit) Tr. 1149-1150). Copy testing of comparable ads in Tax Year 2022 confirms that the revised ad was not deceptive. (RX1543 (Intuit); RX1548 (Intuit); RX1549 (Intuit)).

Response to Finding No. 731:

Complaint Counsel disputes the Proposed Finding. First, Complaint Counsel disputes that it has contended that "the ad shown to the Revised Disclosures Group was as deceptive as the ad shown to the Original Disclosures Group" because that does not set forth a factual assertion supported by the evidentiary record. Instead, as clearly stated, Complaint Counsel has contended that "adding the phrase "see if you qualify" is unlikely to have a material impact on consumers." (Complaint Counsel's Pretrial Brief at 19 n.21). Complaint Counsel also objects to the Proposed Finding that the revised ad was not deceptive because it contained repeated, explicit, and prominent qualifying statements. As discussed above, the revised ads still included prominent free claims, disclaimers that were less prominent than the free claims, and provided "simple returns" disclaimers that were meaningless to consumers. (RFF-728). Moreover, Complaint Counsel disputes that copy testing of comparable ads in Tax Year 2022 confirms that the revised ad was not deceptive. If anything, the Disclosure Efficacy Survey undermines any conclusions Intuit tries to draw from the TY22 Copy Test, showing that the changes made in the TY22 Copy Test (to the extent they are the same as those made in the Disclosure Efficacy Survey) either make no difference to consumers, or lead more consumers to consider a free tax filing option when not all taxpayers qualify. (See FF-765—FF-768). 64.3% of respondents in the revised disclosure group and 56.1% of respondents in the original disclosure group selected a Vertex Free Edition as the product that they "would be most likely to start with" (FF-766) when it is

likely that only one third of survey respondents actually qualified for the offer. (RX1017 (Hauser Expert Report) C-1-1 & C-1-2 (describing the target population for the Disclosure Efficacy Survey, which included all taxpayers over 18 who have previously prepared and filed their household's taxes in 2022 and who considered using an online tax website to prepare and file their taxes in 2022); Hauser (Intuit) Tr. 875 (“Q. And roughly what percentage of taxpayers in the general population actually qualify to file for Free Edition? A. It’s roughly about a third.”); *see also* FF-22).

732. After viewing the video ad, the Disclosure Efficacy Survey participants were exposed to the two webpages. (Hauser (Intuit) Tr. 856; RX1017 (Hauser Expert Report) at C-1-29).

Response to Finding No. 732:

Complaint Counsel has no specific response.

733. The Original Disclosures Group saw Vertax-branded webpages that were substantively identical to the Tax Year 2021 TurboTax.com homepage and Products & Pricing page. (RX1017 (Hauser Expert Report) ¶90, C-1-7).

Response to Finding No. 733:

Complaint Counsel disputes the Proposed Finding. Professor Hauser made a number of changes between the TurboTax.com homepage and the Products & Pricing pages for the Vertax Original Disclosure Group stimuli. (RX1017 (Hauser Expert Report) at C-1-8; C-1-15 & C-1-16).

734. For the webpages shown to the Revised Disclosures Group, the qualifications for Vertax Free Edition were substantially more prominent. (Hauser (Intuit) Tr. 857). In particular, in the Revised Disclosure Group homepage, hyperlinked “see if you qualify” language was added to both the center of the webpage and in the Free Edition starting area—which, when clicked, presented survey participants with a pop-up disclosure explaining the specific tax situations covered, and not covered, by Vertax Free Edition. (Hauser (Intuit) Tr. 867-868; RX1017 (Hauser Expert Report) at C-1-9 to C-1-10, C-1-39). And in the Revised Disclosure Group Products & Pricing page, Dr. Hauser added hyperlinked “see if you qualify” language at both the top and in the middle of the page—which took participants to the same pop-up disclosure available from the homepage. (Hauser (Intuit) Tr. 868-869; RX1017 (Hauser Expert Report) at C-1-17 to C-1-24, C-1-47). Dr. Hauser also added the full qualifications for Vertax Free Edition on the Producing & Pricing page, meaning participants did not have to click a hyperlink to access those qualifications. (Hauser (Intuit) Tr. 868-869; RX1017 (Hauser Expert Report) at C-1-19, C-1-41).

Response to Finding No. 734:

Complaint Counsel disputes that the qualifications for Vertax Free Edition were substantially more prominent. In fact, the survey evidence suggests that the disclosures were not substantially more prominent, since the change in the appearance of the disclosures did not lead to a statistically significant change in respondent's willingness to consider Vertax, and in fact, more respondents would consider using Vertax for free in the Revised Disclosure Group with "enhanced" disclosures than in the Original Disclosure Group. (IFF-736; IFF-739). Complaint Counsel has no specific response to the remainder of the Proposed Finding.

735. After exposure to the ad and webpages, participants in both the Original Disclosures Group and the Revised Disclosures Group were asked the same series of questions. (Hauser (Intuit) Tr. 852).

Response to Finding No. 735:

Complaint Counsel has no specific response.

736. The first question was whether the respondents would "consider starting [their] taxes on Vertax." (RX1017 (Hauser Expert Report) ¶¶90, 92, C-3-39; Hauser (Intuit) Tr. 869-870). The difference between the share of respondents who answered that they would consider Vertax from the Original Disclosures Group (77.7%) and the Revised Disclosures Group (75.9%) is statistically insignificant. (Hauser (Intuit) Tr. 870; RX1017 (Hauser Expert Report) ¶92).

Response to Finding No. 736:

Complaint Counsel has no specific response.

737. This lack of a significant difference is "inconsistent with the hypothesis that TurboTax's ad[s] served as misleading door openers" that bring consumers to the TurboTax website under the false impression that they can file for free using TurboTax. (Hauser (Intuit) Tr. 869-870; RX1017 (Hauser Expert Report) ¶91). If that were true, reducing the emphasis on "free" and adding more prominent disclosures about Free Edition's qualifications would cause respondents to be substantially less likely to consider starting their taxes with Vertax. (Hauser (Intuit) Tr. 869-870; RX1017 (Hauser Expert Report) ¶91). As Dr. Hauser testified, "we should see fewer people statistically considering [TurboTax]" upon "chang[ing] the advertisements" as Complaint Counsel desire. (Hauser (Intuit) Tr. 869-870; RX1017 (Hauser Expert Report) ¶91).

Response to Finding No. 737:

Complaint Counsel disputes the Proposed Finding. As an initial matter, as discussed above, the "revised" disclosure stimuli contained a variety of aspect that exist in the deceptive

advertising at issue in this matter, including using an ad that is at issue in this matter as a “revised” stimuli. (RFF-728, FF-758), and do not reflect what “Complaint Counsel desire.” What is more, Professor Hauser’s Disclosure Efficacy Survey is incapable of measuring whether or not consumers were deceived by TurboTax advertising because it does not ask them. (FF-745—FF-746; FF-750; FF-764). Instead, all the Disclosure Efficacy Survey can measure are the differences between two sets of ads, both of which include prominent free claims. (FF-751; FF-754; FF-757; FF-762). If there is no substantial change of what consumers would consider between the two sets of stimuli, that merely suggests that any changes did not have an effect on consumers, not that the ads did not have a deceptive effect. (*See* FF-750). In fact, the Disclosure Efficacy Survey results illustrate the persuasive power of the TurboTax’s free-themed ads in getting the consumers to start trying the product advertised for free (FF-768) and are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims in both stimuli. (FF-769).

738. The Disclosure Efficacy Survey shows, however, that those changes had no such effect, i.e., that “when we actually make these changes . . . , there is no statistical difference” in the number of consumers who considered TurboTax. (Hauser (Intuit) Tr. 869-870; RX1017 (Hauser Expert Report) ¶¶91-92). Thus, Complaint Counsel’s door-opener “hypothesis is rejected scientifically by the results” of the survey. (RX1017 (Hauser Expert Report) ¶91).

Response to Finding No. 738:

Complaint Counsel does not disputes that “when we actually make these changes . . . , there is no statistical difference” in the number of consumers who considered Vertax. Complaint Counsel disputes the remainder of the Proposed Finding. As discussed above (RFF-737), because Professor Hauser did not measure whether either the original or revised ads were deceptive (FF-745—FF-746; FF-750; FF-764), if there is no substantial change of what consumers would consider between the two sets of stimuli, that merely suggests that any changes did not have an effect on consumers, not that the ads did not have a deceptive effect. (*See* FF-750). In fact, the Disclosure Efficacy Survey results illustrate the persuasive power of the TurboTax’s free-themed ads in getting the consumers to start trying the product advertised for free (FF-768) and are

consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims in both stimuli. (FF-769).

739. Survey participants who answered that they would consider Vertax were then asked which Vertax product they would be most likely to start with. (Hauser (Intuit) Tr. 871; RX1017 (Hauser Expert Report) ¶95). The percentage who answered they would be most likely to start with Vertax Free Edition was greater in the Revised Disclosures Group (64.3%) than in the Original Disclosures Group (56.1%). (Hauser (Intuit) Tr. 871; RX1017 (Hauser Expert Report) ¶95).

Response to Finding No. 739:

Complaint Counsel has no specific response.

740. These results are inconsistent with Complaint Counsel’s hypothesis that TurboTax marketing deceives non-qualifying consumers into thinking they can file for free with TurboTax Free Edition. (Hauser (Intuit) Tr. 871-872). If Complaint Counsel’s hypothesis were true, then reducing the emphasis on “free” and adding more prominent disclosures would cause fewer respondents to choose Vertax Free Edition. (Hauser (Intuit) Tr. 871-872; RX1017 (Hauser Expert Report) ¶¶95-96). But the opposite occurred in the Disclosure Efficacy Survey: reducing the emphasis on “free” and adding more prominent disclosures about Free Edition’s qualifications caused a slight *increase* in the percentage of participants who chose Vertax Free Edition. (Hauser (Intuit) Tr. 871-872; RX1017 (Hauser Expert Report) ¶¶95-96).

Response to Finding No. 740:

Complaint Counsel disputes the Proposed Finding. As an initial matter, as discussed above, the “revised” disclosure stimuli contained a variety of aspect that exist in the deceptive advertising at issue in this matter, including using an ad that is at issue in this matter as a “revised” stimuli and prominent free claims. (RFF-728; RFF-737; FF-738). In fact, the Disclosure Efficacy Survey results illustrate the persuasive power of the TurboTax’s free-themed ads in getting the consumers to start trying the product advertised for free (FF-768) and are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims in both stimuli. (FF-769). Additionally, it is likely that not all 64.3% of survey respondents who indicated they would use Free Vertax were eligible for that option, and therefore those survey respondents could have in fact been deceived. (RX1017 (Hauser Expert Report) C-1-1 & C-1-2

(describing the target population for the Disclosure Efficacy Survey, which included all taxpayers over 18 who have previously prepared and filed their household's taxes in 2022 and who considered using an online tax website to prepare and file their taxes in 2022); Hauser (Intuit) Tr. 875 (“Q. And roughly what percentage of taxpayers in the general population actually qualify to file for Free Edition? A. It’s roughly about a third.”); *see also* FF-22).

741. Lastly, participants who selected a Vertax product were asked how likely they were to start their taxes with that product, on a scale of 1% to 99% likelihood. (Hauser (Intuit) Tr. 872-873; RX1017 (Hauser Expert Report) ¶99). Between the Original Disclosures Group and the Revised Disclosures Group, there was no statistically significant difference in respondents’ likelihood of starting with Vertax Free Edition. (Hauser (Intuit) Tr. 873; RX1017 (Hauser Expert Report) ¶99).

Response to Finding No. 741:

Complaint Counsel has no specific response.

742. These results are also inconsistent with Complaint Counsel’s hypothesis that TurboTax marketing deceives non-qualifying consumers into thinking they can file for free with TurboTax Free Edition. (Hauser (Intuit) Tr. 873). If Complaint Counsel’s hypothesis were accurate, then reducing the emphasis on “free” and adding more prominent disclosures would make respondents less likely to start in Vertax Free Edition. (Hauser (Intuit) Tr. 873). The Disclosure Efficacy Survey produced no such effect. (Hauser (Intuit) Tr. 873; RX1017 (Hauser Expert Report) ¶99).

Response to Finding No. 742:

Complaint Counsel disputes the Proposed Finding. As an initial matter, as discussed above, the “revised” disclosure stimuli contained a variety of aspect that exist in the deceptive advertising at issue in this matter, including using an ad that is at issue in this matter as a “revised” stimuli and prominent free claims. (RFF-728; RFF-737; FF-758). As discussed above (RFF-737), because Professor Hauser did not measure whether either the original or revised ads were deceptive (FF-745—FF-746; FF-750; FF-764), if there is no substantial change of what consumers would consider between the two sets of stimuli, that merely suggests that any changes did not have an effect on consumers, not that the ads did not have a deceptive effect. (*See* FF-750). In fact, the Disclosure Efficacy Survey results illustrate the persuasive power of the TurboTax’s free-themed ads in getting the consumers to start trying the product advertised for

free (FF-768) and are consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims in both stimuli. (FF-769).

743. Taking the results from all three survey questions together, Dr. Hauser was able to calculate an estimate of the respondents in each survey group who would start in Vertax Free Edition. (Hauser (Intuit) Tr. 874-875; RX1017 (Hauser Expert Report) ¶¶99). The estimated percentages were 33.4% in the Original Disclosures Group, and 36.8% in the Revised Disclosures Group. (Hauser (Intuit) Tr. 875; RX1017 (Hauser Expert Report) ¶¶99-100; Novemsky (FTC) Tr. 1811).

Response to Finding No. 743:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the calculation proposed here and at trial was not contained in Professor Hauser’s expert report and should be disregarded. (*See* Chappell (ALJ) Tr. 889 (admonishing the parties that “anything that’s in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.”). Paragraph 99 in Professor Hauser’s expert report discusses the data related to the likelihood consumers would start with Free Vertax, on a likelihood scale of 1-99% (*see* IFF-741) but neither Paragraphs 99 nor 100 discuss how Intuit and Professor Hauser arrived at the numbers reflected in this Proposed Finding. This calculation, which Complaint Counsel finds difficult to comprehend because it is not described or justified in Professor Hauser’s report, appears to be a multiplication of the the *percentage of survey respondents* who indicated they were likely to start in Vertax Free with the *likelihood* (on a 1-99% scale) that a respondent would start in the Free Vertax offer. Those percentages measure different things and are entirely distinct and multiplying them is nonsensical, unscientific, and uninformative.

744. Those results, from both groups, are similar to the percentage all U.S. taxpayers who qualify to file with TurboTax Free Edition, again about 33%. (Johnson (Intuit) Tr. 657; Ryan (Intuit) Tr. 739; Hauser (Intuit) Tr. 875).

Response to Finding No. 744:

Complaint Counsel disputes the validity of the calculation from the Disclosure Efficacy Survey, as discussed above, and disputes that there is any reliable comparison that can be drawn from the numbers set forth in IFF-743. (RFF-743). Complaint Counsel does not dispute that the percentage all U.S. taxpayers who qualify to file with TurboTax Free Edition is about 33%.

745. If Complaint Counsel's hypothesis were accurate and TurboTax's ads (which the ads shown to the Original Disclosures Group replicated) misled consumers about their ability to file for free, one would expect the percentage of respondents in the Original Disclosures Group that would start in Free Edition to be much higher. (Hauser (Intuit) Tr. 875). This feature of the Disclosure Efficacy Survey provides even further evidence that TurboTax's ads were not deceptive. (Hauser (Intuit) Tr. 875; RX1017 (Hauser Expert Report) ¶91).

Response to Finding No. 745:

Complaint Counsel disputes the Proposed Finding. As discussed above (RFF-743), the calculation performed to reach the purported estimate regarding consumers who would start in Free Vertax is not contained in any expert report and is unreliable and it and any conclusions based on it should therefore be disregarded. (*See* Chappell (ALJ) Tr. 889 (admonishing the parties that "anything that's in ... the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.")).

4. Kirk Fair Survey

746. The survey in the record designed by Rebecca Kirk Fair reinforces that consumers are not deceived by TurboTax marketing.

Response to Finding No. 746:

Complaint Counsel disputes the Proposed Finding. The purported fact asserted does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.")).

Ms. Kirk Fair's survey is also fatally flawed and unreliable and should be disregarded. (RFF-755). Moreover, Ms. Kirk Fair's survey was not designed to assess deception resulting from TurboTax marketing, the main issue addressed by Professor Novemsky's survey and report. (GX749 (Novemsky Rebuttal Expert Report) ¶ 257); *see also* RX1016-A (Kirk Fair Expert Report) ¶ 19 ("The purpose of my Disclosure Survey was to assess whether and to what extent the information presented to prospective TurboTax customers through the software's upgrade screens affects their selection of various tax preparation solutions."); RX1393 (Kirk Fair (Intuit) Dep.) at 25–27, 36–40, 43–44, 53–54, 60–61, 66, & 83). Ms. Kirk Fair states that if consumers had been deceived by Intuit's ads as alleged, she would expect to see substantial, statistically significant differences in respondent choices upon learning about an additional free option at the point of the hard stop (RX1016-A (Kirk Fair Expert Report) ¶ 16), but these conclusions do not in fact follow from the evidence she cites, because the fact that consumers upgrade when faced with a hard stop at similar rates whether or not they are told about the IRS Free File Program does not mean that they did not arrive at the site expecting to file for free and still desiring to file for free when they encounter the upgrade screen. (GX749 (Novemsky Rebuttal Expert Report) ¶ 271). Ms. Kirk Fair's conclusion is predicated on the idea that the IRS Free File Program is in other ways perceived to be identical to the TurboTax Free Edition respondents were expecting to use. It seems very likely that if the upgrade screen offered an opportunity to continue with Free Edition and not upgrade without giving up the accuracy of the tax return, that most, if not all, customers would choose to do that. (GX749 (Novemsky Rebuttal Expert Report) ¶ 271).

747. That survey, a test-control experiment, evaluated whether the intersection of TurboTax Free Edition advertising and upgrade screens induced consumers to switch to paid TurboTax SKUs as a result of feeling "locked-in" to TurboTax. (RX1016-A (Kirk Fair Expert Report) ¶¶ 16, 20, 43).

Response to Finding No. 747:

Ms. Kirk Fair's survey did not evaluate anything whatsoever with regard to TurboTax Free Edition advertising, as the only aspect of the survey that involved advertising was a brief showing of a single banner ad to all respondents. (RX1393 (Kirk Fair (Intuit) Dep.) at 46–47).

Even regarding that ad, Ms. Kirk Fair testified that “[t]he purpose of my survey is not to test the effect of TurboTax’s advertising.” (RX1393 (Kirk Fair (Intuit) Dep.) at 83). In addition, Ms. Kirk Fair’s survey was not able to reliably measure the effects of lock-in because it fails to replicate the real-world environment in which consumers would be moving through the TurboTax software, and particularly does not replicate the time and effort that taxpayers may experience when using TurboTax to file their taxes. (GX749 (Novemsky Rebuttal Expert Report) ¶ 263). Once the main questionnaire in the Kirk Fair Disclosure Survey begins, there are only five screens before the respondents reach the upgrade screen and are asked to answer questions, (RX1016-A (Kirk Fair Expert Report) Appendix D.2) with four of them show an image for at least 10-seconds (RX1016-A (Kirk Fair Expert Report) Appendix C ¶ 12), so a respondent could proceed to answering survey questions as quickly as about 40 seconds, when in reality, consumers may spend between 10 and 43 minutes filling out tax information before encountering a hard stop. (RX749 (Novemsky Rebuttal Expert Report) ¶ 263; RX55 (Intuit) at INTUIT-FTC-PART3-000601463).

Otherwise, Complaint Counsel’s response is the same as RFF-746.

748. More generally, the survey evaluated whether the amount of information provided to consumers when they were informed they needed to switch products influenced the likelihood that those consumers would in fact switch. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 12-13; RX1016-A (Kirk Fair Expert Report) ¶7).

Response to Finding No. 748:

Same response as RFF-746 (second paragraph) and RFF-747.

749. Ms. Kirk Fair’s survey population of 751 respondents consisted of those consumers most likely to use TurboTax: consumers who were over eighteen years old, used an online tax software to file taxes in 2019 or 2020, and were primarily responsible or substantially involved in preparing their taxes. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 22-24; RX1016-A (Kirk Fair Expert Report) ¶34 & Ex. 1).

Response to Finding No. 749:

This is a design flaw of Ms. Kirk Fair’s survey. She included in her survey sample consumers who are and are not eligible for Free Edition and did not ask any questions to

determine whether the respondents in her survey were or were not qualified for Free Edition, (RX1016-A (Kirk Fair Expert Report) ¶ 19 Appendix C ¶ 8), making it impossible to evaluate the results of her survey separately for the group of potentially misled consumers. (GX749 (Novemsky Rebuttal Expert Report) ¶ 260).

750. Survey respondents were shown a TurboTax Free Edition ad and instructed to start their tax returns in TurboTax Free Edition. Each respondent was then assigned to a group and shown one of three upgrade screens, with differing levels of information about TurboTax SKUs and free alternatives to TurboTax. The three screens were designated the “Representative Upgrade Screen,” the “Enhanced Information Upgrade Screen,” and the “Reduced Information Upgrade Screen.” (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 30-35; RX1016-A (Kirk Fair Expert Report) ¶20).

Response to Finding No. 750:

Same response as RFF-746 (second paragraph) and RFF-747.

751. The Representative Upgrade Screen was modeled after TurboTax’s actual upgrade screens from Tax Year 2019. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 30; RX1016-A (Kirk Fair Expert Report) ¶20 & n.20). It informed respondents that they would need to switch to file their taxes accurately and compared features for three products: TurboTax Free Edition, TurboTax Deluxe, and TurboTax Self-Employed. (RX1016-A (Kirk Fair Expert Report) ¶20).

Response to Finding No. 751:

Same response as RFF-746 (second paragraph) and RFF-747.

752. The Enhanced Information Upgrade Screen included more information. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 30-34; RX1016-A (Kirk Fair Expert Report) ¶20). It informed respondents that they would need to switch to file their taxes accurately and compared features for four products: TurboTax Free Edition, TurboTax Deluxe, TurboTax Self-Employed, and the IRS Free File program. (RX1016-A (Kirk Fair Expert Report) ¶20). This screen also contained information about eligibility for IRS Free File. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 32; RX1016-A (Kirk Fair Expert Report) ¶20).

Response to Finding No. 752:

Same response as RFF-746 (second paragraph) and RFF-747.

753. The Reduced Information Upgrade Screen contained less information than the Representative Upgrade Screen, omitting details about TurboTax SKUs and simply informing respondents that they could file their taxes accurately using Intuit’s Free Edition. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 34-35; RX1016-A (Kirk Fair Expert Report) ¶20).

Response to Finding No. 753:

Same response as RFF-746 (second paragraph) and RFF-747. Complaint Counsel also disputes that the Upgrade Screen “simply inform[ed] respondents that they could file their taxes accurately using Intuit’s Free Edition.” The Upgrade Screen informed respondents that they would need to use another product to file their taxes (RX1016-A (Kirk Fair Expert Report) at 200).

754. After respondents were shown an upgrade screen, they then answered closed-ended and open-ended questions about which tax-preparation product they would select upon seeing that screen, and why. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 35-38; RX1016-A (Kirk Fair Expert Report) ¶21).

Response to Finding No. 754:

Same response as RFF-746 (second paragraph) and RFF-747.

755. If Complaint Counsel were correct that consumers start using TurboTax because they are deceived into believing they can file for free, one “would expect to see a substantial, statistically significant reduction in respondents’ selection of a TurboTax Paid product [] after learning about the additional free option”; that is, survey respondents who were provided additional information at the point of upgrade about alternative free tax-filing products would upgrade to paid TurboTax SKUs at lower rates than those who did not. (RX1016-A (Kirk Fair Expert Report) ¶¶16, 28; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 40-41, 62).

Response to Finding No. 755:

In addition to not testing the effect of Intuit’s ads, *see* RFF-746 (second paragraph) & RFF-747, Ms. Kirk Fair’s survey suffers from a number of methodological flaws that render it unreliable. (FF-893—FF-901). Those flaws also include faulty survey instructions that require respondents to imagine hypothetical situations, without it being clear how successful survey respondents would be following those instructions (GX749 (Novemsky Rebuttal Expert Report) ¶ 262), a failure to properly replicate any sunk costs or switching costs (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 263, 264), and failure to limit the survey population to the population of interest, those who are not eligible to file for free. (*See* RFF-749).

756. But Ms. Kirk Fair found that consumers who were given additional information about alternative free-filing options chose both to switch to TurboTax paid products and to

switch to a non-TurboTax alternative at similar rates as those who were not. (RX1016-A (Kirk Fair Expert Report) ¶28; RX1555 (Kirk Fair (Intuit) Trial Dep.) at 40-41, 62).

Response to Finding No. 756:

Same response as RFF-746 (second paragraph), RFF-747, and RFF-755. Moreover, Ms. Kirk Fair's survey evidence shows that 28% of survey respondents indicated they would "most likely" select Free Edition even after being told by the original hard stop screen that they could not use it. (RX1016-A (Kirk Fair Expert Report) Ex. 4a), indicating that even the TurboTax hard stop was not able to overcome consumer perceptions about free TurboTax.

757. The fact that there was no statistically significant difference between the three experimental groups in terms of which tax product they would select after encountering an upgrade screen is additional evidence that TurboTax upgrade screens did not induce consumers to use TurboTax paid products and that consumers did not feel locked into doing so. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 40-41, 50, 62; RX1016-A (Kirk Fair Expert Report) ¶¶23-26, 28).

Response to Finding No. 757:

Same response as RFF-746 (second paragraph), RFF-747, and RFF-755. Ms. Kirk Fair ignores that whether or not consumers are willing to switch tax filing providers is related to status quo bias, as well as consumers' switching costs and how each individual's switching costs relate to their perceived benefit from switching. (GX749 (Novemsky Rebuttal Expert Report) ¶ 269; *see also* RFF-452). Moreover, whether respondents would still prefer to upgrade to TurboTax paid products if they knew at the outset of starting with TurboTax Free Edition that they would have to pay to file their taxes could only be inferred from Ms. Kirk Fair's survey if it had indeed included a group of respondents who were informed of the fact that they would have to pay to file their taxes at the outset of beginning the process with TurboTax. Ms. Kirk Fair would have to find that the rate at which that group of respondents are willing to use a paid TurboTax product is not different than the other groups in her survey. (GX749 (Novemsky Rebuttal Expert Report) ¶ 272). This was not part of her survey design, and so no conclusion can be drawn about how respondents beginning to file their taxes with the expectation of filing for

free would affect customers' behavior once on the website. (GX749 (Novemsky Rebuttal Expert Report) ¶ 272)

758. Thus, Ms. Kirk Fair's survey results reinforce that consumers who start in TurboTax Free Edition do not feel "locked-in" to TurboTax SKUs after visiting the TurboTax website. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 50-52, 56-57; RX1016-A (Kirk Fair Expert Report) ¶¶33-37). Rather, respondents were willing to consider alternatives so as to have the appropriate product for their tax situation, even if that meant switching. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 51-52, 56; RX1016-A (Kirk Fair Expert Report) ¶¶33-37). Many respondents indicated that upon encountering an upgrade screen, they would conduct additional research, such as looking at product reviews for TurboTax paid products, talking to family and friends, and making price comparisons. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 50-52, 56-57; RX1016-A (Kirk Fair Expert Report) ¶¶31, 33-37).

Response to Finding No. 758:

Same response as RFF-746 (second paragraph), RFF-747, RFF-755, and RFF-757.

Moreover, Ms. Kirk Fair's survey is not capable of measuring any research respondents might have conducted before being presented with the prompt to upgrade, as her survey, by design, asks respondents questions after they are shown the upgrade screen. (*See* IFF-754).

759. Ms. Kirk Fair's survey also revealed that the price of tax-filing products—including out-of-pocket costs—is not the sole driver of consumers' choice of a product. Regardless of which upgrade screen they saw, survey respondents revealed that they switched to a TurboTax paid product primarily because of their particular "tax situation." (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 42, 46-47, 54-55; RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4). Respondents also indicated that they switched to paid products because of their trust in the TurboTax brand and the features available in paid TurboTax SKUs. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 42, 46-47, 54-55; RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4). Relatively few respondents indicated that they chose a product based on its "Value/Price Point." (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 42, 46-47, 54-55; RX1016-A (Kirk Fair Expert Report) ¶36, fig. 4).

Response to Finding No. 759:

At the same time, Intuit's expert Prof. Hauser conducted a survey that confirms that price is an important factor that consumers considered in choosing a tax preparation provider. (RX1017 (Hauser Expert Report) ¶ 112). Prof. Hauser's Purchase Driver Survey shows that that 70.4% of respondents consider price an important factor in their choice of a tax preparation provider. (RX1017 (Hauser Expert Report) ¶ 113; Hauser (Intuit) Tr. 967); RX1391 (Hauser

(Intuit) Dep.) at 112). Price was the most commonly cited factor important to consumers shopping for tax services. (RX1017 (Hauser Expert Report) ¶ 113; Hauser (Intuit) Tr. 967; Novemsky (Complaint Counsel) Tr. 1789-1790). What is more, the fact that survey respondents indicated that they would upgrade because of their “tax situation” is evidence of respondents merely mirroring the language on the upgrade screen, making the results less reliable. (GX749 (Novemsky Rebuttal Expert Report) ¶ 279). It also shows that, because of the language used by TurboTax, respondents may attribute the fact that they are not able to file for free to themselves and their tax situation, not Intuit. (GX749 (Novemsky Rebuttal Expert Report) ¶ 279). This may make them less likely to complain about the required upgrade. (See FF-729).

Otherwise, Complaint Counsel’s response is the same as to Findings No. 746 (second paragraph), 747, and 755.

760. Complaint Counsel not only did not seek to rebut Ms. Kirk Fair’s testimony, they asked no questions of her on cross-examination. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 63).

Response to Finding No. 760:

As Complaint Counsel stated at the time: “I had a chance to ask you a lot of questions on February 2 [in Ms. Kirk Fair’s deposition], so I’ve sort of accomplished the questions that we needed there in the record of the case. So in appreciation for your earlier testimony and your time today, complaint counsel does not have any questions for you at this time.” (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 63). Indeed, the direct examination by Complaint Counsel in Ms. Kirk Fair’s discovery deposition was nearly 1.5 times longer than the direct examination by counsel for Intuit in her trial deposition. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 63; RX1393 (Kirk Fair (Intuit) Dep.) at 90).

Moreover, Complaint Counsel’s expert, Prof. Novemsky, provided a thorough rebuttal to Ms. Kirk Fair’s opinions in his Rebuttal Report. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 7, 256–80).

F. Complaint Counsel Did Not Satisfy Their Burden Of Proving That The Challenged Ads Were Likely To Mislead A Significant Minority Of Reasonable Consumers

761. Complaint Counsel have not established by a preponderance of the evidence that any of the challenged brand video ads were likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax.

Response to Finding No. 761:

Complaint Counsel disputes this Proposed Finding. As an initial matter, the purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements, including brand video ads, were unlikely to mislead a significant minority of reasonable consumers. Survey evidence from Professor Novemsky shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486—FF-487). Those TurboTax free ads included brand video ads. (FF-65—FF194; *see* FF-212—FF-429). What is more, consumer testimony (FF-664) and consumer complaints (FF-619; FF-620; FF-623; FF-635—FF-662) also show that many consumers had the expectation that they could use TurboTax for free when that was not the case. (*See, e.g.*, FF-642 (“Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”)).

762. Complaint Counsel have not established by a preponderance of evidence that any of the challenged display ads were likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax.

Response to Finding No. 762:

Complaint Counsel disputes this Proposed Finding. As an initial matter, the purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were unlikely to mislead a significant minority of reasonable consumers. Survey evidence from Professor Novemsky shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486—FF-487). Those TurboTax free ads included display ads. (*See* FF-212—FF-429). What is more, consumer testimony (FF-664) and consumer complaints (FF-619; FF-620; FF-623; FF-635—FF-662) also show that many consumers had the expectation that they could use TurboTax for free when that was not the case. (*See, e.g.*, FF-642 (“Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”)).

763. Complaint Counsel have not established by a preponderance of evidence that any of the challenged paid-search ads were likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax.

Response to Finding No. 763:

Complaint Counsel disputes this Proposed Finding. As an initial matter, the purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements were unlikely to mislead a significant minority of reasonable consumers. Survey evidence from Professor Novemsky shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486—FF-487). Those TurboTax free ads included paid search ads. (FF-443—FF-454). What is more, consumer testimony (FF-664) and consumer complaints (FF-619; FF-620; FF-623; FF-635—FF-662) also show that many consumers had the expectation that they could use TurboTax for free when that was not the case. (*See, e.g.*, FF-642 (“Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”)).

764. Complaint Counsel have not established by a preponderance of evidence that any of the challenged email ads were likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax.

Response to Finding No. 764:

Complaint Counsel disputes this Proposed Finding. As an initial matter, the purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements were unlikely to mislead a significant minority of reasonable consumers. Survey evidence from Professor Novemsky shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484;

see also FF-486—FF-487). Those TurboTax free ads included email ads. (FF-430—FF-442). What is more, consumer testimony (FF-664) and consumer complaints (FF-619; FF-620; FF-623; FF-635—FF-662) also show that many consumers had the expectation that they could use TurboTax for free when that was not the case. (*See, e.g.*, FF-642 (“Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”)).

765. Complaint Counsel have not established by a preponderance of evidence that any of the challenged radio ads were likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax.

Response to Finding No. 765:

Complaint Counsel disputes this Proposed Finding. As an initial matter, the purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were unlikely to mislead a significant minority of reasonable consumers. Survey evidence from Professor Novemsky shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486—FF-487). Those TurboTax free ads included radio ads. (FF-195—FF-211) What is more, consumer testimony (FF-664) and consumer complaints (FF-619; FF-620; FF-623; FF-635—FF-662) also show that many consumers had the expectation that they could use TurboTax for free when that was not the case. (*See, e.g.*, FF-642 (“Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”)).

766. Complaint Counsel have not established by a preponderance of evidence that any of the challenged ads were likely to mislead a significant minority of reasonable consumers about their ability to file for free using TurboTax.

Response to Finding No. 766:

Complaint Counsel disputes this Proposed Finding. As an initial matter, the purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. See Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were to unlikely to mislead a significant minority of reasonable consumers. Survey evidence from Professor Novemsky shows that consumers who could not file for free, who had not used TurboTax in the previous three years believed, at a rate of 52.7%, that they could use TurboTax for free, with 72.3% of consumers identifying TurboTax ads or the TurboTax website as playing a role in forming that misimpression. (FF-481; FF-484; *see also* FF-486—FF-487). What is more, consumer testimony (FF-664) and consumer complaints (FF-619; FF-620; FF-623; FF-635—FF-662) also show that many consumers had the expectation that they could use TurboTax for free when that was not the case. (*See, e.g.*, FF-642 (“Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.”)).

G. No Reasonable Person Would Believe That Intuit Acted Dishonestly Or Fraudulently

767. In light of all the evidence suggesting that consumers were not deceived about their ability to file for free using TurboTax, no reasonable person would have believed that Intuit’s advertising practices were dishonest or fraudulent.

Response to Finding No. 767:

Complaint Counsel disputes the Proposed Finding. The purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on

Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

768. To the contrary, for numerous reasons, Intuit has consistently acted in good faith when advertising free TurboTax offers, and reasonably believed that those advertising practices were *not* dishonest or fraudulent.

Response to Finding No. 768:

Complaint Counsel disputes the Proposed Finding. The purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that it did not intend to deceive consumers.

769. Intuit executives consistently and credibly testified that they did not intend to deceive any consumers, did not believe the challenged ads were deceptive, and would not have run any ad that they believed was deceptive. (Johnson (Intuit) Tr. 574-575, 582, 617-618, 623-624; Ryan (Intuit) Tr. 700-702, 704, 712, 716, 718, 722, 727, 734, 741, 743, 749, 753, 758, 760; Rubin (Intuit) Tr. 1524-1525, 1599; *supra* ¶¶169-176). As noted (*supra* ¶¶162-168), before TurboTax ads are finalized, they are reviewed by multiple stakeholders, both inside and outside of Intuit, to ensure the ads are not deceptive or misleading. (Ryan (Intuit) Tr. 699-701). That process provided Intuit a good faith basis for believing that the challenged advertisements did not mislead or otherwise deceive consumers.

Response to Finding No. 769:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that it did not intend to deceive consumers.

The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The

evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (See FF-21—FF-23). The evidence shows that price is a material term to consumers. (See, e.g., FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (See, e.g., FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (See, e.g., FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. FTC Policy Statement on Deception, 103 F.T.C. 174, 176 (1984) (appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

Testimony obtained at trial contradicts Intuit’s Proposed Finding that Intuit’s executives “consistently and credibly” testified regarding steps taken by Intuit to ensure that its ads are not likely to deceive a reasonable consumer. For example, Mr. Johnson testified on cross examination that he couldn’t recall reviewing, or instructing employees who worked for him to review, Intuit’s customer reviews for feedback regarding its free advertising (Johnson (Intuit) Tr. at 668). Those reviews, however, demonstrate that Intuit received a significant volume of negative customer feedback regarding its free advertising. (FF-630—FF-634; FF-630—FF-634; FF-642—FF-662).

Complaint Counsel agrees that Intuit develops TurboTax advertisements through a months-long iterative process that involves several rounds of review from multiple stakeholders. Complaint Counsel further agrees that during this process, ads are reviewed by multiple stakeholders before they are finalized.

Complaint Counsel additionally disputes the Proposed Finding to the extent any portion of the purported fact does not cite to any portion of the record and calls for a legal conclusion without any support. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

770. In addition, the information available to Intuit about consumer understanding and experience reinforced Intuit’s good faith basis for believing that the challenged advertisements did not mislead or otherwise deceive consumers.

Response to Finding No. 770:

Complaint Counsel disputes the Proposed Finding. The Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, the Proposed Finding is so vague and conclusory that it can’t reasonably be considered a fact.

771. The low rate of consumer complaints, particularly when compared to similar companies, provided Intuit a good faith basis for believing that the challenged advertisements did not mislead or otherwise deceive consumers. (Rubin (Intuit) Tr. 1647-1649).

Response to Finding No. 771:

Complaint Counsel disputes the Proposed Finding, which improperly (and in summary fashion) calls for a legal conclusion. Moreover, Mr. Rubin’s testimony, even if determined to be credible (which it should not be, given other evidence in the record with regard to consumer complaints, *see, e.g.*, RFF-623—RFF-647), simply does not say what Intuit cites it for: that customer complaint rates were low “compared to similar companies,” or gave Intuit “a good faith basis” to believe its ads were not deceptive, but at best that Intuit was not “overwhelmed” by complaints. (Rubin (Intuit) Tr. 1647-1649). On cross examination, Mr. Rubin claimed not to know, for example, about the more than 100,000 individual arbitration demands to Intuit from consumers regarding its free advertising, calling into doubt his credibility. (Rubin (Intuit) Tr. 1647-1649).

772. The fact that the retention rate is higher for users of paid TurboTax SKUs (the customers who would be deceived under Complaint Counsel's theory) than for users of free TurboTax SKUs provided Intuit a good faith basis for believing that the challenged advertisements did not mislead or otherwise deceive consumers. (Johnson (Intuit) Tr. 628-629).

Response to Finding No. 772:

Complaint Counsel disputes the Proposed Finding, which improperly calls for a legal conclusion. Further, the cited testimony does not support this Proposed Finding, as Mr. Johnson never testified that Intuit's retention rate across products provided a "good faith basis" to believe consumers were not being misled or deceived by its ads. (*See* Johnson (Intuit) Tr. 628-629). Mr. Johnson's testimony regarding retention rates is also specifically contradicted by the evidentiary record, including expert testimony. (*See, e.g.*, RFF-91—RFF-92, RFF-651—RFF-652, RFF-655, RFF-657).

773. TurboTax's consistently high customer ratings and positive reviews provided Intuit a good faith basis for believing that it was meeting its customers' expectations and that the challenged ads did not mislead or otherwise deceive consumers. (Johnson (Intuit) Tr. 559-562; Rubin (Intuit) Tr. 1556-1557).

Response to Finding No. 773:

Complaint Counsel disputes the Proposed Finding, which improperly (and in summary fashion) calls for a legal conclusion. Neither Mr. Johnson neither Mr. Rubin, even if their testimony regarding Intuit's customer ratings and reviews is determined to be credible, testified that Intuit had a "good faith basis for believing that it was meeting its customers' expectations and that the challenged ads did not mislead or otherwise deceive consumers." Instead, Mr. Rubin testified in relevant part that "people found the advertisements engaging and also that they were clear that TurboTax is a free offering for those who qualify." (Rubin (Intuit) Tr. 1556-1557). Mr. Johnson testified in relevant part about the narrow question of Intuit's product recommendation score, saying that he would expect it to "decrease significantly by those that felt they were deceived" but it had not. Neither of these passages from Intuit's executives, whose conduct is directly implicated by the allegations in the case, permits a sweeping finding that Intuit had a "good faith basis" to believe consumers weren't misled. This is especially true where its

executives have ignored potential negative customer feedback regarding their free product. For example, Mr. Johnson testified on cross examination that he couldn't recall reviewing, or instructing employees who worked for him to review, Intuit's customer reviews for feedback regarding its free advertising (Johnson (Intuit) Tr. at 668). Those reviews, however, demonstrate that Intuit received a significant volume of negative customer feedback regarding its free advertising. (FF-630—FF-634; FF-630—FF-634; FF-642—FF-662).

The Proposed Finding is also impermissibly vague as to what customer ratings and reviews are being referred to but, as a general matter, none of the evidence demonstrates a lack of deception. (*See, e.g.*, RFF-652—RFF-654 (discussing Intuit's rating and reviews)).

774. The fact that the abandonment rate for TurboTax Free Edition is the same for all TurboTax SKUs provided Intuit a good faith basis for believing that the challenged ads did not mislead or otherwise deceive consumers, because it demonstrated that consumers were abandoning TurboTax for reasons common to all SKUs, rather than because they felt deceived in a manner specific to Free Edition. (Rubin (Intuit) Tr. 1587-1588).

Response to Finding No. 774:

Complaint Counsel disputes the Proposed Finding, which improperly calls for a legal conclusion. Further, the cited testimony does not support this Proposed Finding, as Mr. Rubin never testified that Intuit's abandonment across products provided a "good faith basis" to believe consumers were not being misled or deceived by its ads. (*See* Rubin (Intuit) Tr. 1587-1588). Mr. Rubin's testimony regarding abandonment rates is also specifically contradicted by the evidentiary record, including expert testimony. (*See, e.g.*, RFF-655, RFF-657).

775. The fact that most new TurboTax customers each year file their taxes for free using TurboTax Free Edition provided Intuit a good faith basis for believing that the challenged ads did not mislead or otherwise deceive consumers, because it indicated that Intuit was successful in its efforts to reach taxpayers who qualify for that product. (Rubin (Intuit) 1620-1621).

Response to Finding No. 775:

Complaint Counsel disputes the Proposed Finding, which improperly calls for a legal conclusion. Further, the cited testimony does not support this Proposed Finding, as Mr. Rubin never testified that the majority of new TurboTax customers each year file their taxes for free

provided a “good faith basis” to believe consumers were not being misled or deceived by its ads. (See Rubin (Intuit) Tr. 1620-1621). That conclusion, in fact, is specifically contradicted by the evidentiary record, including expert testimony. For example, Intuit can *benefit* from deception if deceived customers become long-term customers (for example, through status quo bias), and thus pay to use TurboTax in subsequent tax years. (See GX743 (Yoeli Expert Report) ¶¶69-70. This scheme, in fact, is consistent with Mr. Johnson’s testimony on how Intuit monetizes its free offering. Specifically, when asked by Complaint Counsel about how “free customers are monetized by TurboTax on a longer term horizon,” Mr. Johnson replied, in part, “Our expectation would be is those customers might become more complex, are loyal to the brand and that creates an opportunity for us to file their returns when they have more complex returns, and those returns -- or which will be products that they would use that they pay for.” (See Johnson (Intuit) Tr. 642).

776. The results of Intuit’s copy tests of many of the challenged ads provided Intuit a good faith basis for believing that the challenged ads did not mislead or otherwise deceive consumers, because [REDACTED]

[REDACTED] (Ryan (Intuit) Tr. 740, 774-775).

Response to Finding No. 776:

Complaint Counsel disputes the Proposed Finding. Intuit’s own marketing research, including its copy tests, shows that a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”). In copy testing four TurboTax “free” video ads (each of the four ads included in Intuits “TY20 Campaign Copy Testing” was a version of Intuit’s “Free, Free, Free, Free” marketing campaign wherein nearly every word in a given commercial is “free.” (FF-601)) for its “TY20 Campaign,” Intuit found that a single exposure to any one of these ads “result[ed] in significant lifts for all ads on perceptions around ... allows you to file your taxes for free.” (FF-601). In fact, after

exposure to a single ad during the TY20 Campaign Copy Testing, 45% to 57% of consumers took away the free message, even though most taxpayers can't file for free with TurboTax. (FF-604).

Additionally, Intuit's copy testing shows that "[t]he promise of a free offer was enticing for many viewers – and differentiated from other brands within the category – which likely contributed to the intrigue to want to trial [sic]." (FF-605). This market research indicates that Intuit understands not only that "free" messaging drives tax filers to try TurboTax, but that the messaging differentiates TurboTax from its competitors. (FF-563). Each of the "free, free, free" ads tested in the TY20 Campaign Copy Testing caused a statistically significant increase in "usage intent," as measured by the percentage of respondents who indicate they "[d]efinitely would consider using TT," resulting in the conclusion that the simple "free" message communicates the main idea clearly and effectively, helping to drive awareness of the TurboTax Free offer and as a result, intent to use. (FF-565).

Intuit's research also shows that price is important to consumers shopping for tax preparation services and is highly motivating. (FF-596). Additionally, Intuit's research shows that a significant number of consumers, between 22-49%, were confident that TurboTax was free for them (FF-597—FF-598), and that in 2018, 44% of consumers had TurboTax brand awareness related to "free." (FF-599).

Additionally, Feedback Intuit received directly from consumers shows that Intuit knew consumers were being deceived by its "free" TurboTax advertising. (FF-620, FF-623, FF-630, FF-635—FF-662). Intuit's internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED]

[REDACTED] (FF-619). That same year, Intuit found that "customers still want more price transparency (*e.g.* 'Free isn't Free,' ...)", and that a number of consumers complained about Intuit's pricing. (FF-619).

777. The TY20 NPS survey results provided Intuit a good faith basis for believing that the challenged ads did not mislead or otherwise deceive consumers, because it demonstrates that consumers who visit the TurboTax website expecting to file for free *are* filing for free, while consumers expecting to pay to file are finding TurboTax’s paid offerings. (Rubin (Intuit) Tr. 1534-1535).

Response to Finding No. 777:

Complaint Counsel objects to the Proposed Finding because high Net Promoter Scores (NPS) are a form of inadmissible consumer satisfaction evidence. *In re Intuit, Inc.*, 2023 WL 2609450, at *8–9 (F.T.C. Mar. 7, 2023) (order granting Complaint Counsel's Motion to Preclude Admission of Evidence of Customer Satisfaction) (Chappell, C.A.L.J.).

Counsel disputes the Proposed Finding. On its face, the TY20 NPS Survey (GX665 (Intuit)), does not provide any support for the fact that there is “evidence indicating an absence of deception.” (GX749 (Novemsky Rebuttal Expert Report) ¶ 200). Moreover, NPS scores are a limited metric intended to distill customer sentiment into a single value and, importantly, mask the number of detractors that comprise it. (GX749 (Novemsky Rebuttal Expert Report) ¶ 200).

Counsel also disputes the Proposed Finding because Intuit’s own marketing research, including its copy tests, shows that a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”). In copy testing four TurboTax “free” video ads (each of the four ads included in Intuits “TY20 Campaign Copy Testing” was a version of Intuit’s “Free, Free, Free, Free” marketing campaign wherein nearly every word in a given commercial is “free.” (FF-601)) for its “TY20 Campaign,” Intuit found that a single exposure to any one of these ads “result[ed] in significant lifts for all ads on perceptions around ... allows you to file your taxes for free.” (FF-601). In fact, after exposure to a single ad during the TY20 Campaign Copy Testing, 45% to 57% of consumers took away the free message, even though most taxpayers can’t file for free with TurboTax. (FF-604).

Additionally, Intuit’s copy testing shows that “[t]he promise of a free offer was enticing for many viewers – and differentiated from other brands within the category – which likely contributed to the intrigue to want to trial [sic].” (FF-605). This market research indicates that Intuit understands not only that “free” messaging drives tax filers to try TurboTax, but that the messaging differentiates TurboTax from its competitors. (FF-563). Each of the “free, free, free” ads tested in the TY20 Campaign Copy Testing caused a statistically significant increase in “usage intent,” as measured by the percentage of respondents who indicate they “[d]efinitely would consider using TT,” resulting in the conclusion that the simple “free” message communicates the main idea clearly and effectively, helping to drive awareness of the TurboTax Free offer and as a result, intent to use. (FF-565).

Intuit’s research also shows that price is important to consumers shopping for tax preparation services and is highly motivating. (FF-596). Additionally, Intuit’s research shows that a significant number of consumers, between 22-49%, were confident that TurboTax was free for them (FF-597—FF-598), and that in 2018, 44% of consumers had TurboTax brand awareness related to “free.” (FF-599).

Additionally, Feedback Intuit received directly from consumers shows that Intuit knew consumers were being deceived by its “free” TurboTax advertising. (FF-620, FF-623, FF-630, FF-635—FF-662). Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED]

[REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (*e.g.* ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).

Complaint Counsel further disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not

require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)).

“Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).

- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive). Intuit’s continued advertising of TurboTax using deceptive free claims was not in good faith given its knowledge that a significant number of consumers were taking away the misimpression they could file for free when they were ineligible to do so.

778. Complaint Counsel have not offered any evidence suggesting that a reasonable person would have believed that Intuit’s advertising practices were dishonest or fraudulent.

Response to Finding No. 778:

Complaint Counsel disputes the Proposed Finding. The Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel further disputes the Proposed Finding because the evidence in the hearing record indeed shows “that a reasonable person would know that the defendant’s [Intuit’s]

practices were dishonest or fraudulent” *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 603 (9th Cir. 1993). Intuit acted with scienter, it knew, the deceptive message that its widely disseminated ads conveyed to consumers. The evidence relevant to Intuit’s knowledge and intent includes, among other things:

- Intuit’s own marketing research, (FF-597—FF-610);
- Feedback Intuit received directly from consumers (FF-619—FF-623; FF-635—FF-662);
- Intuit’s marketing strategy plans (FF-611—FF-618);
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website” (FF-917—FF-918);
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-927);
- A multi-state investigation starting in 2019 (FF-906, FF-909—FF-910);
- Complaint Counsel’s own investigation starting in 2019 (FF-906; FF-909—FF-910).

Knowingly engaging in deceptive advertising is both fraudulent and dishonest. A reasonable person would know that and a highly sophisticated company like Intuit should have known that too. Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). And Complaint Counsel does not suggest that intent or knowledge are required to show fraud or dishonesty under Section 19 of the FTC Act. Such a showing is not necessary, but it is certainly sufficient.

Based on its Intuit’s own marketing research, Intuit knew that a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax^es [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”). In copy testing four TurboTax “free” video ads for its “TY20 Campaign,” Intuit found that a single exposure to any one of these ads “result[ed] in significant lifts for all ads on perceptions around ... allows you to file your taxes for free.” (FF-601). Each of the four ads included in Intuits “TY20 Campaign Copy Testing” was a version of Intuit’s “Free, Free, Free, Free” marketing campaign wherein nearly every word in a given commercial is “free.” (FF-601). In fact, after exposure to a single ad during the TY20 Campaign Copy Testing, 45% to 57% of consumers took away the free message. (FF-604) And Intuit’s research shows that a significant number of consumers (between 22-49%) were confident that TurboTax was free for them (FF-597—FF-598), even though Intuit knew that most taxpayers can’t file for free with TurboTax. (FF-21—FF-23).

Based on feedback it received from consumers, Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED]
[REDACTED]
[REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...)” (FF-619), and that a number of consumers complained about Intuit’s pricing, for example:

PLU Verbatims From PRS

Required Upgrades

.....

it was very predatory. i came for a free file, but needed to upgrade to the delux edition, after refusing to upgrade 5 times before. My "particular" situation required the delux. so i have to shell out 35 for that. then, since i want to pay the 35 out of my tax return, you're charging 35 to take 35 out of my refund! 100% mark up. I signed in for free and ended up paying 70 bucks.

Required Upgrade

Because it wasn't until I was nearly finished with my filling that I was told I couldn't file without paying fees that amounted to 111. I find this absolutely ridiculous considering there wasn't anything special about my filling status. everything was nearly the same as last year and last year I was able to file for free. To make matters worse the explanation for why my tax situation required me to pay was cryptic at best basically saying there was an additional medicare form that magically caused me to have to pay all these fees. I would have tried another service if I hadn't been so far along with this service. I will only use turbo tax next year as an absolute last resort.


ever thing i needed to do required upgradeing to the next level costing me 110 dollars

it gets more expensive every year. I should be required to pay just because i have a 1099-MISC form. Additionally, it's not mentioned up front that there is a \$34.99 charge if you want the fees deducted from refund, that's extremely misleading because most people would likely click right past that considering you have to scroll to clearly see the charge. Luckily, I caught it and wasn't gouged the extra charge. Just put it on the page where you select method of payment.

I was required to pay extra unexpected fees that totaled around \$100 after constantly reading and hearing that I would be able to file for free.

Because the site required me to upgrade my account, then it didn't make a difference in how I filed. Then charged me for an additional \$70 to file, and somehow 1380 - 106 = 1080 in TurboTax land and I lost \$300 in your fees that don't actually add up.

The pricing seems sketchy and devious. I understand the need for marketing and upselling, but this year Turbo Tax seemed even worse with the required "upgrades" to the next higher service offering. I don't even think the price I paid is unreasonable, but the way I got to that price made me feel cheated and deceived. I will not be using TurboTax next year even though I have used it the last several years in a row.

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(FF-619).

In 2019, when TurboTax changed its Free Edition eligibility criteria, many consumers complained about being required to upgrade to a paid product when they were previously eligible to file for free. (FF-620 (citing GX415 (Intuit) at CC-00007582 to -00007583) (showing that, by January 21, there were around 500 posts about new upgrade requirements, 69% of which were negative)). Additionally, a 2019 Intuit study showed that [REDACTED]

[REDACTED]. (FF-621). Intuit determined that, in 2019, [REDACTED]

[REDACTED]. (FF-622). In a different 2019 study, [REDACTED]

[REDACTED] (FF-623).

Intuit also received consumer feedback directly from consumers to Intuit’s customer service team, as well as from reviews left by consumers who completed their taxes using TurboTax. (FF-624—FF-634). Communications to Intuit’s customer service team include, for example, entries such as, [REDACTED] (FF-638), [REDACTED] (FF-639), and [REDACTED] (FF-641). Another consumer wrote: “[REDACTED]” [REDACTED] (FF-636).

Intuit’s customer reviews similarly include, for example, customer feedback such as: “[t]hey advertise \$0 to file a basic W2 and end up charging you,” (FF-644), “ADVERTISESES FREE, FREE, FREE, BUT ITS ACTUALLY FEE, FEE, FEE!,” (FF-643), “... they keep promoting that it is free free free and yet it is NOT NOT NOT,” (FF-645), and “[i]t’s not free, has never been free, stop lying about how it’s free.” (FF-661). Another Intuit customer wrote: “Your TV commercials are a big lie, this company should be put out of business for deceptive practices. Free, free, free, yes right \$154.00 to file this return, Free, Free, free.” (FF-642). Yet another consumer wrote: “However, my only complaint was that you originally advertise the tax program to be free. Once you reach the end of the tax form however, you come to find out that it is indeed not free, but is going to cost at least a minimum of \$39 or more. So that’s not cool. False advertising if you ask me.” (FF-657). In fact, Intuit’s customer review data includes *thousands* of examples that indicate consumers may have been, and in many cases were, deceived by Intuit’s practices. (FF-662 (*citing* RX816 (Intuit) and identifying over 3,800 examples from TY21 alone of customer feedback consistent with Complaint Counsel’s allegations)).

Intuit’s internal marketing strategy documents reflect a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615). Intuit’s FY’19 GTM (“Go-To-Market”) White Paper (GX428 (Intuit)) [REDACTED]. As Intuit

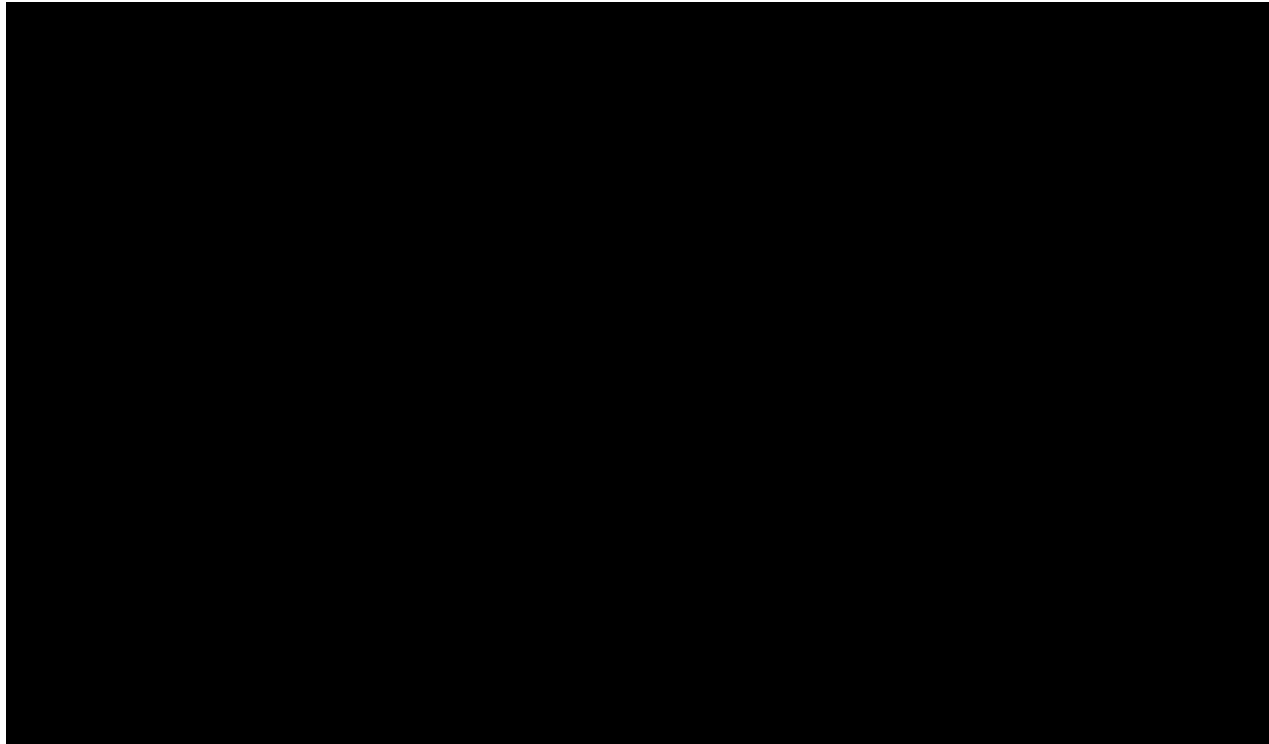
Director of Marketing Elizabeth Berger explained during her deposition, “every team cross-functionally provides some input” on the FY’19 GTM White Paper and it is designed to provide a detailed view of Intuit’s “go-to-market plans for fiscal year 2019.” (FF-611). The FY’19 GTM White Paper admits that:

- [REDACTED] (FF-612).
- [REDACTED] (FF-613) (emphasis in the original).
- [REDACTED] (FF-614).

The fact that “free” is compelling and attracts customers is not new to Intuit. (FF-615 (citing *e.g.*, GX57 (Intuit) at CC-00000646 (2014 marketing strategy document finding that “Free/Free offer is compelling enough to drive considerable (1.2M) incremental customer growth”); GX403 (Intuit) at CC-00007485 ([REDACTED]) & GX144 (Soukas (Intuit) Dep.) at 125-127; GX410 (Intuit) at p. 1 & GX145 (Berger (Intuit) Dep.) at 97, 104–08 (discussing, in part, the “zero-dollar any way” campaign); GX457 (Intuit) at CC-00009340 (“[REDACTED]”) & GX148 (Somers (Intuit) Dep.) at 84-85)).

Similarly, creative briefs, presentations and other advertising strategy documents prepared for Intuit by advertising agency Wieden+Kennedy also show the impression the TurboTax “free” ads would leave with consumers. (FF-616). For example, a March 18, 2020 presentation developed by Wieden+Kennedy for Intuit titled [REDACTED] contains slides recognizing that:

- [REDACTED] (FF-616).



- [REDACTED] (FF-616) (see above for image of presentation slide found at CC-00000285).
- [REDACTED] (FF-616).
- [REDACTED] (FF-616).
- [REDACTED] (FF-616).

While Intuit and several of its executives, including Cathleen Ryan, Senior Vice President Marketing, claim that they only intended to target simple filers, much of Intuit's TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of

TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603).

2019 litigation commenced by the L.A. City and Santa Clara County put Intuit on notice that its “free” TurboTax advertising campaign was deceptive. On May 6, 2019, the People of the State of California, by and through the Los Angeles City Attorney, filed a Complaint for Injunctive Relief, Restitution, and Civil Penalties for Violations of the Unfair Competition Law (Bus. & Prof. Code §§ 17200 et seq.) (“L.A. City Complaint”) against Intuit. (FF-917). Among other averments, the L.A. City Complaint alleged Intuit engaged in unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-918).

On September 6, 2019, the People of the State of California, by and through the Santa Clara County Counsel, filed a Complaint for Violations of California False Advertising Law, Seeking Restitution, Civil Penalties, and Injunctive Relief (“Santa Clara County Complaint”) against Intuit. (FF-919). Among other averments, the Santa Clara County Complaint alleged: “Intuit deliberately implemented a scheme to draw taxpayers to TurboTax’s revenue-producing URL with false representations that they could file their taxes for free using TurboTax and then to charge taxpayers significant sums to file through additional false and misleading statements.” (FF-920). The Santa Clara County Complaint also alleged: “Intuit made and disseminated myriad statements that are likely to deceive members of the public on its website and in advertisements.” (FF-921). The Santa Clara County Complaint further alleged “Examples of Intuit’s false or misleading statements include ... Falsely representing in numerous television advertisements that if taxpayers used TurboTax Free Edition they would be able to file for free, including in an ad campaign using the tagline: ‘Free, free free free,’” and “Falsely representing

in extensive online advertisements that if taxpayers used the TurboTax Free Edition they would be able to file for free.” (FF-922).

Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising put Intuit on notice. On September 13, 2019, a Consolidated Class Action Complaint was filed against Intuit in the matter captioned *In re Intuit Free File Litigation*, in the United States District Court for the Northern District of California (“Consolidated Class Action Complaint”). (FF-923). Among other averments, the Consolidated Class Action Complaint alleged that: “Intuit implemented a pervasive, nationwide marketing and advertising campaign during the 2018 tax filing season promoting its offering of ‘free’ tax filing services, even though the vast majority of users would actually be charged to file their returns.” (FF-924). Count II of the Consolidated Class Action Complaint alleged fraudulent business acts and practices and deceptive advertising in violation of California Business & Professions Code § 17200, *et seq.*; specifically, the Complaint plead that:

Intuit’s deceptive advertising and fraudulent conduct included affirmative misrepresentations, active concealment of material facts, and partial representations paired with suppression of material facts. Intuit’s conduct violative of the fraudulent prong includes at least the following acts and omissions: ... In a pervasive nationwide advertising campaign, Intuit falsely advertised its TurboTax commercial website as being free, causing confusion and deceiving Class members, eligible for free tax filing, into paying Intuit for tax-filing services.

(FF-925).

Between October 1, 2019, and October 23, 2020, approximately 127,000 current and former Intuit customers filed demands for individual arbitration against Intuit with the American Arbitration Association (AAA) through counsel with the firm Keller Lenkner LLC. (FF-926). Each arbitration claimant alleged “that while Intuit created a free tax filing service for low- and middle income taxpayers, it also steered these consumers away from the free option and toward its paid products.” (FF-927). These consumers further alleged they “were lured to Intuit’s website with promises of its Free Edition, only to learn later that they were ineligible for that free product and would have to pay to use TurboTax.” (FF-928).

By 2021, a federal judge put Intuit on notice that its deception had likely caused substantial consumer harm. On March 5, 2021, Judge Charles R. Breyer of the United States District Court for the Northern District of California denied a Motion for Preliminary Approval of Class Action Settlement in the *In re Intuit Free File Litigation*, Case No. 19-cv-02546 (N.D. Cal. Mar. 5, 2021). (FF-929). Among other reasons, Judge Breyer denied preliminary class settlement because “the proposed settlement provides class members with inadequate compensation.” (FF-930). Judge Breyer noted that, because the plaintiffs had not provided an estimate of Intuit’s potential exposure in the matter, “[t]he Court is left to do a back-of-the-envelope calculation: for a projected class of 19 million people, who paid an average of \$100 per-year for at least one year, a conservative estimate of Intuit’s potential liability is \$1.9 billion.” (FF-931). Judge Breyer further noted:

Strangely, the proposed settlement provides for the same award regardless whether a class member paid fees for more than one year. Plaintiffs’ argument that “eligible free-filers who paid a TurboTax fee in more than one year . . . arguably should have known they would be charged in the subsequent year,” Mot. for Preliminary Approval at 14, hardly resolves the matter. Plaintiffs have characterized this action as “a bait-and-switch case.” Hearing Tr. at 32. A person induced into paying for services that the person initially expected to get for free, and who continues to pay for those services annually, can trace the cumulative harm suffered back to the initial deception. Without that deception, the person would have known they could file for free from the start, and presumably would have done so each year.

(FF-932).

While the above-mentioned litigations and arbitrations were ongoing, Intuit also knew that FTC Bureau of Consumer Protection staff along with several state Attorneys General’s offices were concerned about and investigating the same deceptive advertising. (FF-906—FF-908).

Throughout the course of the litigations and arbitrations prosecuted by the L.A. City Complaint, the Santa Clara County Complaint, the Consolidated Class Action Complaint, the demands for individual arbitration against Intuit discussed above, and investigations by Bureau of Consumer Protections staff and several state Attorneys General’s offices, Intuit continued

655—FF-660 (consumer complaints to Intuit regarding free advertising when consumers were not able to file for free).

780. Reflecting Complaint Counsel’s neglect of the materiality element, their own expert testified at trial that he was unaware that the “legal definition of deception includes materiality.” (Yoeli (FTC) Tr. 1718).

Response to Finding No. 780:

Complaint Counsel disputes the Proposed Finding to the extent it asserts “neglect of the materiality element.” Whether or not an expert witness understands the legal elements of deception is irrelevant as to whether Complaint Counsel has “neglected” materiality. Complaint Counsel has identified ample evidence that Intuit’s “free” marketing and advertising claims are material. (*See, e.g.*, FF-596; FF-804—FF-806 (Intuit’s experts explaining that price is important to consumers); FF-605 (Intuit testing showing that “[t]he promise of a free offer was enticing for many viewers – and differentiated from other brands within the category – which likely contributed to the intrigue to want to trial [sic].”); FF-614 (internal Intuit document stating that [REDACTED]); FF-615 (Intuit’s free messaging drove consumers to its product) FF-619; FF-621—FF-623 (customer complaints related to price and price transparency); FF-665 (deposition testimony from 10 consumers who explained that price was important to them); FF-668 (a consumer deponent stating that TurboTax free advertising was “the key message that brought me to TurboTax in the first place.”)).

781. Complaint Counsel’s stated theory of materiality is that that the alleged deception was material because consumers were drawn to the TurboTax website by the challenged ads and thus wasted time and effort, amounting to harm that “can’t be remedied by subsequent disclosures.” (Evans (FTC) Tr. 32). But Complaint Counsel have offered no evidence to support that novel theory.

Response to Finding No. 781:

Complaint Counsel disputes the Proposed Finding. Complaint Counsel’s theory of materiality is that “price, especially whether something is free or not, is material to consumers.”

pay, and consumer may have decided to use or purchase TurboTax before they have completed their tax return. (RX1392 (Novemsky (Complaint Counsel) Dep. 59 (“Q. So a consumer would see the Website before making a purchasing decision, correct? A. They may make the decision before they see the Website. They would have to see the Website before making a purchase.”)). According to one consumer deponent, TurboTax free advertising was “the key message that brought me to TurboTax in the first place.” (FF-668). The fact that consumers are not prompted to pay until they have already completed their tax returns does not mean that consumers have not made any decision regarding whether they will use TurboTax prior to that point. The evidence, including consumer testimony, illustrates that by the time consumers are prompted to pay, they have often invested time entering their information in TurboTax and may be experiencing sunk costs and be unwilling to switch to a different provider. (See FF-671—FF-673). For example, one consumer testified that they spent between 30 to 45 minutes entering their tax information before realizing that they could not file for free (FF-671), while others testified that by the time they realized they would have to pay to file their taxes they did not want to switch providers. (FF-672). Other evidence shows that consumers spend, on average, [REDACTED] before being informed by TurboTax that they must upgrade and pay. (FF-14; GX631 (Intuit) at CC-00013297 (Intuit interrogatory response stating that [REDACTED] was the median time spent by consumers in Tax Year [REDACTED] between beginning their tax return in TurboTax Free Edition and their first encountering a “Hard Stop”). Consumer complaints illustrate that consumers came to TurboTax because of free representations and did not realize they had to pay until they reached the end of the tax filing process. (See, e.g., FF-635; FF-657; FF-651 (“It promotes free, free, free until its [sic] tme [sic] to checkout and then all of a sudden there is a fee that was more than the return itself.”)). As experts for Complaint Counsel opined, consumers may not cease using TurboTax upon learning that they have to pay if the consumer perceives the deception as ‘sunk.’ (FF-843), and consumers may exhibit status quo bias, which would lead them to give preference to the tax preparation method they are already working with. (FF-846—FF-847). In those cases, the moment of purchase is less meaningful than the decision to begin using TurboTax in the first

Response to Finding No. 784:

Complaint Counsel disputes the Proposed Finding because the testimony by Professor Golder does not reflect any opinion contained in his expert report and should be disregarded. (*See* Chappell (ALJ) Tr. 889 (the Court’s admonition that “anything that’s in the record -- in the transcript of this trial spoken by an expert that is pointed out in post-trial briefing that was not in the report will not be considered in any decision in this case.”)). Complaint Counsel has no other specific response.

785. Indeed, consumers must go to the TurboTax website (or use the TurboTax app) to use a TurboTax SKU, regardless of whether they see an advertisement. (GX439 (Ryan (Intuit) Decl.) ¶28).

Response to Finding No. 785:

Complaint Counsel has no specific response.

786. Reliable survey evidence further demonstrates that reasonable consumers do not rely solely on ads when making decisions to try or purchase a tax-preparation product. (Golder (Intuit) Tr. 1076-1077, 1083; RX1017 (Hauser Expert Report) ¶¶104, 107, 109). Dr. Hauser conducted a Purchase Driver Survey—a “census survey of all the various things that people do” when choosing a tax-preparation provider. (RX1391 (Hauser (Intuit) Dep.) at 32; RX1017 (Hauser Expert Report) ¶103). Only 2.4% of respondents in the Purchase Driver Survey even mentioned having “viewed advertisements” when researching tax-preparation options in response to open-ended questions. (RX1017 (Hauser Expert Report) ¶107). And even when respondents indicated that they had “viewed advertisements” in response to close-ended questions, only 3 respondents (again 2.4%) indicated that they relied only on ads in researching tax-preparation methods and providers. (RX1017 (Hauser Expert Report) ¶107).

Response to Finding No. 786:

Complaint Counsel disputes that the Purchase Driver Survey is reliable evidence. The Purchase Driver Survey relied on for this conclusion is methodologically flawed and leads to inflated results. (*See* RFF-505; FF-786—FF-800). For example, the survey asks respondents about “research” they conduct, but this framing is subject to demand artifacts because respondents are likely to understand from the framing and emphasis of this question that the researcher believes they should have done research, encouraging them to provide examples of research they might have conducted, whether or not they in fact undertook those activities. (FF-

788). Moreover, the question's emphasis on "research" is also likely to lead respondents to report activities that they actively pursued and activities they think would be considered "research," which is unlikely to include the context in which most individuals would view advertisements, as those are more passive activities. (FF-787; FF-789). In addition, the survey, without any justification, only reported answers regarding "research" for consumers who switched or considered switching tax preparation providers, which is less than half of respondents. (FF-796—FF-797). The survey results are therefore based on less than half of respondents, leading to inflated results and unreliable conclusions. (FF-796). Also, though Professor Hauser attempts to show that consumers obtain information about TurboTax from sources other than TurboTax, in reality, many sources that consumers selected as part of the survey are either directly related to Intuit marketing (such as online searches, which lead consumers to see both paid search ads and interact with TurboTax search engine optimization), or likely reflect TurboTax advertising content. (FF-793; FF-798—FF-800). For example, word-of-mouth is influenced by advertising a substantial amount of the time, with one study showing that up to 25% of conversations about brands mention advertising. (FF-800). It is worth noting that Professor Hauser's "research" options also reflect an incomplete list, with important choices missing, further calling the survey results into question. (FF-792; FF-794—FF-795; *see* RFF-597). Moreover, Professor Hauser's flawed use of the term "research" in his survey likely led to an underreporting of consumers who viewed advertising, as consumers are unlikely to consider viewing advertising a type of research. (FF-786—FF-787). Moreover, whether advertising sources were the *only* source respondents consulted in making tax decisions is entirely irrelevant, because even if respondents considered other sources, the TurboTax advertisements and website would still have played a role in informing consumers misimpressions that they could file for free using TurboTax. (*See* RFF-619; GX749 (Novemsky Rebuttal Expert Report) ¶ 65).

787. Inbound traffic data for the TurboTax website from Tax Year 2021 reflect that most consumers enter the TurboTax website through means not directly tied to advertising. (Golder (Intuit) Tr. 1231; RX1018 (Golder Expert Report) ¶¶157-161, fig. 24; RX825 (Intuit)). Instead, the largest share of consumers (37%) reach the website by performing a search on an

internet search engine and clicking on a non-sponsored search result for the TurboTax website. (Golder (Intuit) Tr. 1231; RX1018 (Golder Expert Report) ¶158; RX825).

Response to Finding No. 787:

Complaint Counsel disputes the Proposed Finding. The record shows that search engine optimization plays a key role in Intuit’s marketing strategy, that Intuit uses organic searches as part of its advertising, and that website traffic through non-sponsored or “organic” search results for the TurboTax website are therefore directly tied to its advertising and marketing efforts. (See FF-62—FF-63). Intuit documents state that for “Organic Search” the “[g]oal is to ensure that TurboTax Free Edition ranks #1” and that “[s]earches for ‘free’ keywords are optimized to show TTO Free results.” (FF-707). Intuit expert Professor Golder agrees that search engine optimization is a part of marketing strategy and involves having a website appear higher in search results, which may lead to more consumers clicking on a link for the site. (FF-708).

788. Complaint Counsel have also failed to prove how merely visiting the TurboTax website is sufficient to establish materiality when consumers can access the TurboTax website in a matter of seconds and are repeatedly informed of the qualifications for any free TurboTax SKU.

Response to Finding No. 788:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, website itself reinforces deceptive “free” claims (FF-456—FF-466) and does not provide clear and conspicuous information about restrictions on free TurboTax. (See RFF-366—RFF-367; RFF-370; RFF-374; RFF-376; RFF-389—RFF-391; RFF-396; RFF-414—RFF-416; RFF-419; RFF-424; RFF-446; RFF-450). A number of consumer complaints and consumer testimony illustrate that many consumers reached the end of tax filing before learning that they couldn’t file for free. (See RFF-782; FF-671—FF-673; *see also, e.g.*, FF-635; FF-651; FF-657).

789. Once at the TurboTax website, and before entering any information, consumers are promptly provided detailed information about the complete suite of TurboTax SKUs. (Rubin (Intuit) Tr. 1566-1567; RX13 (Intuit); RX381 (Intuit); RX122 (Intuit); RX8 (Intuit); RX138

(Intuit); RX210 (Intuit); RX1532 (Intuit); Rubin (Intuit) Tr. 1571)). Indeed, the full qualifications for any free TurboTax offer were at all times clear, upfront, and ubiquitous on the TurboTax website. (*Supra* ¶¶364-452).

Response to Finding No. 789:

Complaint Counsel disputes the Proposed Finding. Intuit’s website does not provide clear, conspicuous, upfront or ubiquitous information about restrictions on free TurboTax. (*See* RFF-366—RFF-367; RFF-370; RFF-374; RFF-376; RFF-389—RFF-391; RFF-396; RFF-414—RFF-416; RFF-419; RFF-424; RFF-446; RFF-450; *see also* RFF-791 (discussing that hyperlinked disclosures are not effective); RFF-134 (discussing that the use of the “simple returns” language as Intuit’s purported disclaimer is ineffective and fails to convey to consumers that they may not qualify for free TurboTax in a manner that is consistent with TurboTax’s qualification criteria. (citing FF-492—FF-495 & FF-498—FF-500)).

790. Complaint Counsel’s own expert conceded that it took only “a few seconds” to access the TurboTax website, and that once on the website it took only “five to ten seconds” to encounter full eligibility information for the free TurboTax offers. (RX1396 (Yoeli (FTC) Dep.) at 34-35).

Response to Finding No. 790:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the cited part of the deposition of Dr. Yoeli is subject to a valid objection. (RX1396 (Yoeli (FTC) Dep.) at 29-33). More importantly, however, Intuit now misrepresents the testimony it obtained. Specifically, during Dr. Yoeli’s deposition, Intuit’s counsel handed Dr. Yoeli counsel’s personal cell phone. Intuit’s counsel then instructed Dr. Yoeli to navigate to the TurboTax website, where Dr. Yoeli was further instructed what to click and read. (RX1396 (Yoeli (FTC) Dep.) at 33-34). Dr. Yoeli did not agree, as Intuit suggests, that as a general matter it would take a consumer any specific amount of time to navigate to the TurboTax website and encounter eligibility information; instead, he testified that it took “five to ten seconds, assuming somebody actually does click on ‘See if you qualify’ and notices it, because until you asked me, I didn’t see it.” (RX1396 (Yoeli (FTC) Dep.) at 34-35) (emphasis added). When asked again by Intuit’s counsel to agree that it took seconds to arrive at the TurboTax website and click “See if you qualify,” Dr. Yoeli again

provides the caveat that is “[a]ssuming you are directed by somebody who knows what they are doing on where to click,” as he had been. (RX1396 (Yoeli (FTC) Dep.) at 35). So, while Dr. Yoeli may have testified regarding the amount of time it takes for an expert in a matter, during his deposition, to follow the instructions of the opposing party’s counsel regarding what to search and where to click on Intuit’s website, Intuit is disingenuous to cite this interaction as representative of a consumer’s experience, as Dr. Yoeli rightly pointed out.

791. As Mr. Rubin confirmed, the detailed information on the TurboTax website about the qualifications for free TurboTax offers—including the pop-up that appeared after clicking a hyperlinked disclosure—was always accessible before consumers “ha[d] to input their name or any other personal information.” (Rubin (Intuit) Tr. 1566-1567).

Response to Finding No. 791:

Complaint Counsel disputes this Proposed Finding. The purported information was not “accessible” because it was not presented in a manner that was understandable to consumers or placed where consumers were likely to access it. Just because information was contained somewhere does not mean that consumers sought it out or interacted with it. In fact, it is unlikely that consumers would have interacted with information appearing behind a hyperlink. As Professor Novemsky opined, Intuit’s placement of a fuller disclaimer behind a “simple returns” hyperlink made it unlikely that consumers would reach the disclaimer because consumers tend to be cognitive misers, unlikely to click on such a hyperlink or conduct further research when they think they know what a “simple return” is and are under a preexisting misimpression that they have one. (FF-501—FF-502). Hyperlinks are therefore unlikely to be sufficient for presenting important information like eligibility criteria because they require more action than simply reading a description of “simple returns” on the current webpage, and consumers are even less likely to process such information when it is relegated to a hyperlink. (FF-503). What is more, consumers testified that the hyperlinked disclaimers on the TurboTax website were not “obvious.” (FF-674), while another consumer said that “it is highly unlikely that people will click through to an external link.” (FF-675 (testimony by Ms. Phyfer)). Tellingly, Intuit did not

produce in discovery, and did not test during its surveys, the number of consumers who actually interact with its hyperlinks. (See GX631 (Intuit) at CC-00013291-92; Hauser (Intuit) Tr. 1004).

792. For consumers who did input information to start the process of filing a return, they typically encountered a required upgrade screen, if such a screen were encountered at all, shortly after starting their returns. (Rubin (Intuit) Tr. 1541; Johnson (Intuit) Tr. 681).

Response to Finding No. 792:

Complaint Counsel disputes the Proposed Finding that consumers encountered a required upgrade screen “shortly after starting their returns.” The evidence shows on average, consumers encountered an upgrade screen [REDACTED] after beginning to enter their information. (FF-14; GX631 (Intuit) at CC-00013297; see also FF-865). Complaint Counsel disagrees with Intuit’s characterization of this amount of time as “shortly” and Intuit has not established that this would not be a meaningful amount of time for consumers. (FF-866).

793. The average TurboTax Free Edition customer currently *completes* his or her taxes in just 28 minutes. (Rubin (Intuit) Tr. 1541). As Mr. Rubin explained, if a consumer using Free Edition were at some point to see an upgrade screen, they would see that screen in “a lot less than 28 minutes.” (Rubin (Intuit) Tr. 1541; see also RX1027 (Deal Expert Report) ¶105 & fig. 12; Deal (Intuit) Tr. 1334-1340). If they were shown an upgrade screen because they had income not covered by Free Edition, for example, “that would come very early in the process because [TurboTax] start[s] the process with sources of income.” (Rubin (Intuit) Tr. 1541). Indeed, Complaint Counsel conceded during summary decision briefing that “consumers with income-related disqualifiers, for instance, are likely informed that they do not qualify for Free Edition as quickly as 10 minutes into the process of completing their tax returns.” (Complaint Counsel’s Responses & Objections to Intuit’s Statement of Material Facts (Sept. 8, 2022) ¶64).

Response to Finding No. 793:

Complaint Counsel has no specific response, but notes that the evidence shows that consumers encountered hard stops on average [REDACTED] after beginning to enter their information. (FF-14; GX631 (Intuit) at CC-00013297; see also FF-865).

794. Complaint Counsel have failed to explain how, under these circumstances, merely causing consumers to visit the TurboTax website is sufficient to establish materiality as to statements in the challenged ads.

Response to Finding No. 794:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Moreover, website itself reinforces deceptive “free” claims (FF-456—FF-466) and does not provide clear and conspicuous information about restrictions on Free TurboTax. (See RFF-366—RFF-367; RFF-370; RFF-374; RFF-376; RFF-389—RFF-391; RFF-396; RFF-414—RFF-416; RFF-419; RFF-424; RFF-446; RFF-450). A number of consumer complaints and consumer testimony illustrate that many consumers reached the end of tax filing before learning that they couldn’t file for free. (See RFF-782; FF-671—FF-673; *see also, e.g.*, FF-635; FF-651; FF-657; *see also* RFF-792 (on average, consumers spent [REDACTED] entering tax information before encountering a hard stop telling them to upgrade).

795. Complaint Counsel contended in their pretrial brief (at 35 n.47) that the challenged ads are presumptively material because they mention the word “free” and thus relate to the cost of the product. But the products advertised in the challenged ads *were in fact free* for everyone who qualified to use them. (*Supra* ¶¶69, 109-110). Thus, any alleged misrepresentation was not about the *cost* of the advertised product, but rather about the product’s *qualifications*, i.e., about particular consumers’ ability to use the product (at the accurately advertised free price).

Response to Finding No. 795:

Complaint Counsel disputes the Proposed Finding. The consumer takeaway from Intuit’s advertising was not that any particular TurboTax “SKU” was free, but rather that TurboTax was free. Specific TurboTax SKUs or sub brands such as TurboTax Free Edition or TurboTax Live don’t resonate with consumers beyond the TurboTax parent brand. (FF-609). In fact, internal copy testing conducted by Intuit in the ordinary course of business shows that Intuit’s ads “communicate the parent brand, TurboTax well, however, only about ~5% take away the sub brand (TurboTax Free, TurboTax Live).” (FF-609). According to its own copy testing “[m]ost viewers can recall TurboTax, but only a handful mention the specific product name” when asked “Which brand do you think this ad was for?” (FF-610). In other words, consumers remember and

think of the product as “TurboTax” and don’t distinguish between SKUs. This reality is also reflected in testimonials and many customer reviews where consumers typically refer to “TurboTax” as the product without referencing a particular SKU. (*See e.g.* RX1500 at 2 (first visible consumer testimonial stating “I have been using TurboTax for years...” without specifying a SKU and third consumer testimonial stating: “TurboTax is way better than HR Block” without specifying a SKU; GX183A (two out of three customer testimonials featured refer to “TurboTax” without specifying a SKU or version).

796. Complaint Counsel have not established that any of the challenged brand video ads were material.

Response to Finding No. 796:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Additionally, Complaint Counsel has provided ample evidence that price of TurboTax, which Intuit misrepresented in its advertising, is material to consumers. (FF-596; FF-619; FF-621—FF-623; FF-665; FF-804—FF-806). In the words of Intuit’s own expert, the fact that price is important to many people is “not at all surprising for any product sold anywhere.” (FF-596).

797. Complaint Counsel have not established that any of the challenged display ads were material.

Response to Finding No. 797:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Additionally, Complaint Counsel has provided ample evidence that price of TurboTax, which Intuit misrepresented in its advertising, is material to consumers. (FF-596; FF-619; FF-621—FF-623; FF-665; FF-804—FF-806). In the words of Intuit’s own expert, the fact

that price is important to many people is “not at all surprising for any product sold anywhere.” (FF-596).

798. Complaint Counsel have not established that any of the challenged paid-search ads were material.

Response to Finding No. 798:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Additionally, Complaint Counsel has provided ample evidence that price of TurboTax, which Intuit misrepresented in its advertising, is material to consumers. (FF-596; FF-619; FF-621—FF-623; FF-665; FF-804—FF-806). In the words of Intuit’s own expert, the fact that price is important to many people is “not at all surprising for any product sold anywhere.” (FF-596).

799. Complaint Counsel have not established that any of the challenged email ads were material.

Response to Finding No. 799:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Additionally, Complaint Counsel has provided ample evidence that price of TurboTax, which Intuit misrepresented in its advertising, is material to consumers. (FF-596; FF-619; FF-621—FF-623; FF-665; FF-804—FF-806). In the words of Intuit’s own expert, the fact that price is important to many people is “not at all surprising for any product sold anywhere.” (FF-596).

800. Complaint Counsel have not established that any of the challenged radio ads were material.

Response to Finding No. 800:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Additionally, Complaint Counsel has provided ample evidence that price of TurboTax, which Intuit misrepresented in its advertising, is material to consumers. (FF-596; FF-619; FF-621—FF-623; FF-665; FF-804—FF-806) In the words of Intuit’s own expert, the fact that price is important to many people is “not at all surprising for any product sold anywhere.” (FF-596).

801. Complaint Counsel have not established that any of the challenged ads were material.

Response to Finding No. 801:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). Additionally, Complaint Counsel has provided ample evidence that price of TurboTax, which Intuit misrepresented in its advertising, is material to consumers. (FF-596; FF-619; FF-621—FF-623; FF-665; FF-804—FF-806) In the words of Intuit’s own expert, the fact that price is important to many people is “not at all surprising for any product sold anywhere.” (FF-596).

XI. Intuit’s Settlement Agreement And Consent Order With State Attorneys General

802. Complaint Counsel have failed to present evidence that there even was any potential *future* misconduct by Intuit related to its free advertising.

Response to Finding No. 802:

Complaint Counsel disputes the Proposed Finding. As an initial matter, the Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the

evidentiary record.”). Further, there is evidence in the record showing that Intuit’s TY 2022 TurboTax free claims are still deceptive—most importantly, the ads themselves. Intuit argues that these ads are not deceptive because “[n]ot only do these ads have the same features that rendered past ads nondeceptive—identifying the specific SKU being advertised, noting that the offer is only for simple tax returns, and informing consumers that more information can be found on the TurboTax website—but those features have also been enhanced.” Br. at 104 (citation omitted); (*see also* IFF-335). But Intuit is incorrect in asserting that those features were effective in rendering its past ads nondeceptive, and merely enhancing the same ineffective features offers no improvement. For a full discussion, see Complaint Counsel’s Post-Trial Reply Brief Part II.D.1, and RCL-133.

803. Complaint Counsel do not challenge current TurboTax advertising as deceptive. At trial, they clarified that their theory “is that the disclosures made in the ads that ran up until the time the complaint was filed were ineffective,” and conceded that Tax Year 2022 ads were not at issue, and at most, were “relevant to remedy.” (Anguizola (FTC) Tr. 1002, 1839).

Response to Finding No. 803:

There is evidence in the record showing that Intuit’s TY 2022 TurboTax free claims are still deceptive—most importantly, the ads themselves. Intuit argues that these ads are not deceptive because “[n]ot only do these ads have the same features that rendered past ads nondeceptive—identifying the specific SKU being advertised, noting that the offer is only for simple tax returns, and informing consumers that more information can be found on the TurboTax website—but those features have also been enhanced.” Br. at 104 (citation omitted); (*see also* IFF-335). But Intuit is incorrect in asserting that those features were effective in rendering its past ads nondeceptive, and merely enhancing the same ineffective features offers no improvement. For a full discussion, see Complaint Counsel’s Post-Trial Reply Brief Part II.D.1, and RCL-133.

804. Copy testing on four Tax Year 2022 ads conclusively demonstrates that they are not misleading; the proportion of participants who reported believing that they could file for free after watching the test ads was significantly lower than the approximately 50% of consumers in the market for online tax-preparation products who qualify to use the free TurboTax offers.

(*Supra* ¶¶702-713). It is highly implausible that Intuit would reverse course on these improvements and engage in unlawful conduct in the future.

Response to Finding No. 804:

Complaint Counsel disputes the Proposed Finding. As noted below, the TY22 Test was unreliable [REDACTED]. (See RFF-706; RFF-709).

805. Any potential risk of future deceptive advertising relating to Intuit free tax-preparation products is fully addressed by the binding and hence judicially enforceable Consent Order that Intuit entered into with the attorneys general of all 50 states and the District of Columbia. (RX399 (Intuit); Ryan (Intuit) Tr. 755-757). The Consent Order resolved potential claims relating to Intuit’s marketing of its free online tax-preparation products. (RX261 at 15).

Response to Finding No. 805:

After the Commission issued the Complaint in this matter, Intuit entered into a Consent Order with the States and the District of Columbia “to resolve an investigation of the Attorneys General into Intuit’s marketing, advertising, promotion, and sale of certain online tax preparation products and whether Intuit’s conduct constituted deceptive or unfair business acts or practices in violation of the States’ consumer protection laws.” (FF-935). Intuit asserts that it is complying with the Consent Order, Br. at 106, which necessarily means that Intuit views its current ads to be compliant with the Consent Order. But Intuit’s current ads making free claims with regard to TurboTax have not improved in any way that makes them less deceptive than their forebearers. See Complaint Counsel’s Post-Trial Reply Brief Part II.D.1. That alone demonstrates that the Consent Order is not sufficient to curb Intuit’s deceptive advertising.

Additionally, specific loopholes in the Consent Order discussed in Complaint Counsel’s Post-Trial Brief include: (1) 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. (FF-937). This contradicts the black letter law principles articulated in the .com Disclosures, at 10, among other FTC sources. (2) 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”—and not even that in a video of 8

seconds or less, as is often the case for social media video posts. (FF-938). Plus, this entire provision sunsets after ten years. (FF-938). This contradicts the black letter law principles articulated in the Deception Policy Statement, at 180, and the TV Ad Policy Statement, among other FTC sources. The Consent Order defines “Space-Constrained Advertisements” as any “that has space, time, format, size, or technological restrictions that limit Intuit from being able to make the disclosures required by this Assurance.” (FF-939). (3) The Consent Order allows hyperlinks to disclosures on Intuit’s website, without specifying that information integral to the claim cannot be hidden behind a hyperlink. (FF-940).

806. The Consent Order was executed on May 4, 2022, and entered as a final judgment and permanent injunction in Los Angeles County Superior Court (Case No. 19STCV15644) on June 25, 2022. (RX261 (Intuit) at 17; RX399 (Intuit)). Other substantively identical settlement documents have been filed with courts and regulators in all other states, according to those states’ laws. (RX399 (Intuit); RX261 (Intuit)).

Response to Finding No. 806:

Same response as RFF-805.

807. Intuit did not admit liability or wrongdoing in the Consent Order and maintains that its previous advertisements were not deceptive. (RX261 (Intuit) at 2, 16).

Response to Finding No. 807:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The

evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

808. Intuit agreed to the Consent Order because many of the terms captured practices that Intuit was “already doing or [were] things that [Intuit] had considered doing,” and because it presented “an opportunity to” “be even more clear” in its advertisements while being able “to continue to offer TurboTax Free Edition to millions and millions of people who have simple tax returns and can come to [Intuit] and file their tax returns for free.” (Rubin (Intuit) Tr. 1599-1600).

Response to Finding No. 808:

Same response as RFF-805.

809. Under the terms of the Consent Order, Intuit agreed to a number of restrictions on its “free” advertising, which took effect and became legally enforceable in June 2022. (RX261 (Intuit) at 4-15, 17).

Response to Finding No. 809:

Same response as RFF-805.

810. Intuit is prohibited from airing, in any medium, the “Free, Free, Free” ads that ran between Tax Years 2018 and Tax Year 2021 (e.g., RX1110 (Intuit); RX1112 (Intuit); RX1119 (Intuit); RX1120 (Intuit)), or any other video ads “that are substantially similar in their repetition of the word free.” (RX261 (Intuit) at 8, 18-23; Ryan (Intuit) Tr. 755).

Response to Finding No. 810:

Same response as RFF-805.

811. The Consent Order imposes distinct requirements on “Space-Constrained” and “non-Space-Constrained” ads. “Space-Constrained” ads include any video or online ad, except for ads on the TurboTax website, with “space, time, format, size, or technological restrictions that limit Intuit from being able to make the disclosures required.” (RX261 (Intuit) at 4-5).

Response to Finding No. 811:

Same response as RFF-805.

812. 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.” (RX261 (Intuit) at 7).

Response to Finding No. 812:

Same response as RFF-805.

813. For “Space-Constrained” ads (other than Space-Constrained video ads), Intuit “must disclose that eligibility requirements apply,” and “[i]f made online, Intuit 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.” (RX261 (Intuit) at 7).

Response to Finding No. 813:

Same response as RFF-805.

814. 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.” (RX261 (Intuit) at 7). In addition, Space-Constrained Video Ads longer than eight seconds “must verbally disclose, Clearly and Conspicuously and in Close Proximity to the representation that the product is free, that not all taxpayers qualify.” (RX261 (Intuit) at 7-8; Ryan (Intuit) Tr. 756).

Response to Finding No. 814:

Same response as RFF-805.

815. The TurboTax website must “disclose (1) Clearly and Conspicuously and 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, 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.” (RX261 (Intuit) at 8; Ryan (Intuit) Tr. 757).

Response to Finding No. 815:

Same response as RFF-805.

816. With respect to any consumer who does not qualify to use TurboTax Free Edition, “Intuit must disclose” the ineligibility to the consumer “Clearly and Conspicuously ... at the earliest point at which it is reasonably possible to determine” the consumer's ineligibility. (RX261 (Intuit) at 8).

Response to Finding No. 816:

Same response as RFF-805.

817. Intuit must not misrepresent “[a]ny other fact material to consumers concerning any tax-preparation product or service, such as the price; total cost; any material restrictions, limitations, or conditions; or any material aspect of its performance, efficacy, nature, or central characteristics.” (RX261 (Intuit) at 7).

Response to Finding No. 817:

Same response as RFF-805.

818. The Consent Order defines the requirement that a disclosure be made “Clearly and Conspicuously” to mean that the disclosure is “difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers.” (RX261 (Intuit) at 2-3). For example, “[a] visual disclosure, by its size, contrast, location, the length of time it appears ... must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.” (RX261 (Intuit) at 3). And audio disclosures must “be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.” (RX261 (Intuit) at 3).

Response to Finding No. 818:

Same response as RFF-805.

819. The Consent Order defines the requirement that a disclosure be made in “Close Proximity” to the free representation to mean that the disclosure is “very near the triggering representation and that the disclosure is made simultaneously with the triggering representation and remains or is repeated throughout the duration of the Advertisement.” (RX261 (Intuit) at 3-4).

Response to Finding No. 819:

Same response as RFF-805.

820. The Consent Order also includes requirements that ensure Intuit's compliance, including submitting regular notices to an oversight committee of the attorneys general, creating and retaining records demonstrating compliance, and submitting reports upon request by the oversight committee. (RX261 (Intuit) at 14-15).

Response to Finding No. 820:

Same response as RFF-805.

821. Intuit has taken compliance with the order seriously: It has organized a team responsible for ensuring that all marketing and advertising is compliant with the Consent Order. (Rubin (Intuit) Tr. 1600).

Response to Finding No. 821:

Same response as RFF-805.

822. All Intuit employees in marketing roles and leadership roles, including employees subsequently hired by the marketing team, are provided clear and comprehensive training on the Consent Order's provisions. (Rubin (Intuit) Tr. 1600-1601).

Response to Finding No. 822:

Same response as RFF-805.

823. Since the Consent Order was executed, Intuit has complied with the order's requirements. (Ryan (Intuit) Tr. 757; Rubin (Intuit) Tr. 1600-1601; *supra* ¶¶335-352 (Tax Year 2022 ads)).

Response to Finding No. 823:

Same response as RFF-805.

824. For example, Intuit has not run any "Free, Free, Free" ads or any other video ads that repeat the word "free," and has expressly disclaimed any intent to do so in the future. (Ryan (Intuit) Tr. 754-757).

Response to Finding No. 824:

Same response as RFF-805.

825. Intuit has also complied with the Consent Order's provisions governing Space-Constrained video ads, by including written disclosures when an ad is shorter than eight seconds or written and verbal disclosures when an ad is eight seconds or longer—and Intuit plans to continue doing all this going forward. (Ryan (Intuit) Tr. 754-756, 758-759; RX1444 (Intuit); *supra* ¶¶342-343).

Response to Finding No. 825:

Same response as RFF-805.

826. Intuit has likewise complied with the Consent Order’s provisions governing non-Space Constrained display ads, by including verbal and written disclosures in its display advertisements—and it plans to continue to do so going forward. (Ryan (Intuit) Tr. 757, 760-761; *supra* ¶¶342-343, 345).

Response to Finding No. 826:

Same response as RFF-805.

827. Finally, Intuit has complied with the Consent Order’s provisions governing Space-Constrained display ads, by including hyperlinks to webpages with detailed eligibility requirements; Intuit had in fact included such hyperlinks in its display ads before the Consent Order was executed—and it plans to continue this compliance going forward. (Ryan (Intuit) Tr. 757, 760-761; RX1420 (Intuit); *supra* ¶¶253, 345).

Response to Finding No. 827:

Same response as RFF-805.

828. Complaint Counsel have not presented any evidence that Intuit’s current practices fail to comply with the Consent Order in any way, nor any evidence suggesting that Intuit might not comply with the Consent Order in the future.

Response to Finding No. 828:

Same response as RFF-805. Also, this fact asserted does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

XII. The Proposed Order Sought By Complaint Counsel Would Harm Consumers

829. Beyond being unnecessary (given the Consent Order’s provisions and Intuit’s compliance with them), Complaint Counsel’s proposed order here would affirmatively harm consumers, by dissuading those that qualify for TurboTax Free Edition from using it. (Ryan (Intuit) Tr. 776-777; RX601 (FTC) at 1-11).

Response to Finding No. 829:

Regarding the effectiveness of the Consent Order, see RFF-805.

Complaint Counsel’s proposed cease and desist order is essentially a follow-the-law injunction. Intuit appears to directly argue against only Section I of the proposed order, which provides:

Prohibition Concerning “Free” Offers

It is ordered that Respondent, Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or

participation with them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, or offering for sale of any goods or services, must not represent that a good or service is “Free” unless:

A. Respondent offers the good or service for Free to all consumers; or

B. 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.

C. Further, if the goods or services are not Free for a majority of U.S. taxpayers, such a fact is disclosed Clearly and Conspicuously at the outset of any disclosures required by I[]B.³

Proposed Order § I. Intuit argues most strenuously against paragraphs B and C of the proposed language. Br. at 110–13. But this provision is little more than a basic instruction not to deceive people. Compare § I.B with the Guide Concerning Use of the Word “Free” and Similar Representations 16 C.F.R. 251.1(c): “[C]onditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be 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.” This proposed language echoes consumer protection fundamentals that have been in place for nearly seventy years.⁴

Intuit also argues that any ad compliant with the proposed order “would affirmatively harm consumers.” But what is the purported harm? “[D]issuading those that qualify for TurboTax Free Edition from using it.” If the only way Intuit can make nondeceptive free TurboTax claims is to make ads so heavily laden with disclaimers that consumers will end up confused, that is a warning sign about the nature of the claims Intuit is making in the first place. If Intuit *cannot* hold itself to a basic standard of transparency, it may not make claims that would

³ The Proposed Order, at § I.C, cross-references “II.B”—with apologies to the Court for the typo, it should cross-reference “I.B.”

⁴ The Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251.1, has been in place since 1971; it superseded an older trade practice rule on use of the word “free,” released by the Commission on December 3, 1953. *See* 36 Fed. Reg. 21,517.

trigger the need for such clarifying disclosures. *See* .com Disclosures, at 6 (“If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, and if it is not possible to make the disclosure clear and conspicuous, then either the claim should be modified so the disclosure is not necessary or the ad should not be disseminated.”). But if Intuit did continue to make the claim, it has demonstrated a wealth of internal and external marketing and legal experts that can help it develop the right message without misleading consumers. *E.g.* IFF-163—IFF-166. Getting consumers to an offering that is free for them is a laudable goal; but not at the price of deceiving other consumers. Intuit cannot justify deceiving as many as two-thirds of taxpayers by providing a free service to the other third. Consumers are not harmed by truthful advertising; they are harmed by Intuit’s deception. (According to Judge Breyer: “The Court is left to do a back-of-the envelope calculation [of the harm caused by Intuit’s deception]: for a projected class of 19 million people, who paid an average of \$100 per-year for at least one year, a conservative estimate of Intuit’s potential liability is \$1.9 billion.” (FF-930).) Beyond individual consumers, Intuit’s deception also harms the marketplace. (*See* FF-848—FF-850).

830. The proposed order would require Intuit to include an exhaustive list of the specific tax situations covered and not covered by TurboTax Free Edition in all free TurboTax advertisements, even space-constrained ads. (RX601 (FTC) at 5; Golder (Intuit) Tr.1166-1167).

Response to Finding No. 830:

The proposed order would require Intuit to “not represent that a good or service is ‘Free’ unless: A. Respondent offers the good or service for Free to all consumers; or B. 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.” (RX601 (Complaint Counsel) at 5). How Intuit complies with this provision would be up to Intuit. For additional information, see RFF-829.

831. It would also require all TurboTax ads to state, at the outset of any disclosures, that TurboTax Free Edition is “not free for the majority of U.S. taxpayers.” (RX601 (FTC) at 5).

Response to Finding No. 831:

The proposed order would require Intuit to, “if the [advertised] goods or services are not Free for a majority of U.S. taxpayers, [disclose] such a fact ... Clearly and Conspicuously at the outset of any disclosures required” by the order. (RX601 (Complaint Counsel) at 5). For additional information, see RFF-829.

832. Complaint Counsel did not present any evidence to justify these onerous requirements as being necessary or even helpful to prevent deception of reasonable consumers.

Response to Finding No. 832:

Complaint Counsel disputes the asserted fact. As an initial matter, the fact asserted does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”). For additional information, see RFF-829.

833. Intuit, however, presented substantial evidence that the requirements would confuse reasonable consumers and discourage taxpayers who qualify to file for free from doing so. (Johnson (Intuit) Tr. 583; Ryan (Intuit) Tr. 776-777; Rubin (Intuit) Tr. 1543-1544).

Response to Finding No. 833:

The cited testimony is speculation by Intuit executives. Otherwise, Complaint Counsel has the same response as RFF-829.

834. The proposed order’s disclosure requirements would be confusing—and thus ineffective at communicating the qualifications for free TurboTax SKUs or offers—because they would cause reasonable consumers to experience information overload. (Johnson (Intuit) Tr. 583; Ryan (Intuit) Tr. 776-777; Rubin (Intuit) Tr. 1543-1544; Golder (Intuit) Tr. 1174; *see also* Novemsky (FTC) Tr. 401).

Response to Finding No. 834:

Same response as RFF-829.

835. As Complaint Counsel’s own expert Professor Novemsky acknowledged, information overload occurs when consumers are given too much information in a context where they are unable to process it. (Novemsky (FTC) Tr. 401; *see also* Golder (Intuit) Tr. 1174). When consumers experience information overload, they are likely to tune out and process less information than has been provided. (Golder (Intuit) Tr. 1175-1176). For this reason, the FTC’s “.com Disclosures” guidelines recommend that disclosures be short. (RX96 (FTC) at 21; RX1018 (Golder Expert Report) ¶118).

Response to Finding No. 835:

Regarding this asserted fact's application to the proposed order, see RFF-829.

The FTC's ".com Disclosures" guidelines do *not* "recommend" that disclosures be short.

Here is what they really say:

Short-form disclosures might or might not adequately inform consumers of the essence of a required disclosure. For example, "Ad:" at the beginning of a tweet or similar short-form message should inform consumers that the message is an advertisement, and the word "Sponsored" likely informs consumers that the message was sponsored by an advertiser. Other abbreviations or icons may or may not be adequate, depending on whether they are presented clearly and conspicuously, and whether consumers understand their meaning so they are not misled. [note 26] Misleading a significant minority of reasonable consumers is a violation of the FTC Act.

[note 26] Empirical evidence may be necessary to demonstrate that certain abbreviations or icons are effective, at least until such time that their usage is sufficiently widespread to provide confidence that consumers see them and understand what they mean. As of the date of publication of this document, such evidence was not available.

(RX96 (Complaint Counsel) at 21). Intuit has not provided "[e]mpirical evidence ... to demonstrate that" *simple tax returns* is effective. On the contrary, the only study of the effectiveness of that disclaimer, by Prof. Novemsky, found that it was not effective. (FF-491—FF-500).

836. Intuit's space-constrained video and display ads provide short disclosures stating that TurboTax Free Edition is "for simple tax returns only" and directing consumers to the TurboTax website for more information. (*Supra* ¶¶215-218, 248-249, 253).

Response to Finding No. 836:

"Simple tax returns only" is not an effective disclaimer. (FF-491—FF-500). And subsequent disclaimers on the TurboTax website do not absolve Intuit for the deception in its advertising. *See* Complaint Counsel's Post-Trial Reply Brief Part II.B.1, at pg. 36–38.

837. On the TurboTax website, Intuit provides a comprehensive explanation of free product eligibility, including the definition of a "simple tax return" and detailed descriptions of the tax situations that are covered and not covered. (RX1498 (Intuit); RX1499 (Intuit); Johnson (Intuit) Tr. 582-583; Ryan (Intuit) Tr. 776-777; *supra* ¶¶364-441). That explanation is available both through a hyperlink and a pop-up, or without clicking a hyperlink by scrolling down the

page. (RX1498 (Intuit); RX1499 (Intuit); RX1500 (Intuit); *supra* ¶¶372-407). The TurboTax Free Edition landing page also contains a chart detailing the TurboTax SKU offerings and the IRS forms or schedules included in each offering. (RX1531 (Intuit); Rubin (Intuit) Tr. 1567; *supra* ¶¶392-398). And the Products & Pricing page provides comprehensive information about the full suite of TurboTax SKUs, including their price and any eligibility qualifications. (RX13 (Intuit); RX381 (Intuit); RX122 (Intuit); RX8 (Intuit); RX138 (Intuit); RX210 (Intuit); RX1532 (Intuit); Rubin (Intuit) Tr. 1570-1571; *supra* ¶¶408-418).

Response to Finding No. 837:

Subsequent disclaimers on the TurboTax website do not absolve Intuit for the deception in its advertising. *See* Complaint Counsel’s Post-Trial Reply Brief Part II.B.1, at pg. 36–38.

838. The information offered at various locations on the TurboTax website, moreover, is provided at a point in the buying process when consumers are “motivated and ready to process” the information, and in an environment where consumers can “control the flow” of the information provided, by, for example, clicking on a hyperlink when they are prepared to digest more detailed information. (Golder (Intuit) Tr. 1070-1071, 1105-1108, 1129-1130, 1173-1175; Johnson (Intuit) Tr. 582-583; Ryan (Intuit) Tr. 776-777).

Response to Finding No. 838:

Same response as RFF-837.

839. Complaint Counsel’s proposed order would instead require Intuit to provide “[a]ll the terms, conditions, and obligations ... at the outset of the offer” in every TurboTax ad, no matter the medium—forcing Intuit to include the 157-word disclosure found in the “simple tax returns” pop-up on the TurboTax website even when such a disclosure would be impractical. (RX601 (FTC) at 5; Golder (Intuit) Tr. 1166-1167, 1170-1172).

Response to Finding No. 839:

Prof. Golder testified that “the assumption I was asked to undertake is that the wording in the simple returns pop-up would be incorporated into the advertising, along with the messaging about being—not being free and that there would be text of that language and voiceover of that language.” (Golder (Intuit) Tr. 1166–67). Prof. Golder’s “assumption [he] was asked to undertake” about how Intuit would comply with the proposed order is just that—an assumption. Intuit could simply avoid making claims that require an unwieldy disclaimer to render them truthful. Or if Intuit does want to keep making such claims, it has demonstrated a wealth of internal and external marketing and legal experts that can help it develop the right message without misleading consumers. For additional information, see RFF-829.

840. Reasonable consumers cannot be expected to process and understand such complicated information in a matter of seconds, or to recall the information later, when they make their purchase decisions. (Ryan (Intuit) Tr. 776-777; Golder (Intuit) Tr. 1105-1107, 1129-1130).

Response to Finding No. 840:

Same response as RFF-839.

841. Professor Novemsky conceded that a 30-second television ad or a 6-second TikTok ad is not the place to provide “lots of complicated information” about qualifications and doing so would lead to “poor consumer decision-making.” (RX1392 (Novemsky (FTC) Dep.) at 317; Novemsky (FTC) Tr. 401-402, 1780, 1820; RX1018 (Golder Expert Report) ¶123). He further admitted that “the level of information that’s contained in the eligibility requirements [for free TurboTax SKUs] could not be effectively communicated in a 30-second television commercial,” and Intuit would “overload consumers by providing lots of complicated qualification criteria in a 30-second commercial or in a 6-second TikTok” ad. (Novemsky (FTC) 402, 1780).

Response to Finding No. 841:

Same response as RFF-839.

842. The likely result of the proposed order’s required disclosure would be that consumers would disengage from ads and process less information, ultimately leading to less consumer awareness of TurboTax Free Edition and its qualifications. (Golder (Intuit) Tr. 1177-1178).

Response to Finding No. 842:

Same response as RFF-839.

843. The same is true with respect to the proposed order’s separate requirement of a disclosure stating that TurboTax Free Edition is “not free for the majority of U.S. taxpayers.” (RX601 (FTC) at 5). That would discourage many consumers who qualify from searching for more information about TurboTax Free Edition and from investigating whether they qualify. (Golder (Intuit) Tr. 1168). Those consumers would instead wrongly assume, based on the disclosure, that they are among the “majority” who do not qualify to file for free. (Golder (Intuit) Tr. 1168-1169). The result would be fewer people filing their taxes for free. (Golder (Intuit) Tr. 1168-1169, 1180-1181; RX1018 (Golder Expert Report) ¶¶240, 243, 246).

Response to Finding No. 843:

On the other hand, Intuit’s current disclaimers do not cure the deception in its TurboTax ads because consumers wrongly assume, based on the “simple tax returns” disclaimer, that they are among those with “simple” tax returns who do qualify to file for free. (FF-491—FF-500). For additional information, see RFF-829.

844. In addition, the disclosures required by the proposed order would make Intuit's ads drastically different from its competitors' ads, even though those competitors use similar eligibility requirements for their free products. (Golder (Intuit) Tr. 1170-1172, 1177-1178; RX1018 (Golder Expert Report) ¶¶231-243).

Response to Finding No. 844:

That Intuit's competitors may also employ deceptive advertising is not a defense. Intuit's competitors should carefully examine their own practices in light of any order this Court may issue against Intuit. *Cf.* 15 U.S.C. § 45(m)(1)(B). Also, Intuit's competitors do use the term "simple returns" differently than Intuit does. (FF-697).

845. As Professor Golder testified, the additional disclosures sought by Complaint Counsel "would be out of step with what consumers are seeing," would be "overwhelming" for ads "on TV [and] even more so in social media," and "would not give them [consumers] time to process that information." (Golder (Intuit) Tr. 1172).

Response to Finding No. 845:

Same response as RFF-839.

846. All this is consistent with the testimony of Intuit's fact witnesses that consumers would be worse off if Intuit added overly detailed or technical qualifying language to TurboTax ads. (Johnson (Intuit) Tr. 583; Ryan (Intuit) Tr. 776-777; Rubin (Intuit) Tr. 1543-1544). 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." (Johnson (Intuit) Tr. 583). Ms. Ryan similarly testified that including the full eligibility details for free TurboTax SKUs in ads would be impractical because it simply would not fit, and that consumers would not even know while seeing, reading, or hearing an ad which tax forms they use. (Ryan (Intuit) Tr. 776-777). And Mr. Rubin stated that providing more detailed qualifications, such as identifying specific tax forms, would "be more confusing for consumers" because tax forms can change year to year, and it is difficult to understand lengthy qualifications in a short ad. (Rubin (Intuit) Tr. 1543-1544).

Response to Finding No. 846:

Same response as RFF-829 and RFF-839.

847. By thereby unfavorably differentiating TurboTax from its competitors, the disclosure requirements would likely lead Intuit to decrease its investment in, or eliminate entirely, its advertising for TurboTax Free Edition. (Golder (Intuit) Tr. 1177-1178; RX1018 (Golder Expert Report) ¶233; *see also* Ryan (Intuit) Tr. 723-724, 735-740). Perhaps that is Complaint Counsel's goal in pursuing this case, but it would cause consumer awareness of and interest in free tax-filing options to decrease as well—resulting, again, in fewer consumers filing

their taxes for free, and more consumers unnecessarily paying to file. (Ryan (Intuit) Tr. 776-777; RX1018 (Golder Expert Report) ¶¶235-236, 240, 244-245; Golder (Intuit) Tr. 1177-1178; RX588 (Intuit) at 20-21, 40; RX595 (Intuit) at 6).

Response to Finding No. 847:

There is little support for Intuit’s first proposition. Prof. Golder’s testimony and report only speculate about what Intuit might do. (Golder (Intuit) Tr. 1177–78; RX1018 (Golder Expert Report) ¶ 233). The cited testimony from Ms. Ryan, who might have been an authoritative source about how Intuit would act in the future, is inapt—both citations are to discussions of copy testing, not Intuit’s investment in advertising for Free Edition. (Ryan (Intuit) Tr. 723–24, 735–40). Otherwise, Complaint Counsel has the same response as RFF-829, RFF-839, and RFF-844.

XIII. Intuit’s Witnesses Testified Credibly That There Was No Likelihood Of Deception

A. Intuit Executives

1. Greg Johnson

848. Intuit presented fact testimony at trial from former Intuit marketing executive Greg Johnson. (Johnson (Intuit) Tr. 546-547). Mr. Johnson served as the Vice President and Senior Vice President of Marketing at Intuit from December 2012 until August 2018. (Johnson (Intuit) Tr. 552; GX152 (Johnson (Intuit) IHT at 25-26)). He served as General Manager of Intuit’s Consumer Group—a position “akin to being the CEO of the TurboTax business”—from August 2018 through May 2022, when he became CEO of the software company McAfee. (Johnson (Intuit) Tr. 546-547, 551-552; GX152 (Johnson (Intuit) IHT at 22-24)).

Response to Finding No. 848:

Complaint Counsel has no specific response.

849. Mr. Johnson was credible and knowledgeable about the topics addressed during his testimony. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 849:

Complaint Counsel disputes the Proposed Finding. The purported fact asserted does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

850. Mr. Johnson testified credibly and knowledgeably about Intuit's values and culture, including the company's commitment to solving its customers' problems and its commitment to "integrity without compromise." (Johnson (Intuit) Tr. 549-551, 554). Mr. Johnson explained that Intuit's culture was consistent with his own values, instilled during his career in the Air Force, of being a team player and service-oriented. (Johnson (Intuit) Tr. 548-549).

Response to Finding No. 850:

Complaint Counsel has no specific response as these are not probative facts. *See* Complaint Counsel's Response to Proposed Conclusion of Law No. 140.

851. Mr. Johnston testified credibly and knowledgeably about Intuit's TurboTax business strategy and focus on customer retention. (Johnson (Intuit) Tr. 570-576, 626-627). As Mr. Johnson explained, Intuit prioritizes building long-lasting relationships with its customers, because those relationships "[REDACTED]." (Johnson (Intuit) Tr. 626).

Response to Finding No. 851:

Complaint Counsel has no specific response.

852. Mr. Johnson testified credibly and knowledgeably about Intuit's TurboTax marketing strategy and how Intuit advertises TurboTax Free Edition to make customers with simple tax returns aware that a free TurboTax SKU is available to them. (Johnson (Intuit) Tr. 574). Mr. Johnson also testified credibly that it has never been Intuit's strategy or intent to suggest to consumers who do not qualify for TurboTax Free Edition that they can file for free. (Johnson (Intuit) Tr. 574-575). As Mr. Johnson explained, such a strategy would have eroded trust in the TurboTax brand and discouraged customers from filing their tax returns with TurboTax. (Johnson (Intuit) Tr. 575-576).

Response to Finding No. 852:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. "It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive." *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463-65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). "Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged." *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F.

Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (*e.g.* ‘Free isn’t Free,’ ...”), and that a number of consumers complained about Intuit’s pricing. (FF-619).
- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)

- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

853. Mr. Johnson testified credibly and knowledgeably about how TurboTax SKUs are differentiated by the complexity of the tax situation each product can handle. (Johnson (Intuit) Tr. 568, 571-573). The purpose of this complexity-based model, Mr. Johnson credibly explained, is to avoid ambiguity for customers by aligning TurboTax SKUs with the IRS’s tax forms and schedules. (Johnson (Intuit) Tr. 568, 571).

Response to Finding No. 853:

Complaint Counsel has no specific response.

854. Mr. Johnson testified credibly and knowledgeably about the qualifications for TurboTax SKUs. He explained that TurboTax Free Edition is available for consumers with “simple tax returns,” meaning those that could be filed on a Form 1040, without any attached schedules or forms. (Johnson (Intuit) Tr. 581-583). And he explained that Intuit uses the phrase “simple tax returns” because the IRS and other industry participants also use it to describe those who file on only Form 1040; this practice of aligning the qualifications for TurboTax Free Edition with the IRS’s definition of a “simple tax return” minimizes customer confusion. (Johnson (Intuit) Tr. 581-582, 583-587).

Response to Finding No. 854:

Intuit has not provided any reliable evidence that “the IRS ... also use[s] [simple tax returns] to describe those who file on only Form 1040.” *See* RFF-119. Otherwise, Complaint Counsel has no specific response.

855. Mr. Johnson testified credibly and knowledgeably about how consumers navigate and use the TurboTax website, including the TurboTax homepage, Free Edition landing page, Products & Pricing Page, and SKU Selector. (Johnson (Intuit) Tr. 593-599, 603). Mr. Johnson described in detail how, in numerous places on the TurboTax website, consumers are able to

readily access comprehensive information about the tax situations that are covered, and not covered, by TurboTax Free Edition. (Johnson (Intuit) Tr. 594-598).

Response to Finding No. 855:

Subsequent disclaimers on the TurboTax website do not absolve Intuit for the deception in its advertising. *See* Complaint Counsel’s Post-Trial Reply Brief Part II.B.1, at pg. 36–38.

856. Mr. Johnson’s tone and demeanor during his testimony evinced that he was testifying truthfully, based on his personal experiences. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 856:

Complaint Counsel disputes the Proposed Finding. The fact asserted does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

2. Cathleen Ryan

857. Intuit presented fact testimony at trial from current Intuit marketing executive Cathleen Ryan. (Ryan (Intuit) Tr. 686). Ms. Ryan became Senior Vice President of Marketing at Intuit in February 2022. (Ryan (Intuit) Tr. 688). Prior to that, Ms. Ryan served successively as Manager, Director, and Vice President in Intuit’s marketing group. (Ryan (Intuit) Tr. 687).

Response to Finding No. 857:

Complaint Counsel has no specific response.

858. Ms. Ryan was credible and knowledgeable about the topics addressed during her testimony. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 858:

Complaint Counsel disputes the Proposed Finding. The purported fact asserted does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

859. Ms. Ryan testified credibly and knowledgeably about Intuit’s TurboTax business strategy. She testified that marketing free TurboTax SKUs benefits Intuit because consumers with simple tax returns are easier to acquire than those with more complex tax situations, as

consumers with simple returns are typically younger and less set in their ways when it comes to tax preparation. (Ryan (Intuit) Tr. 702). Consistent with Mr. Johnson, Ms. Ryan further explained that Intuit seeks to acquire and retain customers with simple tax returns because the company's hope is that these customers will continue to use TurboTax over time, as their tax situations become more complex and require the use of paid products. (Ryan (Intuit) Tr. 702-703).

Response to Finding No. 859:

Complaint Counsel has no specific response.

860. Ms. Ryan testified credibly and knowledgably about Intuit's TurboTax marketing strategy. Like Mr. Johnson, Ms. Ryan testified that it is not Intuit's strategy or intent to trick customers into believing they can file for free when they must pay; such a strategy would actually harm Intuit's business, which depends on returning customers. (Ryan (Intuit) Tr. 704, 747). Instead, Ms. Ryan explained, Intuit strives to get customers in the right SKU for their tax situation from the start by (1) being transparent in marketing communications, and (2) targeting advertising for free products toward individuals who qualify for those products and away from individuals who do not qualify. (Ryan (Intuit) Tr. 704-705, 747-748).

Response to Finding No. 860:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. "It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive." *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463-65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). "Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged." *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit's executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit's knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).
- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

Complaint Counsel also disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit claims that it only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (*See* FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603).

861. Ms. Ryan testified credibly and knowledgeably about how Intuit’s process for developing its ads is consistent with its broader marketing strategy. As Ms. Ryan explained, TurboTax ads are developed through an iterative process involving several rounds of review from multiple stakeholders. (Ryan (Intuit) Tr. 699-701). She explained that during the review process, ads are carefully reviewed to ensure they are not deceptive or misleading, and if any stakeholder considered an ad to be deceptive or misleading, the ad would not make it on the air. (Ryan (Intuit) Tr. 701-702).

Response to Finding No. 861:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit’s free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes

for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

862. Ms. Ryan testified credibly and knowledgeably about the copy testing that was conducted on some of Intuit’s TurboTax ads. As she explained in detail, the results of those copy tests did not in any way suggest that the ads were misleading. (Ryan (Intuit) Tr. 713-715, 722-725, 735-740, 771-775).

Response to Finding No. 862:

Same response as RFF-861.

863. Ms. Ryan testified credibly and knowledgeably about the ads that were ultimately produced from Intuit’s iterative process. As she explained in detail, ads for free TurboTax SKUs—which she played a role in approving—were not intended to convey that all TurboTax SKUs are free; to the contrary, the ads consistently included the name of the product being advertised and its qualifications. (Ryan (Intuit) Tr. 700-702, 704, 712, 716, 718, 722, 727, 733-734, 741, 743, 749, 753, 758, 760).

Response to Finding No. 863:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED]

[REDACTED] (FF-

619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).

- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

864. Ms. Ryan testified credibly and knowledgeably about the Consent Order that Intuit entered into with the attorneys general of all 50 states and the District of Columbia, and how that Consent Order imposes additional requirements on Intuit’s advertisements for free TurboTax SKUs. (Ryan (Intuit) Tr. 755-756). Ms. Ryan testified that Intuit has complied, and will continue to comply, with the Consent Order’s requirements. (Ryan (Intuit) Tr. 757). She also testified credibly about how Complaint Counsel’s additional proposed requirements for TurboTax’s ads would harm consumers, by dissuading those that qualify for TurboTax Free Edition from using it. (Ryan (Intuit) Tr. 776-777).

Response to Finding No. 864:

Same response as RFF-805, RFF-829, and RFF-839.

865. Ms. Ryan's tone and demeanor during her testimony evinced that she was testifying truthfully, based on her personal experiences. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 865:

Complaint Counsel disputes the Proposed Finding. The fact asserted does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

3. Jack Rubin

866. Intuit presented fact testimony at trial from current Intuit marketing executive Jack Rubin. (Rubin (Intuit) Tr. 1498). Mr. Rubin joined Intuit in 2018 as the Vice President of Marketing Strategy for the Consumer Group—the Intuit business unit that includes TurboTax—and he remains primarily focused on TurboTax marketing strategy. (Rubin (Intuit) Tr. 1498-1501).

Response to Finding No. 866:

Complaint Counsel has no specific response.

867. Mr. Rubin was credible and knowledgeable about the topics addressed during his testimony. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 867:

Complaint Counsel disputes the Proposed Finding. The purported fact asserted does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

868. Mr. Rubin testified credibly and knowledgeably about Intuit's TurboTax business strategy. Consistent with Mr. Johnson and Ms. Ryan, he explained that Intuit offers TurboTax Free Edition as part of a long-term growth strategy, under which the company seeks to develop long-term relationships with customers with simple tax returns, in the hope that they will continue to use TurboTax over time, as their tax situations become more complex over time and require use of paid products. (Rubin (Intuit) Tr. 1522-1523).

Response to Finding No. 868:

Complaint Counsel has no specific response.

869. Mr. Rubin testified credibly and knowledgeably about how it is essential to Intuit's business strategy that consumers understand the qualifications for free TurboTax SKUs. (Rubin (Intuit) Tr. 1542, 1559-1560, 1583-1585). Consistent with Mr. Johnson, Mr. Rubin explained that Intuit aligns the qualifications for those free TurboTax SKUs with the IRS's definition of "simple tax return" in order to make it easy for consumers to understand which SKU is right for their tax situation. (Rubin (Intuit) Tr. 1542). Mr. Rubin testified credibly that approximately 60 million tax returns each year meet the definition of simple tax return, and he testified credibly that, each year, over half of the taxpayers who file their taxes online have simple returns. (Rubin (Intuit) Tr. 1594-1596). Mr. Rubin further explained that Intuit tested consumer comprehension of the phrase "simple tax return" and determined that consumers found the phrase easy to understand. (Rubin (Intuit) Tr. 1544-1546).

Response to Finding No. 869:

Intuit has not provided any reliable evidence that the IRS defines "simple tax return." *See* RFF-119. Mr. Rubin's cited testimony discusses "simpler returns that fit on the simplest IRS form" (Rubin (Intuit) Tr. 1542), which does not substantiate that the IRS has a definition of "simple tax return." Intuit has also not provided any reliable evidence that consumers understand the phrase "simple tax returns." Mr. Rubin's cited testimony discusses two items that purportedly support that assertion: (1) "high Net Promoter Scores," and (2) a seven-person study on an unrelated topic found at RX304 (Intuit). High Net Promoter Scores are a form of inadmissible consumer satisfaction evidence. *In re Intuit, Inc.*, 2023 WL 2609450, at *8-9 (F.T.C. Mar. 7, 2023) (order granting Complaint Counsel's Motion to Preclude Admission of Evidence of Customer Satisfaction) (Chappell, C.A.L.J.). And the small, off-topic study on Intuit's year-over-year data transfer offer is insufficient to counter Prof. Novemsky's actual study of consumer understanding of "simple tax returns." *See* RFF-134.

870. Mr. Rubin testified credibly and knowledgeably about Intuit's TurboTax marketing strategy. Like Mr. Johnson and Ms. Ryan, he testified credibly that it is not Intuit's strategy to deceive customers into believing they can file for free when they actually cannot. (Rubin (Intuit) Tr. 1525-1526, 1529-1531). Consistent with Mr. Johnson and Ms. Ryan, he explained that deceiving customers would hurt Intuit's business—which depends on customers having positive experiences, returning in subsequent years, and encouraging others to also try TurboTax. (Rubin (Intuit) Tr. 1525-1526, 1529-1531). And again consistent with Mr. Johnson and Ms. Ryan, Mr. Rubin testified that Intuit's intent in running advertisements about free TurboTax products has always been to convey to consumers with simple tax returns who qualify to use free TurboTax SKUs that those particular TurboTax SKUs are available to them for free. (Rubin (Intuit) Tr. 1524-1525). For that reason, Mr. Rubin explained, Intuit targets advertising for free TurboTax SKUs toward consumers who would qualify for those SKUs. (Rubin (Intuit)

Tr. 1523-1525, 1534-1535, 1596-1597). Mr. Rubin credibly testified that Intuit would not have run any ads that were deceptive or misleading, and that Intuit continuously considers ways to make its ads even more clear. (Rubin (Intuit) Tr. 1562, 1599).

Response to Finding No. 870:

Complaint Counsel disputes this Proposed Finding to the extent it suggests or implies that Intuit did not intend to deceive consumers by disseminating its free TurboTax advertisements. “It is well established that liability under Section 5 of the FTC Act does not require proof of intent to deceive.” *In re POM Wonderful LLC*, 2012 FTC LEXIS 106, at *463–65 (May 17, 2012) (Chappell, C.A.L.J.) (citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363, 182 U.S. App. D.C. 359 & n.5 (D.C. Cir. 1977); *In re Kraft, Inc.* 114 F.T.C. 40, 121, 1991 FTC LEXIS 38 (1991)). “Similarly, it is no defense to an action for deceptive advertising that the advertiser did not intend to make the claim alleged.” *Id.* (citing *World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998)). Moreover, the evidence shows that Intuit acted with scienter, knowing the message that its ads conveyed to consumers. This evidence contradicts the self-serving testimony of Intuit’s executives and shows that Intuit either knowingly engaged in deception or was recklessly indifferent.

The evidence relevant to Intuit’s knowledge and intent to deceive includes:

- Intuit’s own marketing research which shows Intuit knew a significant percentage of consumers perceive they can use TurboTax for free after viewing Intuit’s TurboTax “free” video ads. (FF-600; FF-606 (for the Spelling Bee ad, 73% of respondents associated “That i can file my tax e s [sic] for free” with the ad) & FF-607 (“About half of viewers take away the ‘free’ offering in Spelling Bee ...”))
- Feedback Intuit received directly from consumers showing that Intuit knew consumers were being deceived by its “free” TurboTax advertising. Intuit’s internal complaint tracking identified price and price transparency as a trend in consumer complaints. (FF-619). For example, [REDACTED]

[REDACTED] (FF-619). That same year, Intuit found that “customers still want more price transparency (e.g. ‘Free isn’t Free,’ ...),” and that a number of consumers complained about Intuit’s pricing. (FF-619).

- Intuit’s internal marketing strategy documents reflecting a recognition of the impression its “free” TurboTax ads leave with consumers. (FF-611—FF-615).
- 2019 litigation commenced by the L.A. City and Santa Clara County alleging unfair, fraudulent, and deceptive business acts and practices by: “advertising ‘FREE Guaranteed’ tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website.” (FF-917—FF-922)
- Litigation and arbitrations commenced by consumers alleging deceptive “free” TurboTax advertising starting in 2019 (FF-923—FF-928)
- A multi-state investigation starting in 2019 (FF-906 & FF-935—FF-936)
- Complaint Counsel’s own investigation. (FF-906).

For years, Intuit has known and been on notice that its “free” TurboTax advertising was deceiving consumers. Yet, Intuit continued making “free” claims in its advertising for TurboTax, including continuing to air ads in its “Free, Free, Free, Free” campaign until just after its meeting with FTC Chair Lina Khan on March 24, 2022. (FF-933—FF-934). *See also*, RCL-140 (responding in more detail to Intuit’s argument that it did not intend to deceive).

Complaint Counsel also disputes this Proposed Finding to the extent it suggests or implies that Intuit only disseminated its free TurboTax advertisements to eligible consumers with “simple returns” as Intuit defines that term. While Intuit claims that it only intended to target simple filers, much of Intuit’s TurboTax advertising was not at all targeted. (FF-617). Instead, Intuit engaged in mass marketing of TurboTax via television and other channels. (FF-617). While this approach certainly reached simple filers, it predictably reached a much broader audience

including millions of consumers ineligible for TurboTax Free Edition or the TurboTax Live free promotion. (See FF-47—FF-466). And when Intuit tested its TurboTax “free” ads, the target audience was *not* limited to only those with a “simple” return. (FF-602—FF-603).

871. Mr. Rubin testified credibly and knowledgeably about the TurboTax website. He explained that consumers can access the TurboTax Free Edition landing page numerous ways, including through search results, TurboTax blog content, TurboTax press releases, and by clicking on TurboTax display ads. (Rubin (Intuit) Tr. 1564-1565). Once consumers reach the website, Mr. Rubin explained, there are myriad ways they can learn whether they qualify for TurboTax Free Edition, before inputting any of their personal information. (Rubin (Intuit) Tr. 1564-1569).

Response to Finding No. 871:

Subsequent disclaimers on the TurboTax website do not absolve Intuit for the deception in its advertising. See Complaint Counsel’s Post-Trial Reply Brief Part II.B.1, at pg. 36–38.

872. Mr. Rubin testified credibly and knowledgeably about Intuit’s efforts to ensure customers have positive experiences with TurboTax. Consistent with Mr. Johnson and Ms. Ryan, he testified that Intuit works extensively to ensure that consumers begin their filing experience in the correct SKU and that they finish their in that same SKU. (Rubin (Intuit) Tr. 1583-1584). For example, Mr. Rubin credibly testified about how Intuit created the SKU Selector in order to make it easier for customers to choose the right SKU for their individual tax situations. (Rubin (Intuit) Tr. 1575-1577, 1580-1581). Through these efforts, Mr. Rubin explained, Intuit’s hope is that each customer will not need to be presented with an upgrade screen; however, whenever a customer enters information that does require them to upgrade, Intuit ensures the customer is notified immediately. (Rubin (Intuit) Tr. 1583-1584).

Response to Finding No. 872:

Same response as RFF-871.

873. Mr. Rubin testified credibly and knowledgeably about how Intuit has consistently sought to improve TurboTax Free Edition by adding additional features, services, and functionality. (Rubin (Intuit) Tr. 1539-1540). He testified that Intuit has enhanced TurboTax Free Edition by providing customers the ability to review and import information from their prior year’s tax return and by allowing customers to review their prior year(s)’ tax returns. (Rubin (Intuit) Tr. 1540). Mr. Rubin explained that each of these services were previously offered to customers for a fee, but that Intuit incorporated them into TurboTax Free Edition because the company is committed to delivering the best free offering in the marketplace for its customers. (Rubin (Intuit) Tr. 1540).

Response to Finding No. 873:

Complaint Counsel has no specific response.

874. Mr. Rubin testified credibly and knowledgeably about the numerous business metrics that Intuit uses to monitor its customers' experiences. He testified credibly that the abandonment rate for TurboTax Free Edition is the same for all other TurboTax SKUs, indicating that consumers abandon for reasons common to all products—not because they expect to file for free but are then informed that they must pay. (Rubin (Intuit) Tr. 1585-1588). He testified credibly about how TurboTax customer views are overwhelmingly positive, which he credibly explained is the opposite of what Intuit would expect to see if consumers were deceived about their ability to file for free. (Rubin (Intuit) Tr. 1530-1531). And he testified credibly about the TY20 NPS Study (GX665 (Intuit)); as he explained, that study demonstrates that Intuit is successful in its efforts to target its ads for free TurboTax SKUs toward consumers who would qualify, because it shows that the percentage of customers who are aware that TurboTax offers a free SKU is barely higher than the percentage of customers who actually file their taxes with TurboTax Free Edition. (Rubin (Intuit) Tr. 1532-1533, 1622-1623).

Response to Finding No. 874:

The fact that abandonment rate for TurboTax Free Edition is the same as for TurboTax paid products does not prove a causal connection between features common to all SKUs and abandonment. Customer reviews and high NPS scores are inadmissible consumer satisfaction evidence. *In re Intuit, Inc.*, 2023 WL 2609450, at *8–9 (F.T.C. Mar. 7, 2023) (order granting Complaint Counsel's Motion to Preclude Admission of Evidence of Customer Satisfaction) (Chappell, C.A.L.J.). Regarding the TY20 NPS Study, see RFF-714, RFF-717—RFF-721.

875. Mr. Rubin testified credibly and knowledgeably about the Consent Order that Intuit entered into with the attorneys general of all 50 states and the District of Columbia. He explained that Intuit maintains that none of its ads have ever been deceptive, but that the company agreed to the Consent Order because many of the order's terms encompassed practices that Intuit was already engaging in, and because the agreement provided Intuit an opportunity to be even more clear in its ads while continuing to offer TurboTax Free Edition to the millions of people who qualify. ((Rubin (Intuit) Tr. 1598-1600). Consistent with Ms. Ryan, Mr. Rubin credibly testified that Intuit has taken a number of measures to ensure that all TurboTax marketing and advertising complies with the Consent Order, and that Intuit intends to continue complying. (Rubin (Intuit) Tr. 1600-1601).

Response to Finding No. 875:

With regard to the effectiveness of the State Consent Order, Complaint Counsel's response is the same response as RFF-805.

Complaint Counsel also disputes this Proposed Finding to the extent it suggests or implies that Intuit's free TurboTax advertisements were not deceptive or misleading. The evidence in the hearing record establishes that Intuit has deceptively advertised TurboTax for

years through a pervasive marketing campaign that delivers an inescapable message: “consumers can file their taxes for free using TurboTax.” Compl. ¶ 119. The evidence shows that many TurboTax advertisements include a “free” claim. (*See, e.g.*, FF-47—FF-466; *see also* FF-958—FF-987). The evidence shows that consumers understand that claim to mean that they can file their taxes for free using TurboTax. (*See, e.g.*, FF-480—FF-490; FF-561—FF-566; FF-597—FF-601; FF-604—FF-616; FF-618; FF-664; FF-666—FF-668; FF-740). The evidence shows that claim is not true—TurboTax is not free for approximately two-thirds of taxpayers. (*See* FF-21—FF-23). The evidence shows that price is a material term to consumers. (*See, e.g.*, FF-596; FF-619; FF-621—FF-622; FF-665; FF-804—FF-806). The evidence shows that these advertisements were widely disseminated on television, radio, and online. (*See, e.g.*, FF-104; FF-116; FF-117; FF-127; FF-128; FF-133; FF-134; FF-141; FF-142; FF-150; FF-159; FF-160; FF-169; FF-170; FF-178; FF-179; FF-184; FF-193; FF-215—FF-320 (odd-numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-328—FF-429 (even numbered facts citing GX Summary 002 (Complaint Counsel) (summarizing GX434 (Intuit))); FF-548—FF-557). And the evidence shows that Intuit’s purported disclaimers were insufficient to change the deceptive message conveyed by Intuit’s false “free” TurboTax claims. (*See, e.g.*, FF-491—FF-503; FF-669—FF-670). Intuit’s false and deceptive claims are textbook violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). They are likely to mislead consumers acting reasonably under the circumstances, to the consumers’ detriment. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 176 (1984) (*appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) (hereinafter “Deception Policy Statement”).

876. Mr. Rubin testified credibly and knowledgeably about Intuit’s participation in the IRS Free File program. (Rubin (Intuit) Tr. 1506-1521). He testified that the IRS Free File program was launched in Tax Year 2002 to provide free online tax preparation services to eligible taxpayers and to increase the percentage of federal returns filed online. (Rubin (Intuit) Tr. 1508, 1510). Intuit’s participation in the Free File program, Mr. Rubin credibly explained, was completely separate from its commercial TurboTax product lineup; Intuit did not view the program as a means to advertise its commercial TurboTax offerings and ensured that consumers who started in the IRS Free File program software and later visited the TurboTax website, were directed back to the Free File Program. (Rubin (Intuit) Tr. 1513-1514, 1519-1520). Mr. Rubin

also credibly explained that Intuit decided to terminate its participation in the IRS Free File program in 2021, due in part to the FTC's demand that Intuit promote the IRS Free File software on its commercial website—which would have violated the terms of the IRS program. (Rubin (Intuit) Tr. 1510, 1514).

Response to Finding No. 876:

Page 1513 does not contain any testimony by Mr. Rubin, only a colloquy between counsel for Intuit and Judge Chappell, which is not evidence. Mr. Rubin is mistaken about there being “a demand from the FTC” that Intuit promote the IRS Free File Program on its commercial website. (Rubin (Intuit) Tr. 1510). When Intuit participated in the IRS Free File Program, it did link to the irs.gov Free File Program website from various pages on the TurboTax website. (FF-38).

877. Mr. Rubin's tone and demeanor during his testimony evinced that he was testifying truthfully, based on his personal experiences. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 877:

Complaint Counsel disputes the Proposed Finding. The fact asserted does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

B. Expert Witnesses

1. John Hauser

878. Intuit presented expert testimony at trial from Dr. John Hauser, the Kirin Professor of Marketing at the MIT Sloan School of Management. (Hauser (Intuit) Tr. 838-839). Dr. Hauser was qualified to offer expert testimony concerning the opinions contained in his expert report. (Hauser (Intuit) Tr. 838-841; RX1017 (Intuit) at 1, A-1).

Response to Finding No. 878:

Complaint Counsel has no specific response.

879. Dr. Hauser's expert opinions were the product of reliable principles and methods, and were helpful to the Court. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 879:

Complaint Counsel disputes the Proposed Finding. The purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See Order on Post-Trial Filings at 2* (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

880. Dr. Hauser’s field of specialization is marketing science, which is the application of scientific methods to study marketing-related issues. (Hauser (Intuit) Tr. 839). He has extensive experience designing experiments and conducting survey research. (Hauser (Intuit) Tr. 839, 842-843; RX1017 (Hauser Expert Report) ¶1).

Response to Finding No. 880:

Complaint Counsel does not have a specific response.

881. Dr. Hauser demonstrated that he was credible and knowledgeable about the topics addressed in his testimony. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 881

Complaint Counsel disputes the Proposed Finding. The purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See Order on Post-Trial Filings at 2* (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

882. Dr. Hauser testified credibly and knowledgably about how he designed his Disclosure Efficacy Survey in accordance with scientific best practices and in a manner that enabled him to assess causality. (Hauser (Intuit) Tr. 847-869, 1018-1034). He also testified credibly and knowledgably about how the results of his Disclosure Efficacy Survey are inconsistent with Complaint Counsel’s hypotheses in this case and indicate that the challenged ads are not deceptive. (Hauser (Intuit) 869-875).

Response to Finding No. 882:

Complaint Counsel disputes the Proposed Finding. Intuit’s broad assertion that Dr. Hauser “testified credibly and truthfully” about a topic, followed by a general citation to dozens of pages of the hearing transcript, does not provide the kind of “specific references to the

evidentiary record” needed to permit such a finding. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel additionally disputes the Proposed Finding to the extent it contradicts the record regarding Dr. Hauser’s Disclosure Efficacy Survey. (*See* RFF-722—RFF-745; FF-747—FF-777 (discussing in detail Dr. Hauser’s Disclosure Efficacy Survey)).

883. Dr. Hauser also testified credibly and knowledgably about how to analyze and understand the results of Intuit’s TY20 Copy Test (GX460 (Intuit)), and about why the results of that test do not suggest that the challenged ads are deceptive. (Hauser (Intuit) Tr. 876-885).

Response to Finding No. 883:

Complaint Counsel disputes the Proposed Finding. Intuit’s broad assertion that Dr. Hauser “testified credibly and truthfully” about a topic, followed by a general citation to ten pages of the hearing transcript, does not provide the kind of “specific references to the evidentiary record” needed to permit such a finding. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel additionally disputes the Proposed Finding to the extent it contradicts the record regarding the TY20 Copy Test. (*See* RFF610; RFF-687—RFF-701; FF-600—FF-605 (discussing in detail the TY20 Copy Test)).

884. Dr. Hauser testified credibly and knowledgably about why Professor Novemsky’s survey was scientifically invalid and is not reliable evidence. As Dr. Hauser credibly explained, Professor Novemsky’s survey was not designed to assess causality, asked leading questions that encouraged participants to provide the answers that Professor Novemsky wanted, used an unrepresentative, biased survey population, and overstated his results. (Hauser (Intuit) Tr. 893-954).

Response to Finding No. 884:

Complaint Counsel disputes the Proposed Finding. Intuit’s broad assertion that Dr. Hauser “testified credibly and truthfully” about a topic, followed by a general citation to more than sixty pages of the hearing transcript, does not provide the kind of “specific references to the evidentiary record” needed to permit such a finding. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel additionally disputes the Proposed Finding to the extent it contradicts the record regarding Dr. Novemsky's survey design and findings. (*See* RFF-528—RFF-622; FF-480—FF-545 (demonstrating scientific validity of Dr. Novemsky's survey design and findings)).

885. Dr. Hauser's tone and demeanor during his testimony evinced that he was testifying truthfully. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 885:

Complaint Counsel disputes the Proposed Finding. The Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.")

2. Peter Golder

886. Intuit presented expert testimony at trial from Peter Golder, a professor of marketing at Dartmouth College's Tuck School of Business. (Golder (Intuit) Tr. 1041, 1043). Professor Golder was qualified to offer expert testimony concerning the opinions contained in his expert report. (RX1018 (Golder Expert Report) ¶¶1-4, A-1 to A-16; Golder (Intuit) Tr. 1042-1045, 1047-1049).

Response to Finding No. 886:

Complaint Counsel has no specific response.

887. Professor Golder's expert opinions in this case were the product of reliable principles and methods, and were helpful to the Court. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 887:

Complaint Counsel disputes the Proposed Finding. The purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.").

888. In forming his opinions in this case, Professor Golder relied on well-respected marketing research literature, his experience and expertise, a number of analyses he performed, customer outcome metrics he reviewed, and TurboTax advertising and marketing materials. (Golder (Intuit) Tr. 1051-1053).

Response to Finding No. 888:

Complaint Counsel has no specific response.

889. Professor Golder demonstrated that he was credible and knowledgeable about, the topics addressed during his testimony. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 889:

Complaint Counsel disputes the Proposed Finding. The purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

890. Professor Golder testified credibly and knowledgeably about reasonable consumers in the tax-preparation industry. He explained how reasonable consumers are familiar with and regularly encounter free product offers with limitations, both outside and within the tax-preparation industry. (Golder (Intuit) Tr. 1088-1099). And he explained how reasonable consumers demonstrate skepticism toward free product offerings, and therefore are unlikely to assume that TurboTax is necessarily free for them. (Golder (Intuit) Tr. 1095-1099).

Response to Finding No. 890:

Complaint Counsel disputes the Proposed Finding. Intuit’s broad assertion that Professor Golder “testified credibly and truthfully” about a topic, followed by a general citation a dozen pages of the hearing transcript, does not provide the kind of “specific references to the evidentiary record” needed to permit such a finding. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel additionally disputes the Proposed Finding because it contradicts the record. (*See, e.g.*, RFF-485—RFF-501; RFF-506; FF-740—FF-742).

891. Professor Golder testified credibly and knowledgeably about the consumer buying process. As he explained, consumers’ selection of a tax-preparation provider is a high-involvement purchase process, meaning they engage with a variety of information sources, conduct research, evaluate alternatives, and do not rely solely on advertisements. (Golder (Intuit) Tr. 1060-1087).

Response to Finding No. 891:

Complaint Counsel disputes the Proposed Finding. Intuit's broad assertion that Professor Golder "testified credibly and truthfully" about a topic, followed by a general citation more than two dozen pages of the hearing transcript, does not provide the kind of "specific references to the evidentiary record" needed to permit such a finding. *See* Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.).

Complaint Counsel additionally disputes the Proposed Finding because it contradicts the record. (*See, e.g.*, RFF-502—RFF-505; RFF-507—RFF-513; FF-738—FF-739).

892. Professor Golder testified credibly and knowledgeably about his analysis of the disclosures in Intuit's advertising for free TurboTax SKUs. He explained how those ads effectively communicate the existence of a restriction and category of that restriction, direct consumers to the TurboTax website for more information, and provide information in a manner that consumers can process it. (Golder (Intuit) Tr. 1099-1132). Professor Golder further testified that the disclosures in Intuit's advertising for free TurboTax SKUs were in the form, location, and amount of detail that consumers expect and are familiar with. (Golder (Intuit) Tr. 1111-1116, 1153-1155).

Response to Finding No. 892:

Complaint Counsel disputes the Proposed Finding. Intuit's broad assertion that Professor Golder "testified credibly and truthfully" about a topic, followed by a general citation dozens of pages of the hearing transcript, does not provide the kind of "specific references to the evidentiary record" needed to permit such a finding. *See* Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.).

Complaint Counsel additionally disputes the Proposed Finding because it contradicts the record. (*See, e.g.*, RFF-512—RFF-527; FF-690—FF-700).

893. Professor Golder testified credibly and knowledgeably about his analysis of the TurboTax website. Professor Golder explained how the TurboTax website is successfully integrated into Intuit's advertising for TurboTax, because the ads' disclosures encourage consumers to visit the TurboTax website, and because consumers indeed must visit the website in order to use or purchase TurboTax online products. (Golder (Intuit) Tr. 1067-1069, 1124- 1132). Professor Golder further explained that, by encouraging consumers to visit the TurboTax website, Intuit's ads reinforce natural consumer behavior, because consumers understand that they can visit websites to find additional information. (Golder (Intuit) Tr. 1126).

Response to Finding No. 893:

Complaint Counsel disputes the Proposed Finding. Intuit's broad assertion that Professor Golder "testified credibly and truthfully" about a topic, followed by a general citation more than a dozen pages of the hearing transcript, does not provide the kind of "specific references to the evidentiary record" needed to permit such a finding. *See* Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.).

Complaint Counsel additionally disputes the Proposed Finding because it contradicts the record. (*See, e.g.*, RFF-521; FF-706—FF-721).

894. Professor Golder testified credibly and knowledgeably about the benchmarking analysis he performed comparing video and social media display ads for free TurboTax SKUs with ads from 18 benchmark companies, using metrics from the FTC's ".com Disclosures" guidelines. (Golder (Intuit) Tr. 1132-1163). As Professor Golder explained, that benchmarking analysis showed that the disclosures in TurboTax's ads products were comparable or superior to the disclosures in the other companies' advertisements. (Golder (Intuit) Tr. 1148-1151, 1156-1160).

Response to Finding No. 894:

Complaint Counsel disputes the Proposed Finding. Intuit's broad assertion that Professor Golder "testified credibly and truthfully" about a topic, followed by a general citation dozens of pages of the hearing transcript, does not provide the kind of "specific references to the evidentiary record" needed to permit such a finding. *See* Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.).

Complaint Counsel additionally disputes the Proposed Finding because it contradicts the record. (*See, e.g.*, RFF-99; RFF-234—RFF-239; FF-701—FF-705).

895. Professor Golder testified credibly and knowledgeably about the effects that would result from the Proposed Order sought by Complaint Counsel in this case. (Golder (Intuit) Tr. 1164-1184). Professor Golder explained how Complaint Counsel's burdensome proposed disclosures would lead to information overload, be out of step with industry norms, lead to less TurboTax free advertising, decrease consumer awareness of free tax filing options, and ultimately lead to fewer consumers filing for free. (Golder (Intuit) Tr. 1164-1184).

Response to Finding No. 895:

Complaint Counsel disputes the Proposed Finding. Intuit's broad assertion that Professor Golder "testified credibly and truthfully" about a topic, followed by a general citation twenty pages of the hearing transcript, does not provide the kind of "specific references to the evidentiary record" needed to permit such a finding. *See* Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.).

Complaint Counsel additionally disputes the Proposed Finding because it contradicts the record. (*See, e.g.*, RFF-830-847; RFF-99; FF-701—FF-705).

896. Professor Golder testified credibly and knowledgeably about the variety of analyses he performed with respect to consumer outcomes, including consumer complaints and retention rates. (Golder (Intuit) Tr. 1184-1214). With respect to consumer complaints, Professor Golder testified that number of complaints identified by Complaint Counsel is miniscule compared to the millions of TurboTax customers during the relevant time period. (Golder (Intuit) Tr. 1195-1196, 1208). As he explained, one would expect the number of consumer complaints to be significantly higher if Intuit had engaged in a multi-year, multi-channel, multi-modal advertising campaign to deceive customers. (Golder (Intuit) Tr. 1189-1190, 1193-1194, 1212-1213). Professor Golder also testified credibly about his independent coding analysis of Complaint Counsel's identified complaints, which showed that many of those complaints are not relevant to this action. (Golder (Intuit) Tr. 1197-1208). And he testified credibly about his complaint benchmarking analysis, which showed that Intuit's rate of BBB complaints was far lower than that of benchmark companies. (Golder (Intuit) Tr. 1208-1213).

Response to Finding No. 896:

Complaint Counsel disputes the Proposed Finding. Intuit's broad assertion that Professor Golder "testified credibly and truthfully" about a topic, followed by a general citation dozens of pages of the hearing transcript, does not provide the kind of "specific references to the evidentiary record" needed to permit such a finding. *See* Order on Post-Trial Filings at 2 ("All proposed findings of fact shall be supported by specific references to the evidentiary record.).

Complaint Counsel additionally disputes the Proposed Finding because it contradicts the record. (*See, e.g.*, RFF-648—RFF-654; FF-722—FF-737).

897. Professor Golder's tone and demeanor during his testimony evinced that he was testifying truthfully about the topics covered in his testimony. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 897:

Complaint Counsel disputes the Proposed Finding. The purported Proposed Finding does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

3. Bruce Deal

898. Intuit presented expert testimony from Bruce Deal at trial. (Deal (Intuit) Tr. 1291). Mr. Deal was qualified to offer expert testimony concerning the opinions contained in his expert report. (Deal (Intuit) Tr. 1291-1293; RX1027 (Deal Expert Report) ¶¶1-2, A-1 to A-23).

Response to Finding No. 898:

Complaint Counsel does not have a specific response.

899. Mr. Deal’s expert opinions in this case were the product of reliable principles and methods, and were helpful to the Court. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 899:

Complaint Counsel disputes the Proposed Finding. The purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel additionally disputes the Proposed Finding because the evidence does not support a finding that Mr. Deal’s opinions in this case were the product of reliable principles and methods. (*See., e.g.,* RFF- 666-RFF—RFF-682). Dr. Yoeli testified, for example, that Mr. Deal’s method for analyzing Inuit’s economic incentives was not standard, nor was it correct. (Yoeli (Intuit) Tr. 1670).

900. Mr. Deal demonstrated that he was credible and knowledgeable about and the topics addressed during his testimony. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 900:

Complaint Counsel disputes the Proposed Finding. The purported Proposed Finding does not cite to any portion of the record, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel additionally disputes the Proposed Finding because it contradicts the record. (*See, e.g.*, RFF-39—RFF-55; FF-832—FF-847). For example, Mr. Deal testified, consistent with his report, that consumers who were deceived by Intuit would abandon and not complete their tax filing with TurboTax—and applied that logic to, . (*E.g.*,

901. Mr. Deal testified credibly and knowledgeably about the tax-preparation industry. As Mr. Deal testified, the industry is characterized by a relatively stable customer base, repeat interactions every tax season, a large number of tax-preparation options, and low costs to consumers of switching from one tax-preparation provider to another. (Deal (Intuit) Tr. 1296-1303, 1308-1321). In light of these characteristics, deception would not be a rational business strategy in the tax-preparation market. (Deal (Intuit) Tr. 1321).

Response to Finding No. 901:

Complaint Counsel disputes the Proposed Finding. Intuit’s broad assertion that Mr. Deal “testified credibly and truthfully” about a number of topics, followed by a general citation a small portion of the pages of the hearing transcript from the day he testified, does not provide the kind of “specific references to the evidentiary record” needed to permit such a finding. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel additionally disputes the Proposed Finding because it contradicts the record. (*See, e.g.*, RFF-39—RFF-55; FF-832—FF-847).

902. Mr. Deal testified knowledgeably and credibly about his analysis of TurboTax customer data. In the first phase of that analysis, Mr. Deal credibly explained, he found that 97.6% of the 55.5 million TurboTax customers in Tax Year 2021 did not exhibit characteristics of being deceived, because they either did not pay to file, had prior experience with paid TurboTax SKUs, or evinced a preference for paid products. (Deal (Intuit) Tr. 1322-1359, 1389). And in the second phase of the analysis, Mr. Deal found that only 510 of the 1.3 million Tax Year 2021

customers was associated with direct evidence of possible deception. (Deal (Intuit) Tr. 1359-1368, 1375-1377).

Response to Finding No. 902:

Complaint Counsel disputes the Proposed Finding. Intuit’s broad assertion Mr. Deal “testified credibly and truthfully” about a topic, followed by a general citation dozens of pages of the hearing transcript, does not provide the kind of “specific references to the evidentiary record” needed to permit such a finding. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Complaint Counsel additionally disputes the Proposed Finding because it contradicts the record. (*See, e.g.*, RFF-663—RFF-662; FF-851—FF-889).

903. Mr. Deal’s tone and demeanor during his testimony evinced that he was testifying truthfully about the topics covered in his testimony. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 903:

Complaint Counsel disputes the Proposed Finding. The purported Proposed Finding does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

4. Rebecca Kirk Fair

904. Intuit presented expert testimony from Rebecca Kirk Fair through a trial deposition. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 1). Ms. Kirk Fair was qualified to offer expert testimony concerning the opinions contained in her expert report. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 6-9; RX1016-A (Kirk Fair Expert Report) ¶¶1-5).

Response to Finding No. 904:

Complaint Counsel has no specific response.

905. Ms. Kirk Fair has extensive experience with designing, conducting, and evaluating consumer surveys. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 6-10; RX1016-A (Kirk Fair Expert Report) ¶¶1-6). Ms. Kirk Fair has served as an expert for the FTC in previous matters. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 6-9; RX1016-A (Kirk Fair Expert Report) ¶¶1-5).

Response to Finding No. 905:

Complaint Counsel has no specific response.

906. Ms. Kirk Fair’s expert opinions in this case were the product of reliable principles and methods, and were helpful to the Court. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 906:

Complaint Counsel disputes the Proposed Finding. The purported fact asserted does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

907. Ms. Kirk Fair demonstrated that she was credible and knowledgeable about the topics addressed during her testimony, including her survey and its results. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 6-9; RX1016-A (Kirk Fair Expert Report) ¶18). Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 907:

Complaint Counsel disputes the Proposed Finding. Ms. Kirk Fair testified by trial deposition, so the Court did not have an opportunity to assess her credibility and knowledge first-hand.

908. Ms. Kirk Fair testified knowledgeably and credibly about the design and purpose of her survey, including how she designed her survey in accordance with best practices. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 15-38). She also testified knowledgeably and credibly about how she analyzed the results from her survey and the conclusions she was drew from those results. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 38-63).

Response to Finding No. 908:

Complaint Counsel disputes the Proposed Finding. Ms. Kirk Fair testified by trial deposition, so the Court did not have an opportunity to assess her credibility and knowledge first-hand. Moreover, Intuit’s broad assertion that Ms. Kirk Fair “testified knowledgeably and credibly” about a topic, followed by a general citation to dozens of pages of her trial deposition transcript, does not provide the kind of “specific references to the evidentiary record” needed to

permit such a finding. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

909. Ms. Kirk Fair credibly explained that her survey results were inconsistent with Complaint Counsel’s theory of deception, namely that consumers feel “locked-in” to upgrading to paid TurboTax SKUs after starting their tax returns with TurboTax Free Edition. (RX1555 (Kirk Fair (Intuit) Trial Dep.) at 15-16, 39-59; RX1016-A (Kirk Fair Expert Report) ¶¶16, 23-26, 33-37).

Response to Finding No. 909:

Complaint Counsel disputes the Proposed Finding. Ms. Kirk Fair testified by trial deposition, so the Court did not have an opportunity to assess her credibility and knowledge first-hand. Moreover, Intuit’s broad assertion that Ms. Kirk Fair “testified knowledgeably and credibly” about a topic, followed by a general citation to dozens of pages of her trial deposition transcript, does not provide the kind of “specific references to the evidentiary record” needed to permit such a finding. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Importantly, Ms. Kirk Fair’s survey was not designed to assess deception resulting from TurboTax marketing, the main issue addressed by Professor Novemsky’s survey and report. (GX749 (Novemsky Rebuttal Expert Report) ¶ 257); *see also* RX1016-A (Kirk Fair Expert Report) ¶ 19 (“The purpose of my Disclosure Survey was to assess whether and to what extent the information presented to prospective TurboTax customers through the software’s upgrade screens affects their selection of various tax preparation solutions.”); RX1393 (Kirk Fair (Intuit) Dep.) at 25–27, 36–40, 43–44, 53–54, 60–61, 66, & 83). The assertion that “Complaint Counsel’s theory of deception” hinges on “consumers feel[ing] ‘locked-in’ to upgrading to paid TurboTax SKUs after starting their tax returns with TurboTax Free Edition” misunderstands Complaint Counsel’s allegations, which focus on Intuit’s deceptive advertising.

Ms. Kirk Fair states that if consumers had been deceived by Intuit’s ads as alleged, she would expect to see substantial, statistically significant differences in respondent choices upon learning about an additional free option at the point of the hard stop (RX1016-A (Kirk Fair

Expert Report) ¶ 16), these conclusions do not in fact follow from the evidence she cites, because the fact that consumers upgrade when faced with a hard stop at similar rates whether or not they are told about the IRS Free File Program does not mean that they did not arrive at the site expecting to file for free and still desiring to file for free when they encounter the upgrade screen. (GX749 (Novemsky Rebuttal Expert Report) ¶ 271).

910. Ms. Kirk Fair's tone and demeanor during her testimony evinced that she was testifying truthfully about the topics covered in her testimony. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 910:

Complaint Counsel disputes the Proposed Finding. Ms. Kirk Fair testified by trial deposition, so the Court did not have an opportunity to assess her credibility and knowledge first-hand. Moreover, the purported fact asserted does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

911. Ms. Kirk Fair's testimony was credible and reliable, including with respect to her survey and its results. Complaint Counsel did not elicit testimony or offer evidence at trial suggesting otherwise.

Response to Finding No. 911:

Complaint Counsel disputes the Proposed Finding. The purported fact asserted does not cite to any portion of the record, calls for a legal conclusion without any support, makes gross generalizations about the record without evidence, and should be disregarded. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

XIV. Complaint Counsel's Witnesses Offered Incredible And Unreliable Testimony

A. Diana Shiller

912. Complaint Counsel presented fact testimony at trial from Diana Shiller regarding TurboTax ads and customer complaints. (Shiller (FTC) Tr. 138). Ms. Shiller also submitted four

declarations on those topics. (Shiller (FTC) Tr. 264, 266; GX301 (Shiller (FTC) Decl.); GX311 (Shiller (FTC) Decl.); GX319 (Shiller (FTC) Decl.); GX342 (Shiller (FTC) Decl.).

Response to Finding No. 912:

Complaint Counsel has no specific response.

913. Ms. Shiller is a former H&R Block employee and previously filed her taxes for free using TurboTax. (Shiller (FTC) Tr. 205-206). Ms. Shiller is currently an FTC investigator, although her work in this case involved collecting publicly available TurboTax ads that were sent to her by others, or that she obtained by pretexting as a TurboTax customer who qualified to file for free. (Shiller (FTC) Tr. 138-205; GX301 (Shiller (FTC) Decl.) ¶¶1, 4, 44-46; GX311 (Shiller (FTC) Decl.) ¶¶1, 14-21; GX319 (Shiller (FTC) Decl.) ¶¶1, 4-9; GX342 (Shiller (FTC) Decl.) ¶¶1, 4-5, 17-19).

Response to Finding No. 913:

Ms. Shiller worked part-time at an H&R Block tax store from 2008 to 2010 while in college; her assignments were tax preparer, customer sales representative, and receptionist. (Shiller (Complaint Counsel) Tr. 276–77). She used TurboTax around the same time, more than thirteen years ago. (Shiller (Complaint Counsel) Tr. 206). The implication of “although” in the second sentence of this asserted fact is unnecessary belittling of Ms. Shiller’s work; collecting ads and conducting undercover investigatory work is routine work for an FTC investigator in a false advertising case.

914. Ms. Shiller’s testimony did not address the merits of the case, such as the claims the challenged ads conveyed or whether the ads were deceptive, but was instead limited to reshewing TurboTax ads already seen by the court and attempting to authenticate advertisements and consumer complaints already in evidence. (Shiller (FTC) Tr. 142-205; GX301 (Shiller (FTC) Decl.); GX311 (Shiller (FTC) Decl.); GX319 (Shiller (FTC) Decl.); GX342 (Shiller (FTC) Decl.)).

Response to Finding No. 914:

Complaint Counsel disputes the Proposed Finding. Intuit’s broad assertion that “Ms. Shiller’s testimony did not address the merits of the case,” followed by a general citation to dozens of pages of the hearing transcript and four declarations, does not provide the kind of “specific references to the evidentiary record” needed to permit such a finding. *See* Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

Moreover, Ms. Shiller’s testimony established the content of many of Intuit’s ads for TurboTax that made free claims, which are the *most important* evidence pertaining to the “merits of the case.” “The primary evidence of what representations an advertisement conveys to reasonable consumers is the advertisement itself.” *In re Telebrands Corp.*, 140 F.T.C. 278, 290 (2005), *aff’d sub nom Telebrands Corp. v. FTC*, 457 F.3d 354 (4th Cir. 2006); *see also In re Novartis Corp.*, 127 F.T.C. 580, 680 (1999), *aff’d*, 223 F.3d 783 (D.C. Cir. 2000).

915. Ms. Shiller’s testimony and declarations are unreliable and are not credited, for several reasons.

Response to Finding No. 915:

Complaint Counsel disputes the asserted fact. The fact asserted does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

916. Ms. Shiller lacked personal knowledge about the advertisements and customer complaints discussed in her testimony and declarations. (Shiller (FTC) Tr. 189-193, 252-253, 264-268).

Response to Finding No. 916:

Everything Ms. Shiller testified to was something that she saw, heard, did, calculated, or observed personally. Her declarations are full of screenshots that she either took herself or otherwise personally observed. Ms. Shiller’s testimony established the content of many of Intuit’s ads for TurboTax that made free claims, which are the *most important* evidence pertaining to the “merits of the case.” “The primary evidence of what representations an advertisement conveys to reasonable consumers is the advertisement itself.” *In re Telebrands Corp.*, 140 F.T.C. 278, 290 (2005), *aff’d sub nom Telebrands Corp. v. FTC*, 457 F.3d 354 (4th Cir. 2006); *see also In re Novartis Corp.*, 127 F.T.C. 580, 680 (1999), *aff’d*, 223 F.3d 783 (D.C. Cir. 2000). It would be impossible for Ms. Shiller to testify about the content of something she had not seen. Regarding consumer complaints, her testimony factually discusses her searches for complaints and their results. (*E.g.* GX342 (Complaint Counsel) ¶ 220; Shiller (Complaint Counsel) Tr. 275). She did not purport to summarize the contents of complaints she had not read;

she did so only for complaints she had read. (*E.g.* GX342 (Complaint Counsel) ¶ 221; Shiller (Complaint Counsel) Tr. 275–76).

917. Ms. Shiller’s declarations also call into question her veracity. Ms. Shiller’s March 2022 declaration stated under penalty of perjury that the FTC had “received 571 consumer complaints about ‘free’ TurboTax” in the Sentinel database (GX301 (Shiller (FTC) Decl.) ¶72), and her June 2022 declaration likewise stated under penalty of perjury that the FTC had “received 571 consumer complaints, from January 1, 2016 to March 28, 2022, about ‘free’ TurboTax” in the database (GX342 (Shiller (FTC) Decl.) ¶220). But as Ms. Shiller admitted, she made these representations without having read most of those complaints and thus could not have known the contents of the vast majority of the complaints that were the subject of her declaration. (Shiller (FTC) Tr. 264-268). Furthermore, counsel for Intuit repeatedly pointed out to Complaint Counsel errors in Ms. Shiller’s declaration, but over the period of a year, that declaration was never withdrawn.

Response to Finding No. 917:

Ms. Shiller explained paragraph 220 of her declaration at trial:

Q. Now, you were asked some questions about your use of the phrase “about free TurboTax” in your declaration. What did you mean when you said the 571 consumer complaints were “about free TurboTax”?

A. When I searched the Consumer Sentinel Database, I searched for “TurboTax,” and there were thousands of complaints. In order to narrow the search, I included the term “free,” as it is relevant to this case, and I filtered the complaint by the word “free.” That’s what I meant.

She provided the same explanation in her deposition. (RX1390 (Shiller (FTC) Dep.) at 162–65).

Intuit overlooks this to make unwarranted accusations about Ms. Shiller’s “veracity.”

Intuit also cites no support for its last sentence. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

918. Ms. Shiller acknowledged that customer complaints often lack context and require follow-up to understand the customer’s issue. (RX1390 (Shiller (FTC) Dep.) at 56-57). Ms. Shiller, however, only contacted twelve complainants listed in her declarations and only spoke to two. (RX278 (FTC); RX279 (FTC); RX280 (FTC); *see also* RX1390 (Shiller (FTC) Dep.) at 115-116). She did not contact the majority of complainants and did not confirm their identities, their tax-filing history, or their prior use of TurboTax. (RX1390 (Shiller (FTC) Dep.) at 115, 189; Golder (Intuit) Tr. 1199; GX161 (Maxson (FTC) Dep.) at 353-354).

Response to Finding No. 918:

Ms. Shiller factually discussed her searches for complaints and their results. (*E.g.* GX342 (Complaint Counsel) ¶ 220; Shiller (Complaint Counsel) Tr. 275). She did not purport to summarize the contents of complaints she had not read; she did so only for complaints she had read. (*E.g.* GX342 (Complaint Counsel) ¶ 221; Shiller (Complaint Counsel) Tr. 275–76). The complaints Ms. Shiller did testify to are consistent with complaints Intuit itself received (*see* FF-619—FF-662; FF-917—FF-934), and consumer deposition testimony in this case (*see* FF-663—FF-675).

B. Megan Baburek

919. Complaint Counsel presented fact testimony at trial from Megan Baburek, an FTC data analyst, regarding TurboTax advertising-dissemination data. (Baburek (FTC) Tr. 291).

Response to Finding No. 919:

Complaint Counsel has no specific response.

920. Like Ms. Shiller, Ms. Baburek’s testimony was limited to the technical issue of her process for summarizing ad-dissemination data. (Baburek (FTC) Tr. 293).

Response to Finding No. 920:

Complaint Counsel has no specific response.

921. Ms. Baburek’s testimony was unreliable and is not credited, again for several reasons.

Response to Finding No. 921:

Complaint Counsel disputes the asserted fact. The fact asserted does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2 (“All proposed findings of fact shall be supported by specific references to the evidentiary record.”).

922. Ms. Baburek lacked personal knowledge to testify about Intuit’s advertising, or advertising practices more generally.

Response to Finding No. 922:

Complaint Counsel disputes the asserted fact. As an initial matter, the fact asserted does not cite to any portion of the record and should be disregarded. Order on Post-Trial Filings at 2

(“All proposed findings of fact shall be supported by specific references to the evidentiary record.”)

Moreover, everything Ms. Baburek testified to was something that she saw, did, calculated, or observed personally. Her testimony was entirely about summaries she prepared of voluminous Intuit advertising dissemination data. *See* Fed. R. Evid. 1006. Ms. Baburek’s testimony summarized what Intuit’s data showed about the wide dissemination of its TurboTax ads making free claims. (*See* GX Summary 001 (Complaint Counsel) at ‘Ads w-Program Count’ (summarizing TV ad dissemination data produced by Intuit for TV ads that made free claims principally in calendar years 2021 and 2022); GX Summary 002 (Complaint Counsel) at ‘Summary-Online_Ads’ (summarizing Online ad dissemination data produced by Intuit for online ads that made free claims in TY 2020 and 2021 (calendar years 2021 and 2022))). It would be impossible for Ms. Baburek to testify about something she had not analyzed and summarized.

Finally, Intuit does not actually dispute anything that Ms. Baburek testified to regarding the wide dissemination of its ads. Instead, Intuit actually cites her testimony as support for the proposition that “TurboTax Free Edition ads generated over 15 *billion* impressions and were clicked on over 130 million times.” IFF-637 (emphasis in original). Intuit’s complaints about Ms. Baburek’s testimony are belied by the fact that Intuit does not actually challenge the content of her testimony.

923. Ms. Baburek has never worked as a marketing professional (Baburek (FTC) Tr. 330), and she admitted that she had no personal knowledge about how TurboTax advertisements were placed (Baburek (FTC) Tr. 331), or about the TurboTax online advertisement-dissemination data that she summarized (Baburek (FTC) Tr. 329).

Response to Finding No. 923:

Same response as RFF-922.

924. Ms. Baburek’s testimony also demonstrated that she did not fully understand that data. She could not testify to the meaning of the “Big Moment” category mentioned in the data. (Baburek (FTC) Tr. 294). And she testified that she was unaware whether certain text in the data—about qualification terms for free offers—would be displayed alongside online advertisements. (Baburek (FTC) Tr. 332-334).

Response to Finding No. 924:

Same response as RFF-922.

C. Nathan Novemsky

925. Twice at trial, Complaint Counsel presented testimony by its expert Nathan Novemsky. (Novemsky (FTC) Tr. 347, 1763).

Response to Finding No. 925:

Complaint Counsel has no specific response.

926. Professor Novemsky's affirmative testimony and opinions were unreliable and lacked credibility. His perception study, which underpinned his opinions, did not show participants any challenged ads, failed to use a test-control experimental design to assess causation, used a non-representative survey population, was biased, encouraged consumers to guess, and otherwise failed to follow established principles of survey design. (*Supra* ¶¶528-622).

Response to Finding No. 926:

Complaint Counsel disputes the Proposed Finding. Professor Novemsky's opinions and testimony were credible and scientifically reliable. (GX303 (Novemsky Expert Report); GX749 (Novemsky Rebuttal Report); Novemsky (Complaint Counsel) Tr. 347-536, 1762-1828). Professor Novemsky is a well-qualified expert (FF-472—FF-479), and relied on best practices in the design of the perception survey to minimize the possibility of bias and avoid potential demand artifacts. (FF-509). His survey methodology was scientifically sound and reliable. (FF-504—FF-545). The perception survey sample was chosen to be representative of the population of interest and the results of the survey can be generalized to the population at large with a degree of scientific certainty. (FF-511). In designing the perception survey, Professor Novemsky determined that a perception survey, rather than a copy test (where ads are shown), was the appropriate design to examine Intuit's extensive advertising campaign. (FF-531). Professor Novemsky did not use a test/control because it would not have been appropriate where, as here, there is no suitable control group and when the nature of the deception cannot realistically be replicated in the survey environment. (FF-533; *See also* RFF-528—RFF-622). Professor

Novemsky's credibility and the reliability of the perception survey evidence were further illustrated during his direct examination and lengthy cross examination. (RFF-529).

927. Professor Novemsky's rebuttal testimony and opinions of Dr. Hauser, Professor Golder, Mr. Deal, and Ms. Kirk Fair were likewise unreliable and lacked credibility. Professor Novemsky again relied on his faulty survey, and he did not conduct any additional study or perform any other analyses to support his rebuttal opinions, instead offering his *ipse dixit* that the opinions of Intuit's experts were in some way deficient. For example, Professor Novemsky baselessly claimed it "may be the case" that the ads in Dr. Hauser's survey were "equally deceptive" without testing any disclosures or Dr. Hauser's survey ads; repeatedly belittled Professor Golder's disclosure benchmarking analysis as involving merely "a ruler and a stopwatch"; deemed that disclosure benchmarking analysis "irrelevant" because it used "tools that ... do not bear on the question of consumer understanding," namely the FTC's ".com Disclosures" guidelines; downplayed Professor Golder's customer-complaint analysis but conceded the FTC presented zero expert analysis of complaint rates; speculated certain customers Mr. Deal determined were not deceived "could have been deceived" without performing any analysis; and opined on the adequacy of TurboTax website hyperlinks and disclosures without conducting any survey testing them. (Novemsky (FTC) Tr. 1776, 1770, 1798-1801, 1812-1816, 1822-1825; *see also* Novemsky (FTC) Tr. 1800 (arguing that compliance with the FTC's guidelines does not necessarily mean an ad is not deceptive)). Professor Novemsky also attempted to undermine Professor Golder's opinions by arguing that consumers are "misers" who are unlikely to undertake any effort to research tax-preparation products, without conducting any analysis to demonstrate that consumers should be given such little credit. (GX749 (Novemsky Rebuttal Expert Report) ¶100, 234; Novemsky (FTC) Tr. 373, 535).

Response to Finding No. 927:

Complaint Counsel disputes the Proposed Finding. Professor Novemsky's opinions and testimony were credible and scientifically reliable. (GX303 (Novemsky Expert Report); GX749 (Novemsky Rebuttal Report); Novemsky (Complaint Counsel) Tr. 347-536, 1762-1828).

Professor Novemsky relied on best practices in the design of the perception survey to minimize the possibility of bias and avoid potential demand artifacts. (FF-509). His survey methodology was scientifically sound and reliable. (FF-504—FF-545). The perception survey sample was chosen to be representative of the population of interest and the results of the survey can be generalized to the population at large with a degree of scientific certainty. (FF-511). In designing the perception survey, Professor Novemsky determined that a perception survey, rather than a copy test (where ads are shown), was the appropriate design to examine Intuit's extensive advertising campaign. (FF-531). Professor Novemsky did not use a test/control because it would

not have been appropriate where, as here, there is no suitable control group and when the nature of the deception cannot realistically be replicated in the survey environment. (FF-533).

Moreover, Complaint Counsel disputes the Proposed Finding that Professor Novemsky did not conduct any additional analysis other than the perception survey. As the record clearly shows, Professor Novemsky conducted analysis of TurboTax's competitors advertising (*see* FF-548—FF-560), and reviewed and considered Intuit documents, ads, and other materials (FF-546—FF-547; FF-561—FF-571). What is more, Professor Novemsky relied on his expertise as a psychologist and academic literature in considering the expert opinions of Intuit's experts. (FF-472—FF-479; FF-547; GX303 (Novemsky Expert Report) ¶ 18). Moreover, Professor Novemsky's survey was able to measure Intuit's disclosures and website hyperlinks because it took into account anything consumers may have encountered in the marketplace related to TurboTax, including website disclosure if such consumer had visited the website (Novemsky (Complaint Counsel) Tr. 1826-27 (testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey)), which, for example, Group B survey respondents would have done in the last three years. (RFF-541; FF-519). Finally, the concept of "cognitive misers" and process as little information as possible when making decisions is established in consumer psychology and is a concept Professor Novemsky can opine about as an expert in that field. (GX303 (Novemsky Expert Report) ¶¶ 18, 227 (citing Melissa A. Z. Knoll, *The Role of Behavioral Economics and Behavioral Decision Making in Americans' Retirement Savings Decisions*, 70 *Soc. Sec. BULL.* 1 (2010); Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New York, NY: Penguin, 2009), pp. 179–197, 218–249.).

Moreover, regarding the FTC's ".com Disclosures" guidelines, the guidelines also make clear that disclosures "cannot cure a false claim." (GX316 (Complaint Counsel) at CC-00006733). The guidelines further state that "[i]f a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive." (GX316 (Complaint Counsel) at CC-00006733). And that "[w]hether a disclosure

meets this standard is measured by its performance—that is, how consumers actually perceive and understand the disclosure within the context of the entire ad.” (GX316 (Complaint Counsel) at CC-00006734). Professor Golder did nothing to measure how consumers actually perceive the TurboTax ads and understand the disclosures within that context. He did not conduct any surveys or ask any consumers about their beliefs or understanding regarding TurboTax or purported TurboTax disclaimers. (FF-683—FF-685; FF-687; FF-693—FF-694). On the other hand, Professor Novemsky was able to measure the ads performance, and determine that they were leaving consumers with a misimpression about their ability to file for free. (*See* FF-482—FF-487).

Professor Novemsky’s conclusions about Professor Hauser’s survey were not baseless. They were based on his experience as a consumer psychologist (FF-472—FF-479), and his review of the survey itself. (GX749 (Novemsky Rebuttal Expert Report) ¶¶ 108-147). For example, Professor Novemsky carefully considered the Disclosure Efficacy survey results in determining that those results illustrate the persuasive power of the TurboTax’s free-themed ads in getting the consumers to start trying the product advertised for free. (FF-768; GX749 (Novemsky Rebuttal Expert Report) ¶¶ 143-144), and that the results were consistent with the interpretation that both the original and the revised stimuli used in the survey are equally ineffective in curing the deceptive impression left by the “free” claims in both stimuli. (RFF-769; GX749 (Novemsky Rebuttal Expert Report) ¶ 136; Novemsky (Complaint Counsel) Tr. 1812).

928. Professor Novemsky’s rebuttal opinions were also inconsistent with his own affirmative opinions. For instance, he faulted Dr. Hauser’s survey not eliminating the possibility that both the original and revised ads were equally deceptive (Novemsky (FTC) Tr. 1812, 1814-1815), he admitted that his survey did not test consumer understanding of any of the ads or disclosures in Dr. Hauser’s survey. (Novemsky (FTC) Tr. 1815-1816).

Response to Finding No. 928:

Complaint Counsel disputes the Proposed Finding. Professor Novemsky’s opinions and testimony were consistent with his own affirmative opinion, credible, and scientifically reliable. (GX303 (Novemsky Expert Report); GX749 (Novemsky Rebuttal Report); Novemsky

(Complaint Counsel) Tr. 347-536, 1762-1828). The results of the consumer perception survey measured all of the information in the marketplace in mid to late March 2022 when the survey was in the field. (Novemsky (Complaint Counsel) Tr. 1826). This included measurement of any curative effect of the “see if you qualify” disclaimer language used in the challenged ads. (Novemsky (Complaint Counsel) Tr. 1826). And would have included measurement of any curative effect of the “see details at TurboTax.com” disclaimer language used in the challenged ads. ((Novemsky (Complaint Counsel) Tr. 1826-27 (testifying that the perception survey measured the impact of everything that was in the marketplace up until the time of the survey)). The Proposed Finding is misleading in that it omits the above-referenced testimony which pertains to certain disclosure tested in Dr. Hauser’s survey. Moreover, his testimony is entirely consistent, as the perception survey design Dr. Hauser’s survey design used different methodologies – one was a perception survey measuring perceptions in the marketplace (FF-531), while the other was a test/control design that compared two sets of ads. (FF-747). As Professor Novemsky opined, because Professor Hauser did not test consumer perceptions related to the advertisements, he can only draw conclusions about the relative differences between the two sets of ads, which say nothing about whether consumers were deceived or not. (RFF-750—RFF-751; GX749 (Novemsky Rebuttal Report) ¶ 110).

D. Erez Yoeli

929. Complaint Counsel presented rebuttal testimony from Erez Yoeli at trial regarding the opinions offered by Mr. Deal. (Yoeli (FTC) Tr. 1655, 1657-1658); RX1362 (Yoeli Expert Report) ¶8).

Response to Finding No. 929:

Complaint Counsel has no specific response.

930. Dr. Yoeli’s testimony and opinions were not reliable or credible, but rather unsupported *ipse dixit* that were often undermined by his own statements. For example, Dr. Yoeli admitted that he did “very little new analysis” of the data underlying Mr. Deal’s opinions and did not try to understand the TurboTax customer data that Mr. Deal analyzed. (Yoeli (FTC) Tr. 1733; RX1396 (Yoeli (FTC) Dep.) at 257). Nor did he review most of the materials Mr. Deal considered in forming his opinions, including legal documents, academic sources, datasets, Intuit employee-deposition transcripts, and internal Intuit documents. (Yoeli (FTC) Tr. 1722-1725,

1730; RX1396 (Yoeli (FTC) Dep.) at 157). In fact, he stated that he reviewed only five produced documents, none of the challenged ads, and none of the Intuit employee depositions or testimony. (RX1396 (Yoeli (FTC) Dep.) at 23, 128, 135). Dr. Yoeli's testimony instead consisted of offering hypotheticals about Mr. Deal's analysis. (Yoeli (FTC) Tr. 1671-1686). By his own admission, "lots of things *can* be true," rendering his hypothetical opinion that consumers *could* have been deceived "not a very strong claim." (RX1396 (Yoeli (FTC) Dep.) at 60; Yoeli (FTC) Tr. 1738). Moreover, in offering his opinions, he used a definition of deception that excluded materiality. (RX1396 (Yoeli (FTC) Dep.) at 49-50, 69; Yoeli (FTC) Tr. 1717- 1718). And contrary to his opinion, Dr. Yoeli conceded that consumers are less likely to use TurboTax again if they believe they have been deceived. (Yoeli (FTC) Tr. 1738, 1740).

Response to Finding No. 930:

Complaint Counsel disputes the Proposed Finding. Dr. Yoeli's opinions and testimony were credible and scientifically reliable. (GX743 (Yoeli Expert Report); Yoeli (Complaint Counsel) Tr. 1655-1762). Unable to attack or refute Dr. Yoeli's economic analysis, Intuit lobbs feeble criticisms at Dr. Yoeli's preparation. *Id.* The criticisms of Dr. Yoeli—an economist who holds positions at the Massachusetts Institute of Technology, Stanford University, and Harvard University—fall apart on even the slightest nudge. For example, Intuit attacks Dr. Yoeli for not reviewing every document Mr. Deal purports to rely on. The vast majority of these documents, however, are publicly available documents that play little, if any, discernible role in Mr. Deal's analysis, like lists of TaxAct and H&R Block offerings. *See* Appendix B at B-3 to B-17.]

931. Dr. Yoeli never went to the TurboTax website in forming his opinions, and he could not remember reviewing any TurboTax paid-search ads, social-media ads, display ads, or email ads in forming his opinion. (Yoeli (FTC) Tr. 1727-1729). Dr. Yoeli also could not recall the language of disclaimers in the challenged TurboTax ads. (Yoeli (FTC) Tr. 1729). Dr. Yoeli was unfamiliar with TurboTax's features, including that its refund advance service was free. (Yoeli (FTC) Tr. 1732-1733). Numerous other shortcomings in Dr. Yoeli's expert work and knowledge base further undermine his opinions. (Yoeli (FTC) Tr. 1717, 1731-1732; RX1396 (Yoeli (FTC) Dep.) at 49).

Response to Finding No. 931:

Complaint Counsel disputes the Proposed Finding. Dr. Yoeli's opinions and testimony were credible and reliable. (GX743 (Yoeli Expert Report); Yoeli (Complaint Counsel) Tr. 1655-1762). Dr. Yoeli's primary role was to evaluate and rebut the opinions of Mr. Deal, one of Intuit's expert witnesses. (Yoeli (Complaint Counsel) Tr. 1756; GX743 (Yoeli Expert Report) ¶¶ 8, 10). In his limited role as a rebuttal expert on issues involving his expertise as an economist, Dr. Yoeli

did not review the entire record and it would not have been necessary or efficient for him to do so. Instead, Dr. Yoeli focused on: (1) whether Intuit had economic incentives to engage in deception; (2) whether Intuit's business strategy could be consistent with deception; and (3) the credibility and reliability of Mr. Deal's opinion that almost none of the consumers that logged into TurboTax's website could have been deceived based on an analysis of Intuit's customer level data (GX743 (Yoeli Expert Report) ¶ 10). Dr. Yoeli reviewed the data and documents necessary for him to rebut Mr. Deal's opinions in an efficient, credible and reliable manner deploying his expertise and experience as an economist. Whether he had perfect recall regarding certain challenged ads and each of TurboTax's features is irrelevant and in no way undermines his economic analysis and rebuttal of Mr. Deal's opinions in this matter.

XV. The Commission's Documented Bias

932. On March 29, 2022, the day after the FTC sued Intuit, Chair Khan retweeted from her official Twitter account an FTC tweet about Intuit's "deceptive Turbotax 'free' filing campaign" and the need for an "immediate halt to Intuit's deceptive ads." (RX102 (Intuit)).

Response to Finding No. 932:

Complaint Counsel disputes the Proposed Finding in that it mischaracterizes what was retweeted from Chair Khan's FTC Twitter account. The item that was retweeted is an FTC press release announcing the Commission's vote authorizing the staff to file both the administrative complaint and federal court complaint seeking preliminary relief. The headline of the original FTC tweet announcing the case accurately states: "Commission seeks an immediate halt to Intuit's deceptive ads for 'free' products." The Proposed Finding as written suggests there was further editorializing in the tweet that was retweeted from Chair Khan's FTC Twitter account. That is simply not the case upon reviewing the retweet itself. (*Compare* RX102 (Intuit) and FTC March 29, 2022 Press Release at [ftc.gov/news-events/news/press-releases/2022/03/ftc-sues-intuit-its-deceptive-turbotax-free-filing-campaign](https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-sues-intuit-its-deceptive-turbotax-free-filing-campaign)). There is nothing improper about an FTC Chair disseminating an official press release announcing an enforcement action.

933. On April 22, 2022, while the FTC's federal and administrative lawsuits against Intuit were ongoing, Chair Khan publicly suggested in remarks at the 2022 Stigler Center

Antitrust Conference that Intuit had engaged in “law-breaking” through TurboTax advertising and that it was “incredibly important” that the FTC stop Intuit’s unlawful “deceptive” conduct (which, as Chair Khan acknowledged in passing, had only been “alleged”). (RX103 (Intuit) at 6).

Response to Finding No. 933:

This Proposed Finding mischaracterizes Chair Khan’s remarks. Here is what she actually said:

Q: You said that Martin Shkreli was banned for life from pharmaceuticals. Do you think that on top of structural remedies, or governance remedies, at some point, we will see agencies, let’s say, banning Mark Zuckerberg from going on social networks or limiting his screen time?

[A:] I think the industry ban we were able to secure in the Shkreli case is enormously important and somewhat precedent-setting in the antitrust context. The way I think about remedies, and the traditional way to think about remedies, is that there are at least three goals. The immediate goal is to stop the illegal conduct and to stop the recurrence of that conduct. A second goal is to cure the harm that’s occurred through the underlying illegal conduct, the harm both to the market as well as to the victims of that conduct. The third is to really disincentivize further law-breaking.

With each of those prongs, we’re thinking about how we can be more effective. On the first—stopping the law-breaking—I think we need to act in a more timely manner. We need to be going into court more quickly; we need to be seeking preliminary injunctions. On the consumer protection side, the FTC, a few weeks ago, filed a lawsuit against TurboTax on the consumer protection side, **alleging** that TurboTax had been showing all these ads that are **allegedly** deceptive, and that it was really important to get that relief ahead of Tax Day. I think that type of timely intervention and timely goodfiling of lawsuits is incredibly important.

[Chair Khan went on to address the other two goals and other issues without further reference to Intuit or TurboTax.]

(RX103 (Intuit), at 6 (emphasis added)).

934. As noted by former FTC Commissioner Wright, the FTC has “ruled in favor of FTC staff and found liability” in “100 percent of cases” in which the commissioners voted out a complaint over the last twenty years, regardless of the ALJ’s recommended decision. (RX101 (Intuit) at 6). Commissioner Wright described that win rate as “a strong sign of an unhealthy and biased institutional process.” (RX101 (Intuit) at 6).

Response to Finding No. 934:

Complaint Counsel has no specific response as former Commissioner Wright did say the quotations attributed to him, though they are not legally significant. It is also unclear what methodology Commissioner Wright used to arrive at his findings. He cites two sources, an opinion piece in The Hill that does not include empirical analysis, and a public comment filed in conjunction with an FTC Workshop Concerning Section 5 of the FTC Act that counted thirteen cases in which respondents won before the Commission. *See* A. Douglas Melamed, Comments to FTC Workshop Concerning Section 5 of the FTC Act (Oct. 14, 2008), at 18, available at https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00004/537633-00004.pdf.

Respectfully submitted,

Dated: June 20, 2023

/s/ Roberto Anguizola

Roberto Anguizola, IL Bar No. 6270874

Rebecca Plett, VA Bar No. 90988

James Evans, VA Bar No. 83866

Sara Tonnesen, MD Bar No. 1312190241

Federal Trade Commission

600 Pennsylvania Ave., NW, CC-6316

Washington, DC 20580

(202) 326-3284 / ranguizola@ftc.gov

(202) 326-3664 / rplett@ftc.gov

(202) 326-2026 / james.evans@ftc.gov

(202) 326-2879 / stonnesen@ftc.gov

**Counsel Supporting the Complaint
Federal Trade Commission**

Attachment A

FTC v. Kutzner, No. 8:16-cv-00999 (C.D. Cal.)

Dkt. Nos. 284-6, 315 & 347

As cited in RCL-90 and Reply Brief Part II.B.4.a.vi. Attached pursuant to Scheduling Order Additional Provision No. 3.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Federal Trade Commission,
Plaintiffs,

v.

DAMIAN KUTZNER, individually and as an officer of BROOKSTONE LAW P.C. (California), BROOKSTONE LAW P.C. (Nevada), ADVANTIS LAW P.C., and ADVANTIS LAW GROUP P.C.; VITO TORCHIA, JR., individually and as an officer of BROOKSTONE LAW P.C. (California) and BROOKSTONE LAW P.C. (Nevada); JONATHAN TARKOWSKI, individually and as an officer of BROOKSTONE LAW P.C. (California) and BROOKSTONE LAW P.C. (Nevada); R. GEOFFREY BRODERICK, individually and as an officer of ADVANTIS LAW P.C. and ADVANTIS LAW GROUP P.C.; CHARLES T. MARSHALL, individually and as an officer of ADVANTIS LAW P.C. and ADVANTIS LAW GROUP P.C.; BROOKSTONE LAW P.C., d/b/a BROOKSTONE LAW GROUP, a California professional corporation; BROOKSTONE LAW P.C., d/b/a BROOKSTONE LAW GROUP, a Nevada professional corporation; ADVANTIS LAW P.C., a California professional corporation; ADVANTIS LAW GROUP P.C., a California professional corporation, and JEREMY FOTI, individually and as an officer of BROOKSTONE LAW P.C. (California), BROOKSTONE LAW P.C. (Nevada), ADVANTIS LAW P.C., and ADVANTIS LAW GROUP P.C.

Defendants.

No. SACV-00999-BRO (AFMx)

**EXPERT REPORT SUBMITTED BY
DR. BRUCE ISAACSON
MEASURING THE EXPERIENCES
OF CONSUMERS WHO RETAINED
BROOKSTONE LAW FIRM**

1 1. I have been retained by the Federal Trade Commission (FTC) in the above matter. This
2 report provides the results of a survey I conducted measuring the experiences of consumers who
3 retained Brookstone Law Firm (Brookstone). My survey interviewed clients who had retained
4 Brookstone, and asked them about their experience with that law firm, such as why they hired the
5 firm, and what the clients were told they could achieve by retaining Brookstone. I reserve the
6 right to supplement this report in light of the ongoing discovery in this matter.

7
8 **EXECUTIVE SUMMARY**

9 2. In total, 80.4% of all respondents answered that Brookstone’s representatives said or
10 suggested that hiring Brookstone would definitely or probably achieve at least one of the
11 following five outcomes: respondents would (1) win a lawsuit against the company that holds
12 their mortgage; (2) have the terms of their mortgage changed; (3) receive money; (4) have their
13 mortgage voided; and/or (5) get their property free and clear of their mortgage. For each of these
14 outcomes, the percentage of all respondents who were told that the outcome was definite or
15 probable is as follows:

- 16 i. 64.5% of all respondents indicated that Brookstone’s representatives said or
17 suggested they would definitely or probably win their lawsuit.
- 18 ii. 31.2% of all respondents indicated that the law firm’s representatives said or
19 suggested that the terms of their mortgage would definitely or probably be
20 changed.
- 21 iii. 54.3% of all respondents indicated that Brookstone’s representatives said or
22 suggested that they would definitely or probably receive money.
- 23 iv. 17.4% of all respondents indicated that Brookstone’s representatives said or
24 suggested that they would definitely or probably have their mortgage voided.
- 25 v. 24.6% of all respondents indicated that the law firm’s representatives said or
26 suggested that they would definitely or probably get their property free and clear of
27 their mortgage.
28

1 3. Because Brookstone representatives said or suggested to some respondents that more than
2 one such outcome was definite or probable, the sum of these percentages exceeds 80.4%. The
3 unduplicated percentage of respondents to whom Brookstone representatives said or suggested
4 that hiring Brookstone would definitely or probably achieve at least one of the five outcomes is
5 80.4%.

6 4. When asked to indicate in their own words what Brookstone's representatives said or
7 suggested they would achieve by hiring Brookstone:

- 8 i. 47.1% of respondents provided a response referencing obtaining money or a
9 settlement, getting their loan reduced or modified, or eliminating their mortgage;
- 10 ii. 39.1% of respondents referenced joining a lawsuit, suing lenders, or class action;
11 and
- 12 iii. 15.2% of respondents referenced saving their house from foreclosure or keeping or
13 saving their home.

14 5. In total, 73.2% of respondents provided an answer in their own words referencing one of
15 these themes. Although the question did not ask respondents about their experience with
16 Brookstone, or what they actually achieved, 24.6% of respondents mentioned a negative
17 experience with Brookstone, such as indicating that the law firm lied to them, or that they could
18 not reach the law firm's representatives.

19 6. In my opinion, the survey indicates that a substantial percentage of respondents believe
20 that Brookstone's representatives said or suggested that the respondents would definitely or
21 probably: (a) win their lawsuit against the company that holds their mortgage, and/or (b) achieve
22 outcomes such as changing the terms of their mortgage, receiving money, having their mortgage
23 voided, or getting their property free and clear of their mortgage.

1 **OVERVIEW OF THE SURVEY**

2 7. I understand that the FTC alleges that the defendants in this matter advertised or promoted
3 mortgage assistance relief services to prospective clients, and maintains that many of those clients
4 were distressed homeowners at risk of foreclosure. I also understand that the FTC alleges that the
5 defendants told prospective clients that they were likely to prevail in a lawsuit against their
6 lenders, and also alleges that clients of the defendants' law firms paid fees but received little or no
7 services.¹

8 8. My survey was conducted by telephone with respondents recruited from a list of
9 Brookstone and Advantis clients provided by the FTC.² After removing duplicates and records
10 with invalid telephone numbers, the remaining list provided records on 2,551 clients. The records
11 sent to us included as many as two names, as well as phone number, address, and other
12 information.

13 9. To conduct the interviews, the names on the list were contacted by telephone. After
14 reaching potential respondents, trained interviewers introduced themselves as calling on behalf of
15 MMR Strategy Group, and conducting a brief survey sponsored by the FTC.

16 10. Prospective respondents were first qualified as having hired Brookstone Law or Advantis
17 Law,³ and then asked questions to measure their experience with that law firm. Question 6 asked
18 respondents to indicate, in their own words, what representatives of the law firm did "... say or
19 suggest to you about what you would achieve by hiring them." Next, Question 7 asked whether
20 the law firm's representatives did or did not "... say or suggest that they would file a lawsuit
21 against the company that holds your mortgage." If the respondent answered affirmatively,
22 follow-up questions asked what, if anything, the representatives said or suggested about the
23 likelihood of winning the lawsuit.

24 _____
25 ¹ For example, see the First Amended Complaint for Permanent Injunction and Other Equitable Relief,
paragraph 16.

26 ² I understand that the FTC compiled the list from records maintained by the defendants.

27 ³ Respondents who indicated they had retained Brookstone were not asked if they had retained Advantis.
28 All respondents answered that they had retained Brookstone, so the phrasing in this report refers to
Brookstone only.

1 11. The remaining questions in the survey asked about certain outcomes that the law firm’s
2 representatives may have said or suggested the respondent would achieve by hiring Brookstone,
3 including:

4 i. Change the terms of their mortgage: Questions asked whether the representatives
5 said or suggested anything about the likelihood that the terms of their mortgage
6 would be changed, and the types of changes that would be made, such as lowering
7 the interest rate, lowering the monthly payment, lowering the total amount owed,
8 and/or forgiving late payments.

9 ii. Receive money: Questions asked whether the representatives said or suggested
10 anything about the likelihood that they would receive any money, and the amount
11 of money they would receive.

12 iii. Have their mortgage voided: Questions asked whether the representatives said or
13 suggested anything about the likelihood that they would have their mortgage
14 voided.

15 iv. Get their property free and clear of their mortgage: Questions asked whether the
16 representatives said or suggested anything about the likelihood that they would get
17 their property free and clear.

18 12. The final database for the survey reflects 138 interviews, which were conducted using
19 well-accepted survey methods for litigation. For example, initial survey questions asked
20 respondents whether they had ever hired Brookstone Law, Advantis Law, and/or “Darcy Law.”
21 Darcy Law was included in the survey as a control, to remove the effect of respondents who were
22 biased, inattentive, or who did not understand the questions asked. Also, because interviewers
23 were contacting respondents who were likely distressed homeowners and may have been
24 suspicious about the survey or how their name was obtained, they identified themselves as calling
25 on behalf of MMR Strategy Group and conducting a survey sponsored by a governmental entity,
26 the Federal Trade Commission.

27 13. After reviewing certain background information, I will discuss my survey and findings.
28

1 **MY QUALIFICATIONS**

2 14. I am the President of MMR Strategy Group (“MMR”), a marketing research and
3 consulting firm, and am experienced in surveys, marketing, and consumer behavior.

4 15. During my career, I have personally designed, conducted, and analyzed many hundreds
5 of research studies, including surveys for matters involving false advertising and intellectual
6 property litigation. I have provided testimony relating to surveys I have conducted or rebutted in
7 matters involving federal courts, the Trademark Trial and Appeal Board (TTAB), the National
8 Advertising Division of the Better Business Bureau, the United States Federal Trade
9 Commission, the United States International Trade Commission, the United States Court of
10 Federal Claims, the United States Department of Justice, and other venues and authorities.

11 16. For more than 40 years, my firm, MMR, has provided marketing research and consulting,
12 consisting primarily of the design, execution, and analysis of thousands of surveys, as well as
13 expertise related to marketing and strategy. For more than 11 years, I have been President of
14 MMR. During that time, MMR’s clients have included well-known organizations, such as
15 Farmers Insurance Group, Goodyear Tire & Rubber Company, several regions of the American
16 Automobile Association, Nestlé USA, Inc., RE/MAX, Kaplan Test Prep, and many other
17 organizations, encompassing thousands of studies.

18 17. I received a Bachelor of Science degree in engineering from the Technological Institute
19 at Northwestern University in 1985, and Master of Business Administration and Doctor of
20 Business Administration degrees from the Harvard Graduate School of Business Administration
21 in 1991 and 1996. At Harvard, I received my MBA with highest distinction as a Baker Scholar
22 and was a Dean’s Doctoral Fellow, writing 14 publications on marketing and strategy, including
23 best-selling teaching materials. Also, I taught marketing and strategy for executive groups and
24 executive MBA programs, and, for my research, I won awards from institutions including The
25 Institute for the Study of Business Markets at Penn State University and Harvard University.

26 18. I am on the editorial board of the *Journal of Business-to-Business Marketing*, and am a
27 member of *The Trademark Reporter* Committee of the International Trademark Association. I
28 am a member of the American Marketing Association and the Insights Association (a merger of

1 the former Marketing Research Association and the former Council of American Survey
2 Research Organizations). My firm is a member of the Association of National Advertisers, the
3 Brand Activation Association, and the International Trademark Association.

4 19. In terms of professional experience, I have been a marketing and strategy consultant at a
5 global consulting firm called The Boston Consulting Group, Senior Vice President at a publicly
6 traded data processing company that is now a division of Intuit, Division President at a media
7 services company that is now a division of News Corporation, and Vice President responsible for
8 marketing and strategy at a financial services company. I also served as the West Coast Practice
9 Leader of an executive education practice at a strategy consulting firm, focusing on educational
10 programs for marketing and strategy.

11 20. I regularly consult with clients regarding marketing, research, and strategy, and also
12 address conferences and groups on the same issues. My public speaking includes addressing law
13 firms and bar associations on the use of research and surveys in litigation and related topics. For
14 example:

- 15 i. In May 2016, and May 2013, I led roundtable discussions on litigation surveys at
16 the annual conference of the International Trademark Association.
- 17 ii. In March 2015, I spoke on litigation surveys at a conference on resolving and
18 litigating advertising disputes, and also conducted a seminar on litigation surveys at
19 the U.S. Department of Justice.
- 20 iii. In October 2013, I was a speaker at the Corporate Researchers Conference hosted
21 by the Marketing Research Association.
- 22 iv. In October 2015, I was co-presenter for a Continuing Legal Education seminar on
23 litigation surveys sponsored by the San Francisco Bar Association. In May 2013, I
24 was a panelist at a Continuing Legal Education seminar sponsored by the Los
25 Angeles County Bar Association, also on litigation surveys.
- 26 v. In April 2013, I was an invited speaker at a multi-day course on surveys and
27 marketing/advertising claims.
28

1 21. I have authored or co-authored articles for publications such as the Intellectual Property
2 Law Newsletter of the American Bar Association, Intellectual Property Law Section; Intellectual
3 Property Today, Intellectual Property Magazine, Quirk’s Marketing Research Review, and
4 others.

5 22. Exhibit 1 shows my curriculum vitae and testimony experience, including my experience
6 conducting surveys for litigation matters.

7
8 **MATERIALS REVIEWED AND COMPENSATION**

9 23. For purposes of the survey and this report, I have reviewed materials that include the
10 following:

- 11 i. The First Amended Complaint for Permanent Injunction and Other Equitable
12 Relief, dated July 5, 2016.
- 13 ii. Declarations and Exhibits Filed in Support of Plaintiff’s *Ex Parte* Application for
14 Temporary Restraining Order with Asset Freeze, Appointment of Temporary
15 Receiver, Limited Expedited Discovery, and Other Equitable Relief, and Order to
16 Show Cause Why Preliminary Injunction Should Not Issue, filed May 31, 2016.
- 17 iii. Scripts from Brookstone Law and Advantis Law relating to interactions with
18 customers, including MAIN FLOOR SCRIPT (outbound),⁴ MAIN FLOOR
19 SCRIPT (Inbound),⁵ MAIN FLOOR SCRIPT (Inbound),⁶ CLR MAIN FLOOR
20 SCRIPT (Inbound),⁷ MAIN FLOOR SCRIPT (Inbound),⁸ Rebuttals,⁹ MAIN
21 FLOOR SCRIPT,¹⁰ Rebuttals,¹¹ and MAIN FLOOR SCRIPT (Inbound).¹²

22 ⁴ FTC-RAD-001-0039885-0039890.

23 ⁵ FTC-RAD-001-0089955-0089958.

24 ⁶ FTC-RAD-001-0108052-0108059.

25 ⁷ FTC-RAD-001-0171362-0171376.

26 ⁸ FTC-RAD-002-0133014-0133019.

27 ⁹ FTC-RAD-002-0133023-0133025.

28 ¹⁰ FTC-RAD-002-0135921-0135922.

¹¹ FTC-RAD-002-0233901-0233902.

¹² Document 42-1, #2516-2532.

- 1 iv. Images of the websites for Brookstone Law,¹³ and for Advantis Law.¹⁴
- 2 v. Publicly-available documents, including articles entitled “Mortgage Relief
- 3 Defendant Banned from Debt Relief Business”¹⁵ and “Sue Your Bank, Keep Your
- 4 Home, Repeat”;¹⁶ as well as a press release entitled, “Operator of mortgage relief
- 5 scheme banned from business by FTC.”¹⁷

6 24. In addition, I consulted published literature and cases relevant to the issues and theories in
7 this matter, the most relevant of which are cited in this report. I also rely on my knowledge in
8 fields such as surveys, consumer behavior, and marketing.

9 25. Regarding compensation, my firm has billed \$70,000 in this matter, which covers all
10 activities up to and including the production of this expert report. After this expert report, my
11 firm bills for my time at \$600 per hour, with daily rates for testimony. My compensation does not
12 depend on the outcome of this matter.

13 26. The next section describes the survey in detail.

14 15 **METHODOLOGY FOR THE SURVEY**

16 27. The survey used generally-accepted methods to gather measures. All aspects of the
17 survey were designed and carried out by me or under my supervision. Exhibit 2 shows the
18 questions asked in the survey.¹⁸

19 28. As described earlier, the FTC provided information regarding contacts from Brookstone
20 and Advantis. The information in the record for each contact included the name of one or two
21 contact people, as well as phone number, address, and other information. I understand that the
22 FTC obtained this information from the defendants’ records. Staff at my firm, under my
23 direction, removed any duplicates and also removed records with invalid phone numbers.

24 ¹³ Document 14-4, #1268-1366.

25 ¹⁴ Document 14-4, #1367-1376.

26 ¹⁵ FTC Press Release, dated January 11, 2017.

27 ¹⁶ *Bloomberg*, by Anna Scott, September 10, 2015.

28 ¹⁷ *Orange County Register*, Hannah Madans, January 18, 2017.

¹⁸ Exhibit 2 contains programming and interviewer instructions that were not read to respondents.

1 29. Trained interviewers contacted the names on the list in random order. When an
2 interviewer reached a contact from the list, the interviewer began by stating,

3 “Hello. My name is [interviewer name]. I am calling on behalf of MMR Strategy Group
4 and we are conducting a brief survey sponsored by the Federal Trade Commission. May I
5 speak with [respondent name]?”

6 30. In place of “[respondent name],” the interviewer asked for the first name associated with
7 that record. If that person was not available, and the record included a second name, the
8 interviewer asked for the second name associated with the record, and/or asked for a time to call
9 back or for another phone number to reach that person.

10 31. A survey conducted on a “double blind” basis refers to a survey in which neither the
11 interviewers nor the respondents are aware of key aspects of the survey, such as the survey’s
12 sponsor or intended purpose or outcome.¹⁹ In this research, it was appropriate to identify the
13 sponsor of the research as the FTC, a governmental entity. The interview addressed an interaction
14 with a specific company that respondent may have hired to help them address difficulty with their
15 mortgage. The FTC was identified because some respondents were likely distressed homeowners
16 who had faced foreclosure risk and might otherwise be suspicious about the survey and how their
17 name was obtained.

18 32. Many surveys, such as the United States Census, reveal the survey’s sponsor.²⁰ In such
19 cases, revealing the sponsor can help establish the survey’s legitimacy. The introduction provided
20 only a single mention of the FTC as the sponsor of the survey.²¹ The mention is neutrally
21 worded, and the same instruction mentioned MMR Strategy Group as conducting the research.

22 _____
23 ¹⁹ “Reference Guide on Survey Research,” in *Reference Manual on Scientific Evidence, Third Edition*.
Federal Judicial Center, National Research Council, 2011, p. 374.

24 ²⁰ The 2010 Census questionnaire is at <https://www.census.gov/history/pdf/2010questionnaire.pdf>. See also
25 the National Survey on Drug Use and Health, conducted by the U.S. Department of Health and Human
26 Services (<https://nsduhweb.rti.org/respweb/homepage.cfm>) or the National Health Interview Survey,
conducted by the Centers for Disease Control and Prevention (<https://www.cdc.gov/nchs/nhis/>).

27 ²¹ If the respondent asked about the purpose or sponsor of the survey, interviewers were instructed to
28 answer, “I am calling on behalf of MMR Strategy Group and we are conducting a brief survey sponsored
by the Federal Trade Commission. Although sponsored by the FTC, the FTC will not have access to your
specific answers.”

1 Respondents remained blind as to the purpose of the survey, as the introduction did not reveal that
2 the survey was conducted for use in litigation, or even that there is litigation. None of the
3 responses to the open-ended question in the survey referenced this matter, the Federal Trade
4 Commission, the federal government, any state government, or any other governmental agency or
5 entity.

6 33. Once the interviewer located a prospective respondent, the next instruction made clear that
7 there were no ramifications, expectations, or desired outcomes related to their answers:

8 I appreciate your time to answer a few brief survey questions.

9 I'm not trying to sell you anything. Your individual answers to this survey will not be used
10 to identify you personally in any way, or for any sales or marketing.

11 For any question, if you don't know how to answer or don't remember, simply
12 indicate that you don't know or don't remember. Please do not guess. This
13 call may be monitored for quality assurance purposes.

14 34. The first three questions in the survey qualified prospective respondents by asking about
15 law firms they had ever hired.

16 35. Question 1 asked, "Have you ever hired a law firm called Brookstone Law? By hired, I
17 mean that you signed a contract for them to conduct legal work for you." The response choices
18 were "yes," "no," and "I don't know or don't remember." Respondents who answered "no" or "I
19 don't know or don't remember" were asked Question 2, which used similar phrasing to ask if they
20 had "ever hired a law firm called Advantis Law."

21 36. Respondents were also asked Question 3, which was phrased similarly to Questions 1 and
22 2, but asked if they had "... ever hired a law firm called Darcy Law."

23 37. Prospective respondents qualified for the survey if they answered affirmatively to either
24 Brookstone Law or Advantis Law. If the first name associated with the phone number did not
25 qualify, and there was a second name for that phone number, survey Questions 4 and 5 allowed
26 the interviewer to ask similar questions about hiring Brookstone and/or Advantis about the second
27 person, to determine whether they qualify for the survey.

28

1 38. Question 3 asked about Darcy Law, which was a control question for the survey. In
2 research such as my survey in this matter, a control is used to remove what Professor McCarthy
3 calls “general background noise.”²² Responses to surveys may be affected by factors such as a
4 respondent’s pre-existing impressions, general expectations, or guessing; a control can remove the
5 influence of such factors.²³ Controls are also used to address the possible tendency of
6 respondents to answer affirmatively to certain questions, which is sometimes called
7 “acquiescence bias” or “yea-saying.”²⁴

8 39. The responses from Question 3 were used to remove respondents who were not paying
9 attention, did not understand the survey instructions, or otherwise might provide biased answers
10 (e.g., yea-saying). Respondents who answered “yes” or “I don’t know or don’t remember” to
11 “Darcy Law” in Question 3 were not asked the remaining questions in the survey and were
12 removed from the survey database and analysis.

13 40. The remaining questions in the survey were programmed to ask either about Brookstone
14 Law or Advantis Law, according to each respondent’s answers to Questions 1 and 2. Because no
15 survey respondent answered that they had retained Advantis,²⁵ the remaining survey questions
16 only referenced Brookstone, and this report also references only Brookstone.

17 41. After qualification questions, respondents were next asked Question 6, “What, if anything,
18 did Brookstone Law representatives say or suggest to you about what you would achieve by
19 hiring them?” Question 6 was an open-ended question that respondents answered in their own
20 words.

21 42. Next, Questions 7, 8, and 9 asked about a possible lawsuit against their mortgage holder:

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23 _____
24 ²² *McCarthy on Trademarks and Unfair Competition*, by J. Thomas McCarthy, updated March, 2009,
25 32:187.

26 ²³ Shari Seidman Diamond, “Reference Guide on Survey Research” from *Reference Manual on Scientific*
27 *Evidence*, 3rd Edition, Federal Judicial Center, National Research Council, 2011, p. 398.

28 ²⁴ The amount of acquiescence can vary greatly depending on contextual variables such as question
phrasing and respondent characteristics. (Hans Baumgartner and Jan-Benedict E.M. Steenkamp (2001)
“Response Styles in Marketing Research: A Cross-National Investigation,” *Journal of Marketing Research*,
May 2001, Vol. 38 No. 2, pp. 143-156.)

²⁵ Respondents who indicated that they had hired Brookstone were not asked about Advantis.

1 i. Question 7 asked, “Did any of the law firm’s representatives say or suggest that
2 they would file a lawsuit against the company that holds your mortgage?” The
3 possible response options were to answer yes, no, or don’t know or don’t
4 remember.

5 ii. Respondents who answered yes to Question 7 were asked Question 8, “Did any of
6 the law firm’s representatives say or suggest anything about the likelihood of
7 winning your lawsuit against the company that holds your mortgage?” Again, the
8 response options were to answer yes, no, or don’t know or don’t remember.

9 iii. Respondents who answered yes to Question 8 were asked Question 9, “What did
10 Brookstone Law representatives say or suggest about the likelihood of winning
11 your lawsuit against the company that holds your mortgage? Did they say or
12 suggest that you ...?” Response options were “definitely would win your lawsuit,”
13 “probably would win your lawsuit,” “might or might not win your lawsuit,”
14 “probably would not win your lawsuit,” “definitely would not win your lawsuit,”
15 and “you don’t know or don’t remember.”

16 43. Next, Question 10 asked, “Although you may have already mentioned it, which, if any, of
17 the following did Brookstone Law representatives say or suggest you would achieve by hiring
18 them?” Response options were “the terms of your mortgage would be changed,” “you would
19 receive money,” “you would have your mortgage voided,” “you would get your property free and
20 clear of your mortgage,” “something else not listed here,” “nothing,” and “you don’t know or
21 don’t remember.” Respondents selected all responses that applied, and follow-up questions
22 gathered additional information regarding each response that was selected.

23 44. Before the follow-up questions, Question 11 instructed, “The following questions ask
24 about your mortgage. If you hired Brookstone Law regarding more than one mortgage, please
25 answer the questions thinking about the single property with the highest mortgage amount.”

26 45. Respondents who indicated in Question 10 that Brookstone representatives said or
27 suggested that, by hiring Brookstone, the terms of their mortgage would be changed, were next
28 asked Questions 12, 13, 14, and 15, which asked about possible changes to their mortgage.

- 1 i. Question 12 asked, “Did any of the law firm’s representatives say or suggest
2 anything about the likelihood that the terms of your mortgage would be changed as
3 a result of hiring them?” The possible responses were yes, no, and don’t know or
4 don’t remember.
- 5 ii. Respondents who answered yes to Question 12 were asked Question 13, “What did
6 the law firm’s representatives say or suggest about the likelihood that the terms of
7 your mortgage would be changed? Did they say or suggest that the terms of your
8 mortgage...?” Response options were “definitely would be changed,” “probably
9 would be changed,” “might or might not be changed,” “probably would not be
10 changed,” “definitely would not be changed,” and “you don’t know or don’t
11 remember.”
- 12 iii. Respondents were then asked Question 14, “Did any of the law firm’s
13 representatives say or suggest anything about how the terms of your mortgage
14 would be changed? Again, the responses were options to answer yes, no, or don’t
15 know or don’t remember.
- 16 iv. Respondents who answered yes to Question 14 were asked Question 15, which
17 presented a series of possible changes to the terms of their mortgage, and asked,
18 “Did any of the law firm’s representatives say or suggest anything about the
19 following types of changes to the terms of your mortgage as a result of hiring
20 them?” The response options were, “lower your interest rate,” “lower your
21 monthly payment,” “lower the total amount owed on your loan,” and “forgive late
22 payments.” For each possible change, Question 15 asked respondents to indicate
23 whether or not representatives of the law firm said or suggested something about
24 this type of change to their mortgage, or that they didn’t know or didn’t remember.

25 46. Respondents who had indicated in Question 10 that Brookstone representatives said or
26 suggested that, by hiring Brookstone, they would receive money, were next asked follow-up
27 questions relating to the money they would receive, including Questions 16, 17, 18, and 19.
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- i. Question 16 asked, “Did any of the law firm’s representatives say or suggest anything about the likelihood that you would receive any money as a result of hiring them?” The response options were to answer yes, no, or don’t know or don’t remember.
- ii. Respondents who answered yes to Question 16 were asked Question 17, “What did the law firm’s representatives say or suggest about the likelihood that you would receive any money? Did they say or suggest that you ...?” Response options were “definitely would receive any money,” “probably would receive any money,” “might or might not receive any money,” “probably would not receive any money,” “definitely would not receive any money,” and “you don’t know or don’t remember.”
- iii. Respondents were next asked Question 18, “Did any of the law firm’s representatives say or suggest anything about the amount of money that you would receive?” The response options were to answer yes, no, or don’t know or don’t remember.
- iv. Respondents who answered yes to Question 18 were asked Question 19, “Which of the following best describes the amount of money the law firm’s representatives said or suggested you would receive?” The possible responses were less than \$25,000, \$25,000 to less than \$50,000, \$50,000 to less than \$75,000, \$75,000 to less than \$150,000, \$150,000 to less than \$300,000, \$300,000 to less than \$500,000, \$500,000 or more, and a response to indicate that they don’t know or don’t remember.

47. Respondents who indicated in Question 10 that Brookstone’s representatives said or suggested that, by hiring Brookstone, they would have their mortgage voided, were next asked follow-up Questions 20 and 21.

- 1 i. Question 20 asked, “Did any of the law firm’s representatives say or suggest
- 2 anything about the likelihood you would have your mortgage voided as a result of
- 3 hiring them?” The response options were to answer yes, no, or don’t know or
- 4 don’t remember.
- 5 ii. Respondents who answered yes to Question 20 were asked Question 21, “What did
- 6 the law firm’s representatives say or suggest about the likelihood that you would
- 7 have your mortgage voided? Did they say or suggest that you ...?” Response
- 8 options were “definitely would have your mortgage voided,” “probably would
- 9 have your mortgage voided,” “might or might not have your mortgage voided,”
- 10 “probably would not have your mortgage voided,” “definitely would not have your
- 11 mortgage voided,” and “you don’t know or don’t remember.”

12 48. Respondents who indicated in Question 10 that Brookstone’s representatives said or
13 suggested that, by hiring Brookstone, they would get their property free and clear of their
14 mortgage, were next asked follow-up Questions 22 and 23.

- 15 i. Question 22 asked, “Did any of the law firm’s representatives say or suggest
- 16 anything about the likelihood that you would get your property free and clear of
- 17 your mortgage as a result of hiring them?” The possible response options were to
- 18 answer yes, no, or don’t know or don’t remember.
- 19 ii. Respondents who answered yes to Question 22 were asked Question 23, “What did
- 20 any of the law firm’s representatives say or suggest about the likelihood that you
- 21 would get your property free and clear of your mortgage? Did they say or suggest
- 22 that you ...?” Response options were “definitely would get your property free and
- 23 clear of your mortgage,” “probably would get your property free and clear of your
- 24 mortgage,” “might or might not get your property free and clear of your
- 25 mortgage,” “probably would not get your property free and clear of your
- 26 mortgage,” “definitely would not get your property free and clear of your
- 27 mortgage,” and “you don’t know or don’t remember.”
- 28

1 49. The initial list provided by the Federal Trade Commission included 3,140 records. After
2 removing duplicate and invalid records, the list had 2,551 records. These records were dialed in
3 random order, with follow-up calls made to prospective respondents who were called but did not
4 answer.²⁶ The interviews were conducted in English²⁷ from May 2 to 13, 2017, by trained
5 interviewers at Luth Research, in San Diego, California.²⁸

6 50. The execution of the survey included a number of elements for quality control and
7 validation. Because the topic of the survey interviews related to a possible consumer deception,
8 the quality control procedures used in the survey included procedures to provide anonymity, so no
9 information in the database could be used to personally identify any individual respondents.

10 51. The quality control and validation measures included the following:

- 11 i. To reduce order bias, the order of certain questions was varied across respondents.
12 For example, for some respondents Question 1 (which asked if the respondent had
13 ever hired Brookstone Law) and Question 2 (which asked if the respondent had
14 ever hired Advantis Law) were asked before Question 3 (which asked if the
15 respondent had ever hired Darcy Law); for other respondents, Question 3 was
16 asked before Questions 1 and 2.
- 17 ii. Also to reduce order bias, the order of certain responses varied across respondents.
18 For example, Questions 1, 2, 3, 4, 5, 7, 8, 12, 14, 15, 16, 18, 20, 22 included “yes,”
19 “no,” and “I don’t know or don’t remember” options. For each respondent, the
20 order for all these questions was randomly assigned either as “yes,” “no,” and “I
21 don’t know or don’t remember;” or as “no,” “yes,” and “I don’t know or don’t
22 remember.” Also, Questions 9, 13, 17, 21, and 23 included the responses
23 “definitely would,” “probably would,” “might or might not,” “probably would

24 _____
25 ²⁶ Numbers were dialed at least three to six times a week, including two to four times during weekdays and
one to two times during weekends. Of all records, 58% were dialed one to three times and 42% were
dialed four times or more.

26 ²⁷ The records included a language field with a code to indicate language. For about 89% of the records in
27 the initial list, the language field contained a numerical code which I believe indicates English.

28 ²⁸ Luth Research, of San Diego, California, has provided sampling and data collection for more than 35
years. More information about Luth is available at www.luthresearch.com.

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not,” “definitely would not,” and “you don’t know or don’t remember.” In these questions, some respondents saw this order, while others saw the responses in reverse order, with the don’t know option anchored last.

iii. Survey questions included a “don’t know or don’t remember” option, so respondents were not obligated to select another response if they did not understand the question, or did not know what response option to select. Also, to avoid guessing, Question C instructed respondents that they may select “I don’t know or don’t remember,” and provided an explicit instruction not to guess.

iv. Question 3 is a control question which asked whether the respondent had ever hired Darcy Law. Respondents who answered “yes” or “I don’t know or don’t remember” to this question were removed from the survey database.

v. The responses to Question 6, which respondents answered in their own words, were reviewed. Any respondents who provided an answer indicating that they were not attentive or did not understand the survey question were removed from the database.

vi. The survey was conducted by trained interviewers. Prior to fielding, a supervisor participated in a telephone briefing with my firm.

vii. At the beginning of the study, a staff member from MMR listened by telephone to a pre-test, where a small number of interviews were reviewed to confirm that the interviews were conducted properly and that respondents understood the questions. Because no changes were made in the survey after the pre-test, these interviews are included in the survey database.

1 viii. The survey interviews were validated by a different company from the company
2 that conducted the interviews. On the second business day after completing the
3 survey, respondents received a validation phone call from Interviewing Service of
4 America (ISA).²⁹ The phone call confirmed whether the respondent had
5 participated in the survey, and whether they met key qualification criteria. In total,
6 98% of interviews were validated, meaning that the validation service spoke with
7 the respondent, and the respondent successfully passed the validation interview.
8 This percentage is well above standards for validation, which typically recommend
9 validation of 10% to 15% of interviews.³⁰ Exhibit 3 provides the questionnaire
10 used for the validation interviews.

11 ix. Because of the need for respondent anonymity, MMR Strategy Group used
12 procedures to ensure that MMR could not identify any responses as coming from
13 any specific individual. The database identifies respondents and their responses
14 with an identification number (“ID”) that cannot be linked by MMR to any specific
15 individual. After validation, ISA provided a list of validation dispositions back to
16 MMR that identified respondents only by ID, and not by name or other identifying
17 information.

18 52. Exhibit 4 provides a termination summary indicating how many prospective respondents
19 were screened out at each qualifying question or during quality control and validation checks.
20 After completing 196 interviews, 58 respondents were removed during quality control and
21 validation checks, leaving 138 respondents in the final database.³¹ This database provides a
22 sufficient sample size for reliable analysis.

23 53. The next section describes my detailed findings from analyzing the survey data.

25 _____
26 ²⁹ The validation interviews were conducted by Interviewing Service of America, of Van Nuys, California.

27 ³⁰ Shari Seidman Diamond, “Reference Guide on Survey Research,” from *Reference Manual on Scientific Evidence, Third Edition*. Federal Judicial Center, National Research Council, p. 412.

28 ³¹ As described in Exhibit 4, 1 respondent was removed for verbatim responses, and 57 were removed for answers to the control question, Question 3.

1 **DETAILED FINDINGS FROM THE SURVEY**

2 54. Exhibit 5 provides codes used to analyze verbatim responses. Exhibit 6 shows cross
3 tabulation tables from the data analysis, and Exhibit 7 shows all responses to all questions from all
4 respondents.

5 55. As described earlier, Questions 1, 2, and 3 asked respondents if they had ever hired
6 Brookstone Law, Advantis Law, and/or Darcy Law. All respondents indicated they had hired
7 Brookstone, so no respondents were asked about Advantis.³²

8 56. As described earlier, the respondents who indicated they had hired Darcy Law served as a
9 control for the survey, to address the effect of respondents who were not paying attention, did not
10 understand the survey instructions, or otherwise might provide biased answers. To remove the
11 potential influence of these effects, respondents who answered “yes” or “I don’t know or don’t
12 remember” to Question 3 were removed from the survey database during data analysis.

13 57. These respondents were removed because they may not have a clear memory of their past
14 experiences with Brookstone, or they may exhibit bias and/or inattentiveness. Removing these
15 respondents enhances the reliability of the survey results.

16 58. Question 6 asked what, if anything, Brookstone’s representatives said or suggested they
17 would achieve by hiring Brookstone. Respondents answered in their own words, so Question 6
18 provides a neutral, non-leading format to obtain top-of-mind responses.

19 59. The verbatim responses were analyzed by assigning codes or categories to summarize the
20 themes in the response.³³ Below, Table A summarizes the results of this analysis.

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25 _____
26 ³² Respondents who indicated that they had hired Brookstone Law were not asked if they had ever hired
Advantis Law.

27 ³³ The coding was conducted by me and by MMR staff under my supervision. The coding of every
28 response was checked by at least two staff members to make sure that the codes assigned were appropriate,
and I personally checked every code.

Table A: Summary of Responses to Question 6

Q.6 What, if anything, did Brookstone representatives say or suggest to you about what you would achieve by hiring them?	All Respondents
Sample size	138
Any of the response categories below	73.2%
Obtain money or settlement / reduce, modify, or eliminate loan	47.1%
Join a lawsuit / sue lender or banks / class action	39.1%
Save house from foreclosure / keep or save home	15.2%
Paid Brookstone / Brookstone charged fees	28.3%
Negative experience with Brookstone / Brookstone lied / can't reach Brookstone	24.6%
Malpractice by banks / bank fraud / bad or unlawful loans	14.5%
Other	31.9%
I don't know / No reason	14.5%

60. As shown in Table A, 47.1% of respondents answered that Brookstone said or suggested that, by hiring Brookstone, they would obtain money or a settlement, or get their loan reduced, modified, or eliminated. Examples of comments reflecting this theme³⁴ include the following:

- i. ID #004: “They said they could help me recover from the loss of my loan. I got into a bad loan and they said they could help me.”
- ii. ID #159: “They were going to get me a modification on my loan. Then, they could recover \$75,000. They were going to lower the payment.”
- iii. ID #184: “They suggested after the court proceedings we would get \$400,000 and they would get 10% of the rest.”

61. Table A also shows that 39.1% of respondents answered that Brookstone said or suggested that, by hiring Brookstone, they would join a lawsuit, sue the lender or banks, or participate in a class action. Examples of comments reflecting this theme include the following:

³⁴ Many of the comments provided by respondents reflect multiple themes, in which case the comment received codes representing multiple categories.

1 i. ID #089: “We were in a class case lawsuit, where we were going to lose our home.
2 They said we were going to get a settlement.”

3 ii. ID #194: “There is a class action I would be part of, if I hired them. They would
4 receive money to remodel my loan.”

5 62. The table also shows that 15.2% answered that Brookstone said or suggested that, by
6 hiring Brookstone, they would save a house from foreclosure or keep or save a home. Examples
7 for this theme include the following:

8 i. ID #058: “They said they can save my house. They said it wouldn’t go to
9 foreclosure. They asked me to pay \$3,000. Basically, it was to save my house and
10 do a restructuring of my loan.”

11 ii. ID #153: “They were going to help us get a settlement for unlawful foreclosure.
12 They said the case was dismissed, because the judge asked them for more
13 information. The case was thrown out because they didn’t follow through.”

14 63. In total, 73.2% of respondents answered Question 6 with a response reflecting at least one
15 of these three themes (i.e., obtain money or settlement / reduce, modify, or eliminate loan; join a
16 lawsuit / sue lender or banks / class action; and/or save house from foreclosure / keep or save
17 home). These three themes are also measured by topics addressed in the remainder of the survey,
18 such as lowering the interest rate, lowering the monthly payment, lowering the total amount owed,
19 and forgiving late payments).

20 64. In other word, there is consistency between responses to the open-ended question and the
21 responses to subsequent survey questions. A substantial percentage of respondents mentioned at
22 least one of these themes in their response to Question 6, which was unprompted, and a substantial
23 percentage of respondents indicated that Brookstone said or suggested they would achieve at least
24 one of these outcomes in response to subsequent questions. This consistency across questions
25 provides another indication that the survey measures are reliable.

26 65. Table A also shows that 28.3% of respondents mentioned that they paid Brookstone, or
27 that Brookstone charged fees. Examples of comments reflecting this theme include the following:
28

- 1 i. ID #085: “It was in regards to my home mortgage. I don't remember all the
2 details, but it was about recuperating money from Wells Fargo. They were going
3 to reinstate the lawsuit with Wells Fargo. I had paid them \$5,000 and they wanted
4 another \$5,000 to reinstate the lawsuit, so at that point I decided to cut my losses.”
5 ii. ID #173: “They said that I would be able to get a loan modification with no
6 problem. They charged me a fee of \$5,000.”

7 66. Table A also shows that 14.5% of respondents provided a response that mentioned
8 malpractice by banks, bank fraud, or bad or unlawful loans. Typically, these comments addressed
9 claims that banks conducted malpractice, fraud, or bad/unlawful loans, as demonstrated by the
10 following comments:

- 11 i. ID #029: “I would expose Bank of America to a certain type of fraud. They
12 showed me some documents that supposedly had my signature.”
13 ii. ID #032: “Addressing illegal foreclosure by Bank of America.”
14 iii. ID #261: “They said that they could win forgiveness on our mortgage and file a
15 lawsuit against Chase Bank for fraudulent mortgage practices. We gave them
16 about \$15,000 and they packed and left town like a bunch of thieves.”

17 67. Although Question 6 may not have specifically asked about this topic, 24.6% of
18 respondents provided a response that referenced a negative experience with Brookstone, or
19 indicated that Brookstone lied, or that the respondent could not reach Brookstone’s
20 representatives. Some of these comments were worded quite strongly. Examples of responses
21 referencing this theme include the following:

- 22 i. ID #021: “When everyone was losing their houses, they were with Bank of
23 America. They came to us and wanted \$5,000 to get Bank of America. We gave it
24 to them and they just wanted more money. We were stupid and kept giving them
25 money.”
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1 ii. ID # 026: “They stole my money and lied to me.”

2 iii. ID # 047: “A lot of lies and promises. They took money from me and nothing
 3 happened.”

4 68. None of the responses to Question 6 referenced this matter, the Federal Trade Commission,
 5 the federal government, any state government, or any other government or agency or entity.

6 69. Question 7 asked whether Brookstone’s representatives said or suggested that Brookstone
 7 would file a lawsuit against the company that holds the respondent’s mortgage. Table B below
 8 displays the results for Question 7.

9 **Table B: Summary of Responses to Question 7**

Q.7 Did any of the law firm’s representatives say or suggest that they would file a lawsuit against the company that holds your mortgage?	All Respondents
Sample size	138
Yes	85.5%
No	4.4%
I don’t know or don’t remember	10.1%

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 12 70. Table B shows that 85.5% of respondents answered yes, 4.4% answered no, and 10.1%
 13 answered that they don’t know or don’t remember.

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 16 71. Question 8 asked respondents who answered affirmatively to Question 7 whether any of
 17 the law firm’s representatives said or suggested anything about the likelihood of the respondent
 18 winning their lawsuit against the company that holds their mortgage. Table C below displays the
 19 results for Question 8. Like other tables in this report, Table C shows two columns: “those asked”
 20 reflects only those respondents asked this particular question, while “all respondents” reflects all
 21 respondents in the database.
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Table C: Summary of Responses to Question 8
 (Asked of those who responded “yes” to Question 7)

Q.8 Did any of the law firm’s representatives say or suggest anything about the likelihood of winning your lawsuit against the company that holds your mortgage?	Those Asked	All Respondents
Sample size	118	138
Yes	84.7%	72.5%
No	3.4%	2.9%
I don’t know or don’t remember	11.9%	10.1%

72. Table C shows that among those asked Question 8, 84.7% answered yes, 3.4% answered no, and 11.9% answered that they don’t know or don’t remember. Among all respondents, 72.5% answered yes, 2.9% answered no, and 10.1% answered I don’t know or don’t remember.

73. Question 9 asked respondents who answered yes to Question 8 what Brookstone’s representatives said or suggested about the likelihood of winning their lawsuit against the company that holds their mortgage. Table D below displays the results for Question 9.

Table D: Summary of Responses to Question 9
 (Asked of those who responded “yes” to Question 8)

Q.9 What did Brookstone Law representatives say or suggest about the likelihood of winning your lawsuit against the company that holds your mortgage? Did they say or suggest that you ...?	Those Asked	All Respondents
Sample size	100	138
...definitely or probably would win your lawsuit	89.0%	64.5%
...definitely would win your lawsuit	48.0%	34.8%
...probably would win your lawsuit	41.0%	29.7%
...might or might not win your lawsuit	7.0%	5.1%
...probably would not win your lawsuit	1.0%	0.7%
...definitely would not win your lawsuit	0.0%	0.0%
you don’t know or don’t remember	3.0%	2.2%

74. Table D shows that among respondents asked Question 9, 89.0% answered that Brookstone representatives said or suggested that they definitely or probably would win their lawsuit, including 48.0% who answered definitely win, and 41.0% who answered probably win. Among all respondents, 64.5% answered that Brookstone representatives said or suggested that the respondent definitely or probably would win their lawsuit.

75. Question 10 asked respondents what, if anything, Brookstone Law representatives said or suggested that the respondent would achieve by hiring Brookstone. Table E below displays the results for Question 10.

Table E: Summary of Responses to Question 10

Q.10 Although you may have already mentioned it, which, if any, of the following did Brookstone Law representatives say or suggest you would achieve by hiring them?	All Respondents
Sample size	138
You would receive money; terms of your mortgage would be changed; would get your property free and clear; would have your mortgage voided; (any mention)	85.5%
You would receive money	68.1%
The terms of your mortgage would be changed	43.5%
You would get your property free and clear of your mortgage	36.2%
You would have your mortgage voided	29.7%
Something else not listed here	8.7%
Nothing	2.2%
You don't know or don't remember	10.1%

76. Table E shows that 85.5% of all respondents selected at least one of the following responses: “you would receive money,” “the terms of your mortgage would be changed,” “you would get your property free and clear of your mortgage.” and/or “you would have your mortgage voided.” Specifically, 68.1% selected “you would receive money,” 43.5% of respondents selected “the terms of your mortgage would be changed,” 36.2% selected “you would get your property free and clear of your mortgage,” 29.7% selected “you would have your mortgage voided,” and 8.7% selected “something else not listed here.”

1 77. For respondents who selected “the terms of your mortgage would be changed” in Question
 2 10, Questions 12, 13, 14, and 15 asked follow-up questions about possible changes in mortgage
 3 terms.

4 78. Question 12 asked if any of Brookstone’s representatives said or suggested anything about
 5 the likelihood that the terms of their mortgage would be changed as a result of hiring Brookstone.
 6 Table F below displays the results for Question 12.

7 **Table F: Summary of Responses to Question 12**
 8 **(Asked of those who responded “mortgage would be changed” in Question 10)**

Q.12 Did any of the law firm’s representatives say or suggest anything about the likelihood that the terms of your mortgage would be changed as a result of hiring them?	Those Asked	All Respondents
Sample size	60	138
Yes	85.0%	37.0%
No	1.7%	0.7%
I don’t know or don’t remember	13.3%	5.8%

15 79. Table F shows that among those asked Question 12, 85.0% answered yes, 1.7% answered
 16 no, and 13.3% answered that they don’t know or don’t remember. Among all respondents, 37.0%
 17 answered yes, 0.7% answered no, and 5.8% answered that they don’t know or don’t remember.

18 80. Among those who answered yes to Question 12, Question 13 asked what Brookstone’s
 19 representatives said or suggested about the likelihood that the terms of their mortgage would be
 20 changed. Table G below displays the results for Question 13.

Table G: Summary of Responses to Question 13
(Asked of those who responded “yes” in Question 12)

Q.13 What did the law firm’s representatives say or suggest about the likelihood that the terms of your mortgage would be changed?	Those Asked	All Respondents
Did they say or suggest that the terms of your mortgage...?		
Sample size	51	138
...definitely or probably would be changed	84.3%	31.2%
...definitely would be changed	52.9%	19.6%
...probably would be changed	31.4%	11.6%
...might or might not be changed	3.9%	1.4%
...probably would not be changed	0.0%	0.0%
...definitely would not be changed	0.0%	0.0%
I don’t know or don’t remember	11.8%	4.3%

81. As shown in Table G, among respondents asked Question 13, 84.3% answered that Brookstone’s representatives said or suggested that they definitely or probably would get the terms of their mortgage changed, with 52.9% answering definitely, and 31.4% answering probably. Among all respondents, 31.2% answered that Brookstone’s representatives said or suggested that they definitely or probably would get the terms of their mortgage changed, including 19.6% who answered definitely, and 11.6% who answered probably.

82. Question 14 asked if the law firm’s representatives said or suggested anything about how the terms of their mortgage would be changed. Table H below displays these results.

Table H: Summary of Responses to Question 14
(Asked of those who responded “yes” in Question 12)

Q.14 Did any of the law firm’s representatives say or suggest anything about how the terms of your mortgage would be changed?	Those Asked	All Respondents
Sample size	51	138
Yes	54.9%	20.3%
No	19.6%	7.2%
I don’t know or don’t remember	25.5%	9.4%

83. Table H shows that among those asked Question 14, 54.9% answered yes, 19.6% answered no, and 25.5% answered I don’t know or don’t remember. Among all respondents 20.3% answered yes, 7.2% answered no, and 9.4% answered I don’t know or don’t remember.

84. Among respondents who answered yes to Question 14, Question 15 asked if any of the law firm’s representatives said or suggested anything about the types of changes that would be made to the terms of their mortgage as a result of hiring them. Table I below displays the results for Question 15.

Table I: Summary of Responses to Question 15
(Asked of those who responded “yes” in Question 14)

Q.15 Did any of the law firm’s representatives say or suggest anything about the following types of changes to the terms of your mortgage as a result of hiring them?³⁵	Those Asked³⁶	All Respondents
Sample size	28	138
Percentage of respondents who selected at least one of the four responses below:	96.4%	19.6%
Lower your interest rate	92.9%	18.8%
Lower your monthly payment	89.3%	18.1%
Lower the total amount owed on your loan	82.1%	16.7%
Forgive late payments	57.1%	11.6%

85. Table I shows that among respondents asked Question 15, 92.9% indicated that the firm’s representatives said or suggested that they would lower their interest rate, 89.3% indicated that they would lower their monthly payment, 82.1% indicated that they would lower the total amount owed on their loan, and 57.1% indicated that they would forgive their late payments.

86. Among all respondents 18.8% indicated that the firm’s representatives said or suggested that they would lower their interest rate, 18.1% indicated that they would lower their monthly payment, 16.7% indicated that they would lower the total amount owed on their loan, and 11.6% indicated that they would forgive their late payments.

87. The table also shows that among those asked, 96.4% selected at least one of these four responses. Among all respondents, 19.6% selected at least one of these four responses.

88. Questions 16, 17, 18, and 19 asked follow-up questions to respondents who selected, “you will receive money” in Question 10. Table J below displays the results for Question 16, which asked whether Brookstone’s representatives said or suggested anything about the likelihood of receiving money.

³⁵ The table shows the percentage of respondents who answered yes to each item. Other response options included no, or I don’t know or don’t remember.

³⁶ The numbers in this column should be interpreted with caution given the small sample size.

Table J: Summary of Responses to Question 16
 (Asked of those who responded “receive money” in Question 10)

Q.16 Did any of the law firm’s representatives say or suggest anything about the likelihood that you would receive any money as a result of hiring them?	Those Asked	All Respondents
Sample size	94	138
Yes	87.2%	59.4%
No	3.2%	2.2%
I don’t know or don’t remember	9.6%	6.5%

89. Table J shows that among those asked Question 16, 87.2% answered yes, 3.2% answered no, and 9.6% answered that they don’t know or don’t remember. Among all respondents, 59.4% answered yes, 2.2% answered no, and 6.5% answered that they don’t know or don’t remember.

90. Question 17 asked respondents who answered yes in Question 16 what the law firm’s representatives said or suggested about the likelihood that they would receive any money. Table K below displays the results for Question 17.

Table K: Summary of Responses to Question 17
 (Asked of those who responded “yes” in Question 16)

Q.17 What did the law firm’s representatives say or suggest about the likelihood that you would receive any money? Did they say or suggest that you ...?	Those Asked	All Respondents
Sample size	82	138
... definitely or probably would receive any money	91.5%	54.3%
... definitely would receive any money	56.1%	33.3%
... probably would receive any money	35.4%	21.0%
... might or might not receive any money	1.2%	0.7%
... probably would not receive any money	1.2%	0.7%
... definitely would not receive any money	0.0%	0.0%
You don’t know or don’t remember	6.1%	3.6%

1 91. Table K shows that among those asked Question 17, 91.5% answered that the law firm’s
 2 representatives said or suggested that they definitely or probably would receive any money,
 3 including 56.1% who answered definitely, and 35.4% who answered probably. Among all
 4 respondents, 54.3% of all respondents answered that the law firm’s representatives said or
 5 suggested that they definitely or probably would receive any money, including 33.3% who
 6 answered definitely, and 21.0% who answered probably.

7 92. Question 18 asked respondents who answered yes in Question 16 if any of the law firm’s
 8 representatives said or suggested anything about the amount of money they would receive. Table
 9 L below displays the results for this question.

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 11 **Table L: Summary of Responses to Question 18**
 (Asked among those who responded “receive money” in Question 16)

Q.18 Did any of the law firm’s representatives say or suggest anything about the amount of money that you would receive?	Those Asked	All Respondents
Sample size	82	138
Yes	68.3%	40.6%
No	20.7%	12.3%
I don’t know or don’t remember	11.0%	6.5%

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 18 93. Table L shows that among those asked Question 18, 68.3% answered yes, 20.7% answered
 19 no, and 11.0% answered that they don’t know or don’t remember. Among all respondents, 40.6%
 20 answered yes, 12.3% answered no, and 6.5% answered that they don’t know or don’t remember.

21 94. Question 19 asked respondents who answered yes to Question 18 about the amount of
 22 money the law firm’s representatives said or suggested they would receive. Table M below
 23 displays the results from this question.

Table M: Summary of Responses to Question 19

Q.19 Which of the following best describes the amount of money the law firm’s representatives said or suggested you would receive?	Those Asked	All Respondents
Sample size	56	138
\$75,000 or more	80.4%	32.6%
\$300,000 or more	51.7%	21.0%
\$500,000 or more	30.3%	12.3%
\$300,000 to less than \$500,000	21.4%	8.7%
\$150,000 to less than \$300,000	10.7%	4.3%
\$75,000 to less than \$150,000	17.9%	7.2%
\$50,000 to less than \$75,000	3.6%	1.4%
\$25,000 to less than \$50,000	3.6%	1.4%
Less than \$25,000	0.0%	0.0%
You don’t know or don’t remember	12.5%	5.1%

95. Among those asked Question 19, 80.4% answered \$75,000 or more, including 51.7% who answered \$300,000 or more. Among all respondents, 32.6% answered \$75,000 or more, including 21.0% who answered \$300,000 or more, and 11.5% who answered \$75,000 to less than \$300,000.

96. Among respondents who selected “you would have your mortgage voided” in Question 10, Questions 20 and 21 followed up on this topic.

97. Question 20 asked if any of the law firm’s representatives said or suggested anything about the likelihood they would have their mortgage voided as a result of hiring them. Table N below displays the results for this question.

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Table N: Summary of Responses to Question 20
 (Asked among those who responded “would have mortgage voided” in Question 10)

Q.20 Did any of the law firm’s representatives say or suggest anything about the likelihood you would have your mortgage voided as a result of hiring them?	Those Asked³⁷	All Respondents
Sample size	41	138
Yes	68.3%	20.3%
No	14.6%	4.3%
I don’t know or don’t remember	17.1%	5.1%

98. Table N shows that among those asked Question 20, 68.3% answered yes, 14.6% answered no, and 17.1% answered that they don’t know or don’t remember. Among all respondents, 20.3% answered yes, 4.3% answered no, and 5.1% answered that they don’t know or don’t remember.

99. Question 21 asked respondents who answered yes to Question 20 what the law firm’s representatives said or suggested about the likelihood that they would have their mortgage voided. Table O below displays the results for Question 21.

³⁷ The numbers in this column should be interpreted with caution given the small sample size.

Table O: Summary of Responses to Question 21
(Asked among those who responded “yes” in Question 20)

Q.21 What did the law firm’s representatives say or suggest about the likelihood that you would have your mortgage voided?	Those Asked³⁸	All Respondents
Did they say or suggest that you ...?		
Sample size	28	138
... definitely or probably would have your mortgage voided	85.7%	17.4%
... definitely would have your mortgage voided	28.6%	5.8%
... probably would have your mortgage voided	57.2%	11.6%
... might or might not have your mortgage voided	7.1%	1.4%
... probably would not have your mortgage voided	0.0%	0.0%
... definitely would not have your mortgage voided	0.0%	0.0%
You don’t know or don’t remember	7.1%	1.4%

100. Table O shows that among those asked Question 21, 85.7% responded that the law firm’s representatives said or suggested that they definitely or probably would have their mortgage voided, including 28.6% who answered definitely, and 57.2% who answered probably. Among all respondents, 17.4% answered that the law firm’s representatives said or suggested that they definitely or probably would have their mortgage voided, including 5.8% who answered they definitely would have their mortgage voided, and 11.6% who answered they probably would have their mortgage voided.

101. Among respondents who selected “you would get your property free and clear of your mortgage” in Question 10, Questions 22 and 23 followed up on this topic.

102. Question 22 asked if any of the law firm’s representatives said or suggested anything about the likelihood they would get their property free and clear of their mortgage as a result of hiring them. Table P below displays the results for this question.

³⁸ The numbers in this column should be interpreted with caution given the small sample size.

Table P: Summary of Responses to Question 22

(Asked among those who responded “would get property free and clear” in Question 10)

Q.22 Did any of the law firm’s representatives say or suggest anything about the likelihood that you would get your property free and clear of your mortgage as a result of hiring them?	Those Asked	All Respondents
Sample size	50	138
Yes	86.0%	31.2%
No	4.0%	1.4%
I don’t know or don’t remember	10.0%	3.6%

103. Among those asked Question 22, 86.0% answered yes, 4.0% answered no, and 10.0% answered that they don’t know or don’t remember. Among all respondents, 31.2% answered yes, 1.4% answered no, and 3.6% answered I don’t know or don’t remember.

104. Question 23 asked respondents who answered yes to Question 22 what the law firm’s representatives said or suggested about the likelihood that they would get their property free and clear of their mortgage. Table Q below displays the results for this question.

Table Q: Summary of Responses to Question 23
 (Asked among those who responded “yes” in Question 22)

Q.23 What did any of the law firm’s representatives say or suggest about the likelihood that you would get your property free and clear of your mortgage?	Those Asked³⁹	All Respondents
Did they say or suggest that you ...?		
Sample size	43	138
... definitely or probably would get your property free and clear of your mortgage	79.1%	24.6%
... definitely would get your property free and clear of your mortgage	20.9%	6.5%
... probably would get your property free and clear of your mortgage	58.1%	18.1%
... might or might not get your property free and clear of your mortgage	14.0%	4.3%
... probably would not get your property free and clear of your mortgage	0.0%	0.0%
... definitely would not get your property free and clear of your mortgage	0.0%	0.0%
You don’t know or don’t remember	7.0%	2.2%

105. Table Q shows that among respondents asked Question 23, 79.1% responded that the law firm’s representatives said or suggested that they definitely or probably would get their property free and clear, including 20.9% who answered definitely, and 58.1% who answered probably. Among all respondents, 24.6% answered that the law firm’s representatives said or suggested that they definitely or probably would get their property free and clear of their mortgage, including 6.5% who answered definitely, and 18.1% who answered probably.

³⁹ The numbers in this column should be interpreted with caution given the small sample size.

SUMMARY AND CONCLUSIONS

106. As described earlier in this report, the survey included questions that asked respondents about the likelihood that certain outcomes would occur, including the respondent winning the lawsuit against the company that holds their mortgage (Question 9), having the terms of their mortgage changed (Question 13), receiving money (Question 17), having their mortgage voided (Question 21), or getting their property free and clear of their mortgage (Question 23).

107. Table R below summarizes the results for respondents who answered that Brookstone’s representatives said or suggested that any of these events would definitely or probably occur.

**Table R: Summary of the Likelihood of Certain Events
 “Definitely” or “Probably” Responses for Questions 9, 13, 17, 21 and 23**

Percentage of respondents answering that the law firm’s representatives said or suggested that “definitely” or “probably” ...	All Respondents
Sample size	138
“Definitely” or “probably” for at least one of the items below:	80.4%
... you would win your lawsuit (Q.9)	64.5%
... the terms of your mortgage would be changed (Q.13)	31.2%
... you would receive any money (Q.17)	54.3%
... you would have your mortgage voided (Q.21)	17.4%
... you would get your property free and clear of your mortgage (Q.23)	24.6%

108. As shown in Table R, 80.4% of all respondents answered that Brookstone’s representatives said or suggested that the likelihood is definite or probable for at least one of the items above.

This percentage is conservatively calculated, because it includes all respondents, even those who were not asked about any likelihood, due to their answers to prior survey questions.

109. Based on the findings from my survey of customers who had retained Brookstone, I conclude that a substantial percentage of respondents hired Brookstone to obtain a settlement or a modification relating to their mortgage, to join a lawsuit, or to save a home from foreclosure.

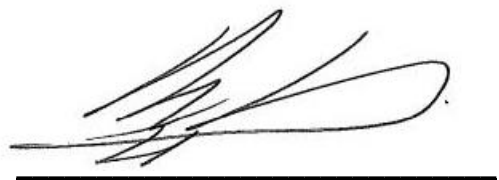
1 110. Based on the findings from my survey, I also conclude that a substantial percentage of
2 respondents believe that Brookstone’s representatives said or suggested that the respondents will
3 definitely or probably: (a) win their lawsuit against the company that holds their mortgage,
4 and/or (b) achieve outcomes such as changing the terms of their mortgage, receiving money,
5 having their mortgage voided, or getting their property free and clear of their mortgage.

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my belief.

Executed in Encino, California, on June 5, 2017.



Dr. Bruce Isaacson

**Exhibit 1:
Dr. Bruce Isaacson CV and Testimony Experience**



16501 Ventura Boulevard, Suite 601, Encino, CA 91436 • Phone (818) 464-2400 • www.mmrstrategy.com

DR. BRUCE R. ISAACSON, DBA, MBA

Summary of Qualifications

- Expertise in surveys, marketing, and strategy.
- Experience in intellectual property matters.
- Doctorate and MBA, Harvard Business School; Bachelor of Science in Engineering, Northwestern University.

MMR Strategy Group, Encino, CA **PRESIDENT**

2005 - Present

MMR provides surveys, analysis, and consulting to measure the attitudes and behaviors of customers and prospective customers. MMR has three primary practice areas:

1. Commercial Marketing Research: MMR provides marketing research and consulting to help clients improve products, and develop marketing and sales strategies. MMR's commercial clients have included Farmers Insurance, Nestle USA, Goodyear, and others.
 2. Claim Substantiation: MMR provides research and consulting to help clients evaluate claims made in packaging, advertising, and other marketplace communications.
 3. Litigation Surveys: MMR provides surveys and testimony for intellectual property matters. MMR has been retained by firms including Jones Day, Proskauer Rose, Kirkland & Ellis, and others.
- As President, I design studies, manage research projects, and provide consulting for clients. I have conducted hundreds of surveys during my career.
 - I regularly provide surveys, testimony, and rebuttals for intellectual property litigation and claim substantiation matters. I have experience with a wide variety of authorities, including Federal Court, the Trademark Trial and Appeal Board (TTAB), National Advertising Division (NAD), and other venues as well.
 - I frequently speak and write on topics relating to surveys, marketing, and strategy.

Education

- Doctor of Business Administration in Marketing, **Harvard Business School**, 1995. Awarded Dean's Doctoral Fellowship.
- MBA with High Distinction, **Harvard Business School**, 1991. Graduated in top 5% of class as a Baker Scholar.
- Bachelor of Science in Engineering with focus on Regional Development, Northwestern University Technological Institute, 1985.

Prior Professional Experience

Fairview Company, Calabasas, CA 2002 - 2004
MANAGING DIRECTOR

- **West Coast Practice Leader of Executive Development for Monitor Group.**
Designed and managed marketing and strategy executive education programs. Developed curriculum, served as lead faculty on programs for Fortune 100 clients.
- **Consulted with clients in technology, software, and financial services.**
Provided consulting services in marketing and strategy.

Intuit/Digital Insight, Calabasas, CA 2001 - 2002
SENIOR VICE PRESIDENT FOR PRODUCTS, MARKETING, AND ALLIANCES

- **Managed business lines for \$130 million provider of outsourced banking services/software.**
Directed marketing, strategy, alliances, mergers, acquisitions, resellers, and pricing for 9 business lines. Managed \$29 million budget and staff of 40.
- **Built product management and strategy functions.**
Set priorities for \$22 million R&D budget. Directed \$51 million acquisition and post-merger conversion of 150 new clients.

Move, Inc., Westlake Village, CA 1999 - 2001
PRESIDENT, HOME SERVICES

- **Founded home services division for software/services provider to real estate industry.**
Directed business unit for new division. Built alliances with associations including National Association of Homebuilders and American Institute of Architects.

PHH Corporation (NYSE: PHH), Mortgage Division, Mount Laurel, NJ 1997 - 1999
VICE PRESIDENT, MARKETING

- **Directed marketing for \$26 billion outsourced mortgage services division.**
Company provided private label loans and loan servicing for customers and partners, including Wells Fargo, USAA, Coldwell Banker, Century 21. Served on 14-member Executive Committee. Managed \$14 million budget and 60 people in marketing, research, public relations, advertising, strategic planning, business development and e-commerce.
- **Created collateral for selling, processing, and closing loans distributed to 750,000 customers annually.**
Redesigned sales materials used by 150-person sales force. Created point-of-sale materials and placed in 1,600 real estate offices nationwide. Negotiated co-marketing deals.
- **Built online platform to originate, close and service mortgages.**
Created co-branded system used by 1,400 partners to originate \$700 million in mortgages in 2000. Integrated system with more than 2,000 sales and customer service reps.

Boston Consulting Group, Chicago, IL
CONSULTANT

1995 to 1997

- **Consulted in marketing, strategy and distribution for \$1 billion international strategy consulting firm.**
Designed and rolled out database marketing program for international supermarket chain.
Developed purchasing strategy for \$3 billion consumer goods company.
Evaluated market strategy for \$800 million division of paper goods company.

Harvard Business School, Cambridge, MA
DEAN'S DOCTORAL FELLOW

1991 to 1995

- **Developed and implemented multi-year research project analyzing buyer-supplier alliances.**
Authored 14 publications including best-selling case studies and articles in distribution, sales, supplier management, purchasing, branding, new products. Taught in Babson College Executive MBA program.

E&J Gallo Winery, Modesto, CA
MBA INTERN

1990

- Summer intern at global winery. Developed packaging strategy, distribution and retailer incentive programs for the wine cooler category.

Long Wharf Trading Company, Danvers, MA
PRESIDENT & CO-FOUNDER

1986 to 1989

- **Co-founded company manufacturing high quality sewn products for advertising premiums.**
Directed 30 employees. Clients included banks, universities, corporations, schools and museums. Company was featured with full-page story in *Inc. Magazine*.

Parsons Corporation/Barton-Aschman Associates, Evanston, IL
ASSOCIATE CONSULTANT

1985 to 1986

- **Conducted strategic and operations planning for public transportation systems at global construction and regional planning company.**
Received *President's Award* for outstanding initiative and performance.

Honors, Appointments, Affiliations

- Member, American Marketing Association (AMA)
- Member, International Trademark Association (INTA)
- Member, Marketing Research Association (MRA)
- Member, Brand Activation Association (BAA)
- Editorial Board, *Journal of Business-to-Business Marketing*, 1994 – present
- Member, *The Trademark Reporter* Committee, International Trademark Association, 2010 - present
- Policy Advisory Board, Joint Center for Housing Studies at Harvard University, 1999 - 2001
- Winner, Doctoral Dissertation, Institute for Study of Business Markets, Penn State, 1994
- George S. Dively Award for Innovative Research, Harvard Business School, 1993
- George F. Baker Scholar, Harvard Business School (top 5% of class), 1991
- Dean’s Doctoral Fellowship, Harvard Business School, 1993 -1995

Selected Speaking Engagements

Frequent speaker at industry conferences and client events on topics relating to marketing and strategy, including:

- Speaker at conference entitled, “Advanced Forum on Resolving & Litigating Advertising Disputes.” Panelist for “Battle of the Experts – Deploying the Proper Scientific Methodology for Supporting or Challenging Claims,” March, 2015.
- “Using Surveys to Measure Attitudes and Behaviors.” Presentation to U.S. Department of Justice, Civil Division, Commercial Litigation Branch, March, 2015.
- Speaker at the “Corporate Researchers Conference,” sponsored by the Marketing Research Association, October, 2013.
- Speaker on panel for seminar entitled “Trademark Protection in Cyberspace,” sponsored by the Los Angeles County Bar Association (LACBA), May, 2013.
- Moderator for round table discussion entitled, “Using Survey Evidence for Claim Substantiation,” International Trademark Association Annual Conference, May, 2013.
- Speaker and panelist for multi-day conference entitled, “Advertising Claims Support: Case Histories and Principles,” conference hosted by The Institute for Perception, April, 2013.

- Moderated round table discussion entitled, “Replicating Marketplace Conditions in Trademark Surveys,” International Trademark Association Annual Conference, 2011.
- Moderated round table discussion entitled, “The Use of Surveys in Intellectual Property Litigation,” International Trademark Association Annual Conference, 2010.
- Faculty on panel at expert forum entitled, “Litigating & Resolving Advertising Disputes,” American Conference Institute, June, 2010.
- “The Use of Online Surveys in Intellectual Property Litigation.” Presentation to the National Advertising Division (NAD) Annual Conference, October, 2009.
- “The Death of the Focus Group: Non-Traditional Research to Create Deeper Customer Insight.” Presentation to American Marketing Association Annual Marketing Research Conference, September, 2008.
- “Understanding Your Customer and Making Tough Strategic Choices,” International Restaurant & Foodservice Show of New York, March, 2008.
- “Measuring Consumer Attitudes and Behaviors in Intellectual Property Litigation,” Continuing Legal Education (CLE) seminar presented to audiences including:
 - Orange County Bar Association, November 2007.
 - Baker Botts, LLP, March, 2008.
 - Amster, Rothstein & Ebenstein LLP, March, 2008.
 - Fulwider Patton, LLP, March, 2008.
- “Understanding Today’s Customers and Making Tough Choices – Lessons Learned From Starbucks,” Western Foodservice & Hospitality Expo, August, 2007.
- “What Can We Learn from Customer Satisfaction Studies?” Real Trends Marketing & Technology Expo, September, 2006.

Publications and Works in Process

Book Review of *Trademark and Deceptive Advertising Surveys: Law, Science, and Design*, edited by Shari Seidman Diamond and Jerre B. Swann. *The Trademark Reporter*, September, 2013.

Playing Nice With Legal: How Research Can Help Keep Marketing Claims in Compliance. *Quirk’s Marketing Research Review*, January, 2013.

The Quantity of Presidential Polls and the Quality of Marketing Research. *Green Book Blog*, October, 2012.

Three Critical Questions to Evaluate Intellectual Property Surveys. *Intellectual Property Today*, September, 2012. Co-authors Professor Jonathan Hibbard and Professor Scott Swain.

Asking the Right Questions (in Litigation Surveys). *Intellectual Property Magazine*, October, 2012.

Conducting Litigation Surveys in an Online World. Manuscript in process with co-author, planning to submit for publication to *The Trademark Reporter*.

Why Online Consumer Surveys Can Be a Smart Choice in Intellectual Property Cases (with Professor Jonathan Hibbard and Professor Scott Swain). *Intellectual Property Law Newsletter of the American Bar Association, Intellectual Property Law Section*, May 2008.

Bose Corporation: The JIT II Program (A), (B), (C), and (D) (with Professor Roy Shapiro). Harvard Business School cases 9-694-001, -002, -003, and -004.

Bose Corporation: The JIT II Program Teaching Note. Harvard Business School teaching note 5-695-017.

Buyer-Supplier Relationships: Antecedents, Management and Consequences. Harvard Business School doctoral dissertation, 1996.

Goodyear: The Aquatred Launch (with Professor John Quelch). Harvard Business School case 9-594-106. Best seller.

Goodyear: The Aquatred Launch Teaching Note (with Professor John Quelch). Harvard Business School teaching note 5-595-016.

Industrial Marketing (with Professor V. Kasturi Rangan). In *AMA Management Handbook, Third Edition*, edited by John J. Hampton. New York: Amacom Books, 1994, pp. 2-101 to 2-108.

Managing Buyer-Supplier Relationships. Preface to *JIT II: Revolution in Buying and Selling*, edited by Lance Dixon and Anne Millen Porter. Newton, MA: Cahners Publications, Inc., 1994

Philip Morris: Marlboro Friday (A) and (B). Harvard Business School case 9-596-001 and -002.

Scope and Challenge of Business-to-Business Marketing (with Professor V. Kasturi Rangan). Harvard Business School class note 9-594-125.

Vistakon: 1 Day Acuvue Disposable Contact Lenses (with Professor Alvin J. Silk and Marie Bell). Harvard Business School case 9-596-087.

What is Industrial Marketing? (with Professor V. Kasturi Rangan). Harvard Business School class note 9-592-012.

Blogging and Commentary

I regularly write posts and white papers at www.MMRStrategy.com. Selected materials include:

Litigation Surveys

- “How to Measure False Advertising in a Litigation Survey” (November, 2012)
- “Using Surveys to Estimate Damages in Patent Infringement Matters” (October, 2012)
- “Apple vs. Samsung: Litigation Surveys as Evidence” (August, 2012)
- “What is the Theory Behind Your Lanham Act Survey?” (June, 2012)
- “Keyword Infringement Surveys: The New Frontier in Measuring Likelihood of Confusion” (June, 2012)
- “The Challenge of Replicating Marketplace Conditions in Intellectual Property Surveys” (May, 2012)

Claim Substantiation

- “When it Comes to ‘Up To’ Claims, Make Sure You Have the Right Substantiation” (February, 2013)
- “Critical Research Steps and Core Principles of Claim Substantiation” (white paper)
- “How Many Industries are Affected by Claim Substantiation?” (June, 2012)
- “Lessons in Claim Substantiation from the Pom Wonderful Decision” (May, 2012)
- “How Claim Substantiation Differs from Traditional Marketing Research” (May, 2012)

Marketing and Marketing Research

- “Lessons in Pricing Strategy from JCPenny” (May, 2013)
- “Why You Should (Almost) Never Use the van Westendorp Pricing Model” (March, 2013)
- “Three Types of Market Segmentation and the 2012 Presidential Election” (October, 2012)
- “Presidential Polls and the Quality of Marketing Research” (October, 2012)
- “Sizing the Potential of a New Market or New Product” (white paper)
- “MaxDiff vs. Conjoint: Which is Better to Measure Consumer Preferences?” (white paper)
- “Ten Best Practices to Improve Your Concept and Product Tests” (white paper)
- “Using Choice-Base Market Segmentation to Improve Your Marketing Strategy” (white paper)

- “What Your Tracking Study Should Measure About Your Customers” (white paper)
- “Using Customer Journey Maps to Improve Your Customer Experience” (white paper)
- “How to Improve Your Usage and Attitude Study” (June, 2012)
- “Five Pitfalls of Market Segmentation and How to Avoid Them” (May, 2012)

Selected Courses Taken in MBA and Doctoral Programs

- Economics and Finance, including topics such as Managerial Economics; Financial Reporting and Accounting; Business, Government, and the International Economy; Corporate Finance; Product Costing; Microeconomic Theory.
- Marketing and Strategy, including topics such as Marketing; Marketing Foundations Readings; New Products; Marketing Implementation; Service Management; Research Issues in Marketing; Buyer Behavior; Industrial Marketing and Procurement; Industry and Competitive Analysis; Communications.
- Sociology and Psychology, including Organizational Behavior; Human Resources; Social Behavior in Organizations; Readings in Administration (two courses); Management Policy and Practice.
- Statistics, including Statistical Inference; Social Network Analysis; Applied Data Analysis; Analyzing Covariance Structures.
- Research Methods and Research Design, including Doctoral Research Seminar; Research Design and Measurement; Design of Field Research in Organizational Behavior; Intervention Research and Action Science.

**Dr. Bruce Isaacson Litigation Expert Witness Experience
June 2017**

Cases in which Dr. Bruce Isaacson has testified as an expert, including written expert reports or testimony at deposition or trial, in the past four years.

In Re: National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation

U.S. District Court, Northern District of California Oakland Division

Adidas America, Inc., Adidas AG, Adidas International Marketing B.V., Reebok International Ltd., and Reebok International Limited v. TRB Acquisitions LLC, et al.

U.S. District Court, District of Oregon Portland Division

Network-1 Technologies, Inc. v. Alcatel-Lucent USA Inc., et al.

U.S. District Court, Eastern District of Texas Tyler Division

In the Matter of DIRECTV LLC v. Comcast Cable Communications

National Advertising Division of the Better Business Bureau

Sisters of Charity of Leavenworth Health System, Inc. v. Blue Cross and Blue Shield Association

U.S. District Court, District of Colorado

Pinkette Clothing, Inc. v. Cosmetic Warriors Limited dba Lush Handmade Cosmetics

U.S. District Court, Central District of California

LifeScan, Inc. and Johnson & Johnson v. PharmaTech Solutions, Inc. and Decision Diagnostics Corp.

U.S. District Court, Northern District of California Oakland Division

General Motors LLC Ignition Switch Litigation

U.S. District Court, Southern District of New York

Robert S. Davidson, d/b/a Plastertech v. The United States

United States Court of Federal Claims

Blue Cross and Blue Shield Association, an Illinois not-for-profit corporation v. Zoom Care, P.C.; Zoom Management, Inc.; Zoomcare; Zoom Care Health Plan; and Zoom Care Washington, P.L.L.C.

U.S. District Court, Western District of Washington at Seattle

Kosair Charities Committee, Inc. v. Norton Healthcare, Inc. et al.

Jefferson Circuit Court, Division Five (5)

Safelite Group, Inc. and Safelite Solutions LLC v. Lori Swanson, in her official capacity as Attorney General of the State of Minnesota, and Michael Rothman, in his official capacity as the Commissioner of the Minnesota Department of Commerce

U.S. District Court, District of Minnesota

Confederate Motors, Inc. v. FCA US LLC

United States Patent and Trademark Office, Trademark Trial and Appeal Board

Talking Rain Beverage Company, Inc. v. DS Services of America, Inc.

U.S. District Court, Western District of Washington, at Seattle

Farouk Systems, Inc. v. AG Global Products, LLC d/b/a FHI Heat, LLC and Shauky Gulamani

U.S. District Court, Southern District of Texas Houston Division

Federal Trade Commission v. LifeLock, Inc. a corporation; Robert J Maynard, Jr., individually and as an officer of LifeLock, Inc.; and Richard Todd Davis, individually and as an officer of LifeLock, Inc.

U.S. District Court, District of Arizona

Parallel Networks Licensing, LLC v. Microsoft Corporation

U.S. District Court, District of Delaware

Parallel Networks Licensing, LLC v. International Business Machines Corporation

U.S. District Court, District of Delaware

In the Matter of Certain Footwear Products (Complainant Converse Inc.)

United States International Trade Commission, Washington DC

Klauber Brothers, Inc. v. Forever 21 Retail Inc., International Intimates, Inc., and Does 1 through 10

U.S. District Court, Central District of California

Weber-Stephen Products LLC v. Sears Holdings Corporation, and Sears, Roebuck and Co.

U.S. District Court, Northern District of Illinois Eastern Division

Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, GMBH

U.S. District Court, Southern District of New York

Robert Namer v. Broadcasting Board of Governors and Voice of America

U.S. District Court, Eastern District of Louisiana

Shannon Fabrics, Inc. v. Jo-Ann Stores, Inc.

U.S. District Court, Central District of California

Mars, Incorporated v. The Hershey Company and Hershey Chocolate & Confectionery Corporation

U.S. District Court, Eastern District of Virginia Alexandria Division

Fitbug Limited v. Fitbit, Inc.

U.S. District Court, Northern District of California

Patrick Dang and Michael Villa v. San Francisco Forty-Niners, LTD., et. al.

U.S. District Court, Northern District of California

Kreation Juicery, Inc. v. Eiman Shekarchi and April Skekarchi

U.S. District Court, Central District of California

Miracle 7, Inc. v. Halo Couture LLC
U.S. District Court, Southern District of Florida

Robert McCrary v. The Elations Company LLC
U.S. District Court, Central District of California

OraLabs, Inc., v. The Kind Group LLC
U.S. District Court, District of Colorado

Philippe Charriol International Limited v. A'lor International Limited
U.S. District Court, Southern District of California

LegalZoom.com, Inc. v. Rocket Lawyer Incorporated
U.S. District Court, Central District of California Western Division

Benchmark Young Adult School, Inc., dba Benchmark Transitions v. Launchworks Life Services, LLC dba Mark Houston Recovery Center and Benchmark Recovery Center
U.S. District Court, Southern District of California

Diageo North America, Inc. v. Mexcor, Inc. and EJMV Investments, LLC
U.S. District Court, Southern District of Texas, Houston Division

AbbVie, Inc. v. A-List, Inc. dba Kitson, Brian Lichtenberg, LLC, and Brian Lichtenberg
U.S. District Court, Central District of California

Jeffrey Sachs and James Alden v. Toyota Motor North America, Inc., Toyota Motor Corp., and Toyota Motor Sales, U.S.A., Inc.
Superior Court of California, County of Los Angeles

Mary O. Rivera v. Toyota Motor North America, Inc., Toyota Motor Corp., and Toyota Motor Sales, U.S.A., Inc.
Myrna Socorro and Donato Pastore as Co-Personal Representatives and Co-Executors of the Estate of Ernest Codelia, Jr., deceased v. Toyota Motor Corp., and Toyota Motor Sales, U.S.A., Inc.
U.S. District Court, Eastern District of New York

Commission on Human Rights v. Tiv-Tov Stores, Inc., et al
New York City Office of Administrative Trials and Hearings

T-Mobile U.S. and Deutsche Telekom AG v. Aio Wireless, Inc.
U.S. District Court, Southern District of Texas, Houston Division

MOD Super Fast Pizza v. Carl Chang, CMCB Ventures, and Pieology Spectrum
U.S. District Court, Western District of Washington

American Security Council Foundation v. Center for Security Policy Inc. and Mr. Frank Gaffney
U.S. District Court, District of Columbia

Jason Trabakoolas and Sheila Stetson v. Watts Water Technologies, Inc., Watts Regulator Co., Watts Anderson-Barrows Metal Corp., Watts Plumbing Technologies (Taizho) Co., LTD., Savard Plumbing Company, Wolverine Brass, Inc., and John Does 1-100
U.S. District Court, Northern District of California

Tara Bannister v. The Rising Beverage Company
Superior Court of California, County of Los Angeles

Akiro LLC v. House of Cheatham, Inc. and Robert H. Bell
U.S. District Court, Southern District of New York

Globefill Incorporated v. Elements Spirits, Inc. and Kim Brandi
U.S. District Court, Central District of California

Luxco, Inc. v. Consejo Regulador Del Tequila, A.C.
United States Patent and Trademark Office, Trademark Trial and Appeal Board

**Exhibit 2:
Survey Screener and Main Questionnaire**

MMR Strategy Group
Study #646-013
May 4, 2017

Banks Study

A. [CONTACT NAME 1]

Hello. My name is _____. I am calling on behalf of MMR Strategy Group and we are conducting a brief survey sponsored by the Federal Trade Commission. May I speak with (INSERT NAME 1)?

(INTERVIEWER: IF NAME 1 IS NOT AVAILABLE, OR CANNOT COME TO THE PHONE, ASK FOR CALL BACK TIME. IF RESPONDENT IS NOT AT NUMBER LISTED, ASK IF THERE IS ANOTHER NUMBER TO CALL.)

(RECORD ONE)

Contacted respondent

Call later (Date/Time: _____)

Call different phone number (Phone: _____)

No answer/busy/voicemail

Not available at this phone number and no additional number provided

Refused/hung-up

[INTERVIEWER: IF NAME 1 ASKS ANYTHING ABOUT THE PURPOSE OR SPONSOR OF THE SURVEY, OR WHAT THE SURVEY INVOLVES, SAY THE FOLLOWING AND NO MORE: "I am calling on behalf of MMR Strategy Group and we are conducting a brief survey sponsored by the Federal Trade Commission. Although sponsored by the FTC, the FTC will not have access to your specific answers."]

[IF "CONTACTED", SKIP TO Q.C.

IF NOT "CONTACTED" AND CONTACT DATABASE INCLUDES "NAME 2", CONTINUE.

IF CONTACT DATABASE DOES NOT INCLUDE "NAME 2" AND NAME 1 IS "CALL LATER", SCHEDULE DATE AND TIME TO CALL BACK. ALLOW RESPONDENT TO BE CALLED LATER. RESTART FROM BEGINNING WHEN CALLING BACK.

IF CONTACT DATABASE DOES NOT INCLUDE "NAME 2" AND NAME 1 IS "CALL DIFFERENT PHONE NUMBER", RECORD NUMBER PROVIDED AND CALL THAT NUMBER. RESTART FROM BEGINNING WHEN CALLING.

IF CONTACT DATABASE DOES NOT INCLUDE "NAME 2" AND NAME 1 IS "NO ANSWER", CALL AGAIN LATER. RESTART FROM BEGINNING WHEN CALLING LATER.

IF CONTACT DATABASE DOES NOT INCLUDE "NAME 2" AND NAME 1 IS "NOT AVAILABLE" OR "REFUSED", TERMINATE AND SKIP TO Q.100.]

B. [CONTACT NAME 2]

May I speak with (INSERT NAME 2)?

(INTERVIEWER: IF NAME 2 IS NOT AVAILABLE, OR CANNOT COME TO THE PHONE, ASK FOR CALL BACK TIME. IF RESPONDENT IS NOT AT NUMBER LISTED, ASK IF THERE IS ANOTHER NUMBER TO CALL.)

(RECORD ONE)

Contacted respondent

Call later (Date/Time: _____)

Call different phone number (Phone: _____)

No answer/busy/voicemail

Not available at this phone number and no additional number provided

Refused/hung-up

[IF “CONTACTED RESPONDENT”, CONTINUE.

IF “CALL LATER”, SCHEDULE DATE AND TIME TO CALL BACK. ALLOW RESPONDENT TO BE CALLED LATER. RESTART FROM BEGINNING WHEN CALLING BACK.

IF “CALL DIFFERENT PHONE NUMBER”, RECORD NUMBER PROVIDED AND CALL THAT NUMBER. RESTART FROM BEGINNING WHEN CALLING.

IF “NO ANSWER”, CALL AGAIN LATER. RESTART FROM BEGINNING WHEN CALLING LATER.

IF “NOT AVAILABLE” OR “REFUSED”, TERMINATE AND SKIP TO Q.100.]

B1 Hello. My name is _____. I am calling on behalf of MMR Strategy Group and we are conducting a brief survey sponsored by the Federal Trade Commission.

[INTERVIEWER: IF NAME 2 ASKS ANYTHING ABOUT THE PURPOSE OR SPONSOR OF THE SURVEY, OR WHAT THE SURVEY INVOLVES, SAY THE FOLLOWING AND NO MORE: “I am calling on behalf of MMR Strategy Group and we are conducting a brief survey sponsored by the Federal Trade Commission. Although sponsored by the FTC, the FTC will not have access to your specific answers.”]

C. I appreciate your time to answer a few brief survey questions.

I'm not trying to sell you anything. Your individual answers to this survey will not be used to identify you personally in any way, or for any sales or marketing.

For any question, if you don't know how to answer or don't remember, simply indicate that you don't know or don't remember. Please do not guess. This call may be monitored for quality assurance purposes.

(INTERVIEWER: IF RESPONDENT ASKS HOW YOU GOT THEIR NAME OR PHONE NUMBER, ANSWER, "I was provided your name and phone number as part of a list provided by the Federal Trade Commission. Would you be willing to participate?")

(RECORD ONE)

Respondent agrees or indicates agreement

Call later (Date/Time: _____)

Refused/hung-up

[IF "RESPONDENT AGREES", CONTINUE.

IF "CALL LATER", SCHEDULE DATE AND TIME TO CALL BACK. ALLOW RESPONDENT TO BE CALLED LATER. RESTART FROM BEGINNING WHEN CALLING BACK.

IF "REFUSED", TERMINATE AND SKIP TO Q.100.]

Main Questionnaire

[RANDOMIZE THE ORDER OF Q.1/Q.2 AND Q.3. ALWAYS SHOW Q.1 BEFORE Q.2. RECORD ORDER. ASK Q.1 THROUGH Q.3, THEN PROCEED WITH THE INSTRUCTION AFTER Q.3.]

1. Have you ever hired a law firm called Brookstone Law? By hired, I mean that you signed a contract for them to conduct legal work for you.

Please answer [**ROTATE**: yes, you have hired Brookstone Law; no, you have never hired Brookstone Law;] or you don't know or don't remember. (**DO NOT READ LIST**) (**RECORD ONE RESPONSE**)

RESPONSES

[MATCH ORDER TO Q.1. ANCHOR "I DON'T KNOW OR DON'T REMEMBER" LAST.]

Yes

No

I don't know or don't remember

[IF Q.1/Q.2 ARE ASKED BEFORE Q.3:

- **AND IF "YES" TO Q.1: SKIP TO Q.3.**
- **AND IF "NO" OR "I DON'T KNOW" TO Q.1, CONTINUE TO Q.2.**

IF Q.3 IS ASKED BEFORE Q.1/Q.2, SKIP TO INSTRUCTION AFTER Q.3.]

2. Have you ever hired a law firm called Advantis Law? By hired, I mean that you signed a contract for them to conduct legal work for you.

Please answer [**MATCH ORDER TO Q.1**: yes, you have hired Advantis Law; no, you have never hired Advantis Law;] or you don't know or don't remember. (**DO NOT READ LIST**) (**RECORD ONE RESPONSE**)

RESPONSES

[MATCH ORDER TO Q.1. ANCHOR "I DON'T KNOW OR DON'T REMEMBER" LAST.]

Yes

No

I don't know or don't remember

[IF Q.1/Q.2 ARE ASKED BEFORE Q.3, CONTINUE TO Q.3. IF Q.3 IS ASKED BEFORE Q.1/Q.2, SKIP TO INSTRUCTION AFTER Q.3.]

3. Have you ever hired a law firm called Darcy Law? By hired, I mean that you signed a contract for them to conduct legal work for you.

Please answer [MATCH ORDER TO Q.1: yes, you have hired Darcy Law; no, you have never hired Darcy Law;] or you don't know or don't remember. (DO NOT READ LIST) (RECORD ONE RESPONSE)

RESPONSES

[MATCH ORDER TO Q.1. ANCHOR "I DON'T KNOW OR DON'T REMEMBER" LAST.]

Yes

No

I don't know or don't remember

[IF Q.1/Q.2 ARE ASKED BEFORE Q.3, CONTINUE. IF Q.3 IS ASKED BEFORE Q.1/Q.2, SKIP TO Q.1.]

[IF "NAME 1":

- AND "NO" OR "I DON'T KNOW" TO Q.1 AND Q.2:
 - IF CONTACT DATABASE INCLUDES "NAME 2", CONTINUE.
 - IF CONTACT DATABASE DOES NOT INCLUDE "NAME 2", TERMINATE AND SKIP TO Q.100.
- IF "YES" TO Q.1 OR Q.2 AND "YES" OR "I DON'T KNOW" TO Q.3:
 - IF CONTACT DATABASE INCLUDES "NAME 2", CONTINUE.
 - IF CONTACT DATABASE DOES NOT INCLUDE "NAME 2", SKIP TO Q.24.
- IF "YES" TO Q.1 OR Q.2 AND "NO" TO Q.3, SKIP TO INSTRUCTION BEFORE Q.6.

IF "NAME 2":

- AND "NO" OR "I DON'T KNOW" TO Q.1 AND Q.2, TERMINATE AND SKIP TO Q.100.
- IF "YES" TO Q.1 OR Q.2 AND "YES" OR "I DON'T KNOW" TO Q.3, SKIP TO Q.24.
- IF "YES" TO Q.1 OR Q.2 AND "NO" TO Q.3, SKIP TO INSTRUCTION BEFORE Q.6.]

4. If you know, has [INSERT NAME 2] ever hired a law firm called Brookstone Law? Please answer [MATCH ORDER TO Q.1: yes, they did hire a law firm called Brookstone Law; no, they did not hire a law firm called Brookstone Law;] or you don't know or don't remember. (DO NOT READ LIST) (RECORD ONE RESPONSE)

RESPONSES

[MATCH ORDER TO Q.1. ANCHOR "I DON'T KNOW OR DON'T REMEMBER" LAST.]

Yes

No

I don't know or don't remember

[IF "YES", SKIP TO Q.B. OTHERWISE, CONTINUE.]

5. If you know, has **[INSERT NAME 2]** ever hired a law firm called Advantis Law? Please answer **[MATCH ORDER TO Q.1: yes, they did hire a law firm called Advantis Law; no, they did not hire a law firm called Advantis Law]** or you don't know or don't remember. **(DO NOT READ LIST) (RECORD ONE RESPONSE)**

RESPONSES

[MATCH ORDER TO Q.1. ANCHOR "I DON'T KNOW OR DON'T REMEMBER" LAST.]

Yes

No

I don't know or don't remember

[IF "YES", SKIP TO Q.B. OTHERWISE, TERMINATE AND SKIP TO Q.100.]

I will now ask you some questions about your experience with **[IF "YES" AT Q.1: Brookstone Law; IF "YES" AT Q.2: Advantis Law]**.

6. What, if anything, did **[IF "YES" AT Q.1: Brookstone Law; IF "YES" AT Q.2: Advantis Law]** representatives say or suggest to you about what you would achieve by hiring them? If you don't know or don't remember, please say you don't know or don't remember. Please be as specific as possible. **(PROBE: Anything else?)**

I don't know or don't remember **[EXCLUSIVE]**

[RESPONDENT MUST PROVIDE AN ANSWER IN THE TEXT BOX OR SELECT "I DON'T KNOW OR DON'T REMEMBER".]

7. Did any of the law firm's representatives say or suggest that they would file a lawsuit against the company that holds your mortgage? Please answer **[MATCH ORDER TO Q.1: yes, representatives of the law firm did say or suggest that they would file a lawsuit against the company that holds your mortgage; no, representatives of the law firm did not say or suggest that they would file a lawsuit against the company that holds your mortgage;]** or you don't know or don't remember. **(DO NOT READ LIST) (RECORD ONE RESPONSE)**

RESPONSES

[MATCH ORDER TO Q.1. ANCHOR "I DON'T KNOW OR DON'T REMEMBER" LAST.]

Yes

No

I don't know or don't remember

[IF "YES", CONTINUE. OTHERWISE, SKIP TO Q.10.]

8. Did any of the law firm’s representatives say or suggest anything about the likelihood of winning your lawsuit against the company that holds your mortgage? Please answer [**MATCH ORDER TO Q.1**: yes, representatives of the law firm did say or suggest something about the likelihood of winning your lawsuit; no, representatives of the law firm did not say or suggest anything about the likelihood of winning your lawsuit;] or you don’t know or don’t remember. (**DO NOT READ LIST**) (**RECORD ONE RESPONSE**)

RESPONSES

[**MATCH ORDER TO Q.1. ANCHOR “I DON’T KNOW OR DON’T REMEMBER” LAST.**]

- Yes
- No
- I don’t know or don’t remember

[**IF “YES”, CONTINUE. OTHERWISE, SKIP TO Q.10.**]

9. What did [**IF “YES” AT Q.1**: Brookstone Law; **IF “YES” AT Q.2**: Advantis Law] representatives say or suggest about the likelihood of winning your lawsuit against the company that holds your mortgage? Did they say or suggest that you ...? (**READ LIST**) (**RECORD ONE RESPONSE**)

RESPONSES

[**REVERSE ORDER. ANCHOR “I DON’T KNOW” LAST.**]

- ... definitely would win your lawsuit
- ... probably would win your lawsuit
- ... might or might not win your lawsuit
- ... probably would not win your lawsuit
- ... definitely would not win your lawsuit
- You don’t know or don’t remember

10. Although you may have already mentioned it, which, if any, of the following did [**IF “YES” AT Q.1**: Brookstone Law; **IF “YES” AT Q.2**: Advantis Law] representatives say or suggest you would achieve by hiring them? (**READ LIST**) (**RECORD ALL THAT APPLY**)

RESPONSES

[**RANDOMIZE ORDER. ANCHOR “SOMETHING ELSE”, “NONE”, AND “YOU DON’T KNOW OR DON’T REMEMBER” LAST.**]

- The terms of your mortgage would be changed
- You would receive money
- You would have your mortgage voided
- You would get your property free and clear of your mortgage
- Something else not listed here
- Nothing [EXCLUSIVE]
- You don’t know or don’t remember [EXCLUSIVE]

[**IF “NOTHING”, “YOU DON’T KNOW OR DON’T REMEMBER”, OR ONLY “SOMETHING ELSE”, SKIP TO Q.24. OTHERWISE, CONTINUE.**]

11. The following questions ask about your mortgage. If you hired **[IF “YES” AT Q.1: Brookstone Law; IF “YES” AT Q.2: Advantis Law]** regarding more than one mortgage, please answer the questions thinking about the single property with the highest mortgage amount.

[MATCH ORDER OF Q.12 THROUGH Q.23 TO OPTIONS SELECTED IN Q.10. ALWAYS SHOW Q.12 THROUGH Q.15 TOGETHER AND IN ORDER. ALWAYS SHOW Q.16 THROUGH Q.19 TOGETHER AND IN ORDER. ALWAYS SHOW Q.20 AND Q.21 TOGETHER AND IN ORDER. ALWAYS SHOW Q.22 AND Q.23 TOGETHER AND IN ORDER.]

[IF “THE TERMS OF YOUR MORTGAGE WOULD BE CHANGED” AT Q.10, CONTINUE. OTHERWISE, SKIP TO INSTRUCTION BEFORE Q.16.]

12. Did any of the law firm’s representatives say or suggest anything about the likelihood that the terms of your mortgage would be changed as a result of hiring them? Please answer **[MATCH ORDER TO Q.1: yes, representatives of the law firm did say or suggest something about the likelihood that the terms of your mortgage would be changed; no, representatives of the law firm did not say or suggest anything about the likelihood that the terms of your mortgage would be changed]** or you don’t know or don’t remember. **(DO NOT READ LIST) (RECORD ONE RESPONSE)**

RESPONSES

[MATCH ORDER TO Q.1. ANCHOR “I DON’T KNOW OR DON’T REMEMBER” LAST.]

Yes

No

I don’t know or don’t remember

[IF “YES”, CONTINUE. OTHERWISE, SKIP TO INSTRUCTION BEFORE Q.16.]

13. What did the law firm’s representatives say or suggest about the likelihood that the terms of your mortgage would be changed? Did they say or suggest that the terms of your mortgage...? **(READ LIST) (RECORD ONE RESPONSE)**

RESPONSES

[MATCH REVERSE ORDER TO Q.9. ANCHOR “I DON’T KNOW OR DON’T REMEMBER” LAST.]

... definitely would be changed

... probably would be changed

... might or might not be changed

... probably would not be changed

... definitely would not be changed

You don’t know or don’t remember

14. Did any of the law firm’s representatives say or suggest anything about how the terms of your mortgage would be changed? Please answer [**MATCH ORDER TO Q.1**: yes, representatives of the law firm did say or suggest something about the terms of how your mortgage would be changed; no, representatives of the law firm did not say or suggest anything about how the terms of your mortgage would be changed;] or you don’t know or don’t remember. (**DO NOT READ LIST**) (**RECORD ONE RESPONSE**)

RESPONSES

[**MATCH ORDER TO Q.1. ANCHOR “I DON’T KNOW OR DON’T REMEMBER” LAST.**]

Yes

No

I don’t know or don’t remember

[**IF “YES”, CONTINUE. OTHERWISE, SKIP TO INSTRUCTION BEFORE Q.16.**]

15. Did any of the law firm’s representatives say or suggest anything about the following types of changes to the terms of your mortgage as a result of hiring them? For each type of change, please answer [**MATCH ORDER TO Q.1**: yes, representatives of the law firm did say or suggest something about this type of change to your mortgage; no, representatives of the law firm did not say or suggest anything about this type of change to your mortgage;] or you don’t know or don’t remember. (**READ LIST**) (**RECORD ONE RESPONSE FOR EACH TYPE OF CHANGE**)

[**GRID FORMAT**]

RESPONSES

[**MATCH ORDER TO Q.1. ANCHOR “I DON’T KNOW OR DON’T REMEMBER” LAST.**]

Yes

No

I don’t know or don’t remember

TYPES OF CHANGES

[**RANDOMIZE ORDER.**]

Lower your interest rate

Lower your monthly payment

Lower the total amount owed on your loan

Forgive late payments

[IF “YOU WOULD RECEIVE MONEY” AT Q.10, CONTINUE. OTHERWISE, SKIP TO INSTRUCTION BEFORE Q.20.]

16. Did any of the law firm’s representatives say or suggest anything about the likelihood that you would receive any money as a result of hiring them? Please answer **[MATCH ORDER TO Q.1:** yes, representatives of the law firm did say or suggest something about the likelihood that you would receive any money; no, representatives of the law firm did not say or suggest anything about the likelihood that you would receive any money;] or you don’t know or don’t remember. **(DO NOT READ LIST) (RECORD ONE RESPONSE)**

RESPONSES

[MATCH ORDER TO Q.1. ANCHOR “I DON’T KNOW OR DON’T REMEMBER” LAST.]

Yes

No

I don’t know or don’t remember

[IF “YES”, CONTINUE. OTHERWISE, SKIP TO INSTRUCTION BEFORE Q.20.]

17. What did the law firm’s representatives say or suggest about the likelihood that you would receive any money? Did they say or suggest that you ...? **(READ LIST) (RECORD ONE RESPONSE)**

RESPONSES

[MATCH REVERSE ORDER TO Q.9. ANCHOR “I DON’T KNOW OR DON’T REMEMBER” LAST.]

... definitely would receive any money

... probably would receive any money

... might or might not receive any money

... probably would not receive any money

... definitely would not receive any money

You don’t know or don’t remember

18. Did any of the law firm’s representatives say or suggest anything about the amount of money that you would receive? Please answer **[MATCH ORDER TO Q.1:** yes, representatives of the law firm did say or suggest something about the amount of money that you would receive; no, representatives of the law firm did not say or suggest anything about the amount of money that you would receive;] or you don’t know or don’t remember. **(DO NOT READ LIST) (RECORD ONE RESPONSE)**

RESPONSES

[MATCH ORDER TO Q.1. ANCHOR “I DON’T REMEMBER” LAST.]

Yes

No

I don’t know or don’t remember

[IF “YES”, CONTINUE. OTHERWISE, SKIP TO INSTRUCTION BEFORE Q.20.]

19. Which of the following best describes the amount of money the law firm’s representatives said or suggested you would receive? **(READ LIST) (RECORD ONE RESPONSE)**

RESPONSES

[MATCH REVERSE ORDER TO Q.9. ANCHOR “I DON’T KNOW OR DON’T REMEMBER” LAST.]

- Less than twenty-five thousand dollars
- Twenty-five thousand dollars to less than fifty thousand dollars
- Fifty thousand dollars to less than seventy-five thousand dollars
- Seventy-five thousand dollars to less than one hundred and fifty thousand dollars
- One hundred and fifty thousand dollars to less than three hundred thousand dollars
- Three hundred thousand dollars to less than five hundred thousand dollars
- Five hundred thousand dollars or more
- You don’t know or don’t remember

[IF “YOU WOULD HAVE YOUR MORTGAGE VOIDED” AT Q.10, CONTINUE. OTHERWISE, SKIP INSTRUCTION BEFORE Q.22.]

20. Did any of the law firm’s representatives say or suggest anything about the likelihood you would have your mortgage voided as a result of hiring them? Please answer **[MATCH ORDER TO Q.1: yes, representatives of the law firm did say or suggest something about the likelihood that you would have your mortgage voided; no, representatives of the law firm did not say or suggest anything about the likelihood that you would have your mortgage voided;]** or you don’t know or don’t remember. **(DO NOT READ LIST) (RECORD ONE RESPONSE)**

RESPONSES

[MATCH ORDER TO Q.1. ANCHOR “I DON’T KNOW OR DON’T REMEMBER” LAST.]

- Yes
- No
- I don’t know or don’t remember

[IF “YES”, CONTINUE. OTHERWISE, SKIP TO INSTRUCTION BEFORE Q.22.]

21. What did the law firm’s representatives say or suggest about the likelihood that you would have your mortgage voided? Did they say or suggest that you ...? **(READ LIST) (RECORD ONE RESPONSE)**

RESPONSES

[MATCH REVERSE ORDER TO Q.9. ANCHOR “I DON’T KNOW OR DON’T REMEMBER” LAST.]

- ... definitely would have your mortgage voided
- ... probably would have your mortgage voided
- ... might or might not have your mortgage voided
- ... probably would not have your mortgage voided
- ... definitely would not have your mortgage voided
- You don’t know or don’t remember

[IF “YOU WOULD GET YOUR PROPERTY FREE AND CLEAR OF YOUR MORTGAGE” AT Q.10, CONTINUE. OTHERWISE, SKIP TO Q.24.]

22. Did any of the law firm’s representatives say or suggest anything about the likelihood that you would get your property free and clear of your mortgage as a result of hiring them? Please answer **[MATCH ORDER TO Q.1:** yes, representatives of the law firm did say or suggest something about the likelihood that you would get your property free and clear of your mortgage; no, representatives of the law firm did not say or suggest anything about the likelihood that you would get your property free and clear of your mortgage;] or you don’t know or don’t remember. **(DO NOT READ LIST) (RECORD ONE RESPONSE)**

RESPONSES

[MATCH ORDER TO Q.1. ANCHOR “I DON’T KNOW OR DON’T REMEMBER” LAST.]

Yes

No

I don’t know or don’t remember

[IF “YES”, CONTINUE. OTHERWISE, OTHERWISE, SKIP TO Q.24.]

23. What did any of the law firm’s representatives say or suggest about the likelihood that you would get your property free and clear of your mortgage? Did they say or suggest that you ...? **(READ LIST) (RECORD ONE RESPONSE)**

RESPONSES

[MATCH REVERSE ORDER TO Q.9. ANCHOR “I DON’T KNOW OR DON’T REMEMBER” LAST.]

... definitely would get your property free and clear of your mortgage

... probably would get your property free and clear of your mortgage

... might or might not get your property free and clear of your mortgage

... probably would not get your property free and clear of your mortgage

... definitely would not get your property free and clear of your mortgage

You don’t know or don’t remember

24. In the next few days, you may receive a follow-up phone call from someone checking to make sure I completed this survey properly. That follow-up phone call will only take a moment of your time. I would appreciate it if you would answer the few questions that person asks.

25. Thank you for completing our survey.

[IF TERMINATED, SHOW Q.100.]

- Q.100 Thank you for your interest in this survey. However, we are looking for individuals with specific qualifications.

**Exhibit 3:
Validation Questionnaire**

MMR Strategy Group
Study #646-013
May 2017

**BANKS STUDY
VALIDATION QUESTIONNAIRE**

(TO PERSON ANSWERING PHONE)

A. May I speak with (NAME)?

(IF PERSON NOT AVAILABLE, SCHEDULE CALL BACK; OTHERWISE CONTINUE)

(PROMPT: TO PERSON FROM LIST)

Hello, I'm _____, calling on behalf of MMR, a marketing research company. I would like to verify some information; it will only take a minute.

Q.1 Did you recently participate in a telephone interview where you were asked questions about a law firm? **(RECORD ONE RESPONSE)**

- Yes **CONTINUE**
- No..... **SKIP TO Q.3 AND RECORD AS “TERMINATE”**
- Don't know/can't remember **SKIP TO Q.3 AND RECORD AS “TERMINATE”**

Q.2 Have you ever hired a law firm called Brookstone Law or Advantis Law? **(RECORD ONE RESPONSE)**

- I have..... **RECORD AS “VALIDATED”**
- I have not **RECORD AS “TERMINATE”**
- Don't know/can't remember **RECORD AS “TERMINATE”**

Q.3 Those are all of the questions I have for you today. Thank you for your time.

(MUST RESPOND “YES” TO Q.1 AND “YES” TO Q.2 TO VALIDATE; OTHERWISE RECORD AS TERMINATE.)

**Exhibit 4:
Termination and Removal Summary**

Termination and Removal Summary

Reason for Termination or Removal		Counts
Q.1/Q.2	First contact name for phone number answers “No” or “Don’t know” to Q.1 and Q.2, and there is no second contact name for phone number	42
Q.1/Q.2	Second contact name for phone number answers “No” or “Don’t know” to Q.1 and Q.2	3
Q.5	“No” or “Don’t know”	5
	Respondents removed for inattentive verbatim response	1
	Respondents removed for answering “Yes” or “I don’t know or don’t remember” to control question, Q.3 ¹	57
Total number of respondents terminated or removed		108

¹ 11 respondents answered “Yes,” and 46 answered “I don’t know or don’t remember.”

Exhibit 5:
Codes for Analyzing Verbatim Responses

**Banks Survey
 Verbatim Code Sheet**

Q.6 Why, if anything, did [IF “YES” AT Q.1: Brookstone Law; IF “YES” AT Q.2: Advantis Law] representatives say or suggest to you about what you would achieve by hiring them? If you don’t know or don’t remember, please say you don’t know or don’t remember. Please be as specific as possible. (PROBE: Anything else?)

1	Obtain money / settlement / get loan reduced or modified / pay off property / eliminate mortgage / house free and clear
2	Save house from foreclosure / keep or save home
3	Join lawsuit / sue lender or banks / class action / case
4	Paid them / charged me / fees
5	Malpractice by banks / bank fraud / bad or unlawful loans
6	Negative experience with Brookstone or Advantis / lies / can’t reach them
9	Other
10	I don’t know / No reason

**Exhibit 6:
Cross Tabulation Tables**

Q.1 Have you ever hired a law firm called Brookstone Law? By hired, I mean that you signed a contract for them to conduct legal work for you.

Please answer yes, you have hired Brookstone Law; no, you have never hired Brookstone Law; or you don't know or don't remember. (RECORD ONE RESPONSE)

Base: All Respondents

	All Respondents	
	Counts	Percentages
Sample size	138	100.0%
Yes	138	100.0%
No	0	0.0%
I don't know or don't remember	0	0.0%

Q.2 Have you ever hired a law firm called Advantis Law? By hired, I mean that you signed a contract for them to conduct legal work for you.

Please answer yes, you have hired Advantis Law; no, you have never hired Advantis Law; or you don't know or don't remember. (RECORD ONE RESPONSE)

Base: All Respondents

	All Respondents	
	Counts	Percentages
Sample size	138	100.0%
Yes	0	0.0%
No	0	0.0%
I don't know or don't remember	0	0.0%
Not asked	138	100.0%

Q.3 Have you ever hired a law firm called Darcy Law? By hired, I mean that you signed a contract for them to conduct legal work for you.

Please answer yes, you have hired Darcy Law; no, you have never hired Darcy Law; or you don't know or don't remember. (RECORD ONE RESPONSE)

Base: All Respondents

	All Respondents	
	Counts	Percentages
Sample size	138	100.0%
Yes	0	0.0%
No	138	100.0%
I don't know or don't remember	0	0.0%

Q.4 If you know, has [NAME 2] ever hired a law firm called Brookstone Law? Please answer yes, they did hire a law firm called Brookstone Law; no, they did not hire a law firm called Brookstone Law; or you don't know or don't remember. (RECORD ONE RESPONSE)

Base: All Respondents

	All Respondents	
	Counts	Percentages
Sample size	138	100.0%
Yes	0	0.0%
No	0	0.0%
I don't know or don't remember	0	0.0%
Not asked	138	100.0%

Q.5 If you know, has [NAME 2] ever hired a law firm called Advantis Law? Please answer yes, they did hire a law firm called Advantis Law; no, they did not hire a law firm called Advantis Law; or you don't know or don't remember. (RECORD ONE RESPONSE)

Base: All Respondents

	All Respondents	
	Counts	Percentages
Sample size	138	100.0%
Yes	0	0.0%
No	0	0.0%
I don't know or don't remember	0	0.0%
Not asked	138	100.0%

Q.6 What, if anything, did Brookstone Law representatives say or suggest to you about what you would achieve by hiring them? If you don't know or don't remember, please say you don't know or don't remember. Please be as specific as possible.

Base: All Respondents

	All Respondents	
	Counts	Percentages
Sample size	138	100.0%
Obtain money / save house from foreclosure / join lawsuit (any mention)	101	73.2%
Obtain money / settlement / get loan reduced or modified / pay off property / eliminate mortgage / house free and clear	65	47.1%
Save house from foreclosure / keep or save home	21	15.2%
Join lawsuit / sue lender or banks / class action / case	54	39.1%
Paid them / charged me / fees	39	28.3%
Malpractice by banks / bank fraud / bad or unlawful loans	20	14.5%
Negative experience with Brookstone or Advantis / lies / can't reach them	34	24.6%
Other	44	31.9%
I don't know / No reason	20	14.5%

Q.7 Did any of the law firm’s representatives say or suggest that they would file a lawsuit against the company that holds your mortgage? Please answer yes, representatives of the law firm did say or suggest that they would file a lawsuit against the company that holds your mortgage; no, representatives of the law firm did not say or suggest that they would file a lawsuit against the company that holds your mortgage; or you don’t know or don’t remember. (RECORD ONE RESPONSE)

Base: All Respondents

	All Respondents	
	Counts	Percentages
Sample size	138	100.0%
Yes	118	85.5%
No	6	4.4%
I don't know or don't remember	14	10.1%

Q.8 Did any of the law firm’s representatives say or suggest anything about the likelihood of winning your lawsuit against the company that holds your mortgage? Please answer yes, representatives of the law firm did say or suggest something about the likelihood of winning your lawsuit; no, representatives of the law firm did not say or suggest anything about the likelihood of winning your lawsuit; or you don’t know or don’t remember. (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	118	138	100.0%	100.0%
Yes	100	100	84.7%	72.5%
No	4	4	3.4%	2.9%
I don't know or don't remember	14	14	11.9%	10.1%
Not asked		20		14.5%

Q.9 What did Brookstone Law representatives say or suggest about the likelihood of winning your lawsuit against the company that holds your mortgage? Did they say or suggest that you ...? (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	100	138	100.0%	100.0%
Definitely or probably would win your lawsuit (any mention)	89	89	89.0%	64.5%
Definitely would win your lawsuit	48	48	48.0%	34.8%
Probably would win your lawsuit	41	41	41.0%	29.7%
Might or might not win your lawsuit	7	7	7.0%	5.1%
Probably would not win your lawsuit	1	1	1.0%	0.7%
Definitely would not win your lawsuit	0	0	0.0%	0.0%
You don't know or don't remember	3	3	3.0%	2.2%
Not asked		38		27.5%

Q.10 Although you may have already mentioned it, which, if any, of the following did Brookstone Law representatives say or suggest you would achieve by hiring them? (RECORD ALL THAT APPLY)

Base: All Respondents

	All Respondents	
	Counts	Percentages
Sample size	138	100.0%
The terms of your mortgage would be changed, you would receive money, you would have your mortgage voided, you would get your property free and clear of your mortgage (any mention)	118	85.5%
The terms of your mortgage would be changed	60	43.5%
You would receive money	94	68.1%
You would have your mortgage voided	41	29.7%
You would get your property free and clear of your mortgage	50	36.2%
Something else not listed here	12	8.7%
Nothing	3	2.2%
You don't know or don't remember	14	10.1%

Q.12 Did any of the law firm’s representatives say or suggest anything about the likelihood that the terms of your mortgage would be changed as a result of hiring them? Please answer yes, representatives of the law firm did say or suggest something about the likelihood that the terms of your mortgage would be changed; no, representatives of the law firm did not say or suggest anything about the likelihood that the terms of your mortgage would be changed; or you don’t know or don’t remember. (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	60	138	100.0%	100.0%
Yes	51	51	85.0%	37.0%
No	1	1	1.7%	0.7%
I don't know or don't remember	8	8	13.3%	5.8%
Not asked		78		56.5%

Q.13 What did the law firm’s representatives say or suggest about the likelihood that the terms of your mortgage would be changed? Did they say or suggest that the terms of your mortgage...? (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	51	138	100.0%	100.0%
Definitely or probably would be changed (any mention)	43	43	84.3%	31.2%
Definitely would be changed	27	27	52.9%	19.6%
Probably would be changed	16	16	31.4%	11.6%
Might or might not be changed	2	2	3.9%	1.4%
Probably would not be changed	0	0	0.0%	0.0%
Definitely would not be changed	0	0	0.0%	0.0%
You don’t know or don’t remember	6	6	11.8%	4.3%
Not asked		87		63.0%

Q.14 Did any of the law firm’s representatives say or suggest anything about how the terms of your mortgage would be changed? Please answer yes, representatives of the law firm did say or suggest something about the terms of how your mortgage would be changed; no, representatives of the law firm did not say or suggest anything about how the terms of your mortgage would be changed; or you don’t know or don’t remember. (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	51	138	100.0%	100.0%
Yes	28	28	54.9%	20.3%
No	10	10	19.6%	7.2%
I don't know or don't remember	13	13	25.5%	9.4%
Not asked		87		63.0%

Q.15 Did any of the law firm’s representatives say or suggest anything about the following types of changes to the terms of your mortgage as a result of hiring them? For each type of change, please answer yes, representatives of the law firm did say or suggest something about this type of change to your mortgage; no, representatives of the law firm did not say or suggest anything about this type of change to your mortgage; or you don’t know or don’t remember.

Summary of "yes" responses

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	28	138	100.0%	100.0%
Lower your interest rate, lower your monthly payment, lower the total amount owed on your loan, forgive late payments (any mention)	27	27	96.4%	19.6%
Lower your interest Rate	26	26	92.9%	18.8%
Lower your monthly payment	25	25	89.3%	18.1%
Lower the total amount owed on your loan	23	23	82.1%	16.7%
Forgive late payments	16	16	57.1%	11.6%

Q.15 Did any of the law firm’s representatives say or suggest anything about the following types of changes to the terms of your mortgage as a result of hiring them? For each type of change, please answer yes, representatives of the law firm did say or suggest something about this type of change to your mortgage; no, representatives of the law firm did not say or suggest anything about this type of change to your mortgage; or you don’t know or don’t remember.

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	28	138	100.0%	100.0%
Lower your interest rate				
Yes	26	26	92.9%	18.8%
No	1	1	3.6%	0.7%
I don't know	1	1	3.6%	0.7%
Not asked		110		79.7%
Lower your monthly payment				
Yes	25	25	89.3%	18.1%
No	2	2	7.1%	1.4%
I don't know	1	1	3.6%	0.7%
Not asked		110		79.7%
Lower the total amount owed on your loan				
Yes	23	23	82.1%	16.7%
No	3	3	10.7%	2.2%
I don't know	2	2	7.1%	1.4%
Not asked		110		79.7%
Forgive late payments				
Yes	16	16	57.1%	11.6%
No	6	6	21.4%	4.3%
I don't know	6	6	21.4%	4.3%
Not asked		110		79.7%

Q.16 Did any of the law firm’s representatives say or suggest anything about the likelihood that you would receive any money as a result of hiring them? Please answer yes, representatives of the law firm did say or suggest something about the likelihood that you would receive any money; no, representatives of the law firm did not say or suggest anything about the likelihood that you would receive any money; or you don’t know or don’t remember. (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	94	138	100.0%	100.0%
Yes	82	82	87.2%	59.4%
No	3	3	3.2%	2.2%
I don't know or don't remember	9	9	9.6%	6.5%
Not asked		44		31.9%

Q.17 What did the law firm’s representatives say or suggest about the likelihood that you would receive any money? Did they say or suggest that you ...? (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	82	138	100.0%	100.0%
Definitely or probably receive any money (any mention)	75	75	91.5%	54.3%
Definitely would receive any money	46	46	56.1%	33.3%
Probably would receive any money	29	29	35.4%	21.0%
Might or might not receive any money	1	1	1.2%	0.7%
Probably would not receive any money	1	1	1.2%	0.7%
Definitely would not receive any money	0	0	0.0%	0.0%
You don’t know or don’t remember	5	5	6.1%	3.6%
Not asked		56		40.6%

Q.18 Did any of the law firm’s representatives say or suggest anything about the amount of money that you would receive? Please answer yes, representatives of the law firm did say or suggest something about the amount of money that you would receive; no, representatives of the law firm did not say or suggest anything about the amount of money that you would receive; or you don’t know or don’t remember. (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	82	138	100.0%	100.0%
Yes	56	56	68.3%	40.6%
No	17	17	20.7%	12.3%
I don't know or don't remember	9	9	11.0%	6.5%
Not asked		56		40.6%

Q.19 Which of the following best describes the amount of money the law firm’s representatives said or suggested you would receive? (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	56	138	100.0%	100.0%
\$75,000 or more (any mention)	45	45	80.4%	32.6%
\$500,000 or more	17	17	30.3%	12.3%
\$300,000 to less than \$500,000	12	12	21.4%	8.7%
\$150,000 to less than \$300,000	6	6	10.7%	4.3%
\$75,000 to less than \$150,000	10	10	17.9%	7.2%
\$50,000 to less than \$75,000	2	2	3.6%	1.4%
\$25,000 to less than \$50,000	2	2	3.6%	1.4%
Less than \$25,000	0	0	0.0%	0.0%
You don’t know or don’t remember	7	7	12.5%	5.1%
Not asked		82		59.4%

Q.20 Did any of the law firm’s representatives say or suggest anything about the likelihood you would have your mortgage voided as a result of hiring them? Please answer yes, representatives of the law firm did say or suggest something about the likelihood that you would have your mortgage voided; no, representatives of the law firm did not say or suggest anything about the likelihood that you would have your mortgage voided; or you don’t know or don’t remember. (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	41	138	100.0%	100.0%
Yes	28	28	68.3%	20.3%
No	6	6	14.6%	4.3%
I don't know or don't remember	7	7	17.1%	5.1%
Not asked		97		70.3%

Q.21 What did the law firm’s representatives say or suggest about the likelihood that you would have your mortgage voided? Did they say or suggest that you ...? (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	28	138	100.0%	100.0%
Definitely or probably would have your mortgage voided (any mention)	24	24	85.7%	17.4%
Definitely would have your mortgage voided	8	8	28.6%	5.8%
Probably would have your mortgage voided	16	16	57.2%	11.6%
Might or might not have your mortgage voided	2	2	7.1%	1.4%
Probably would not have your mortgage voided	0	0	0.0%	0.0%
Definitely would not have your mortgage voided	0	0	0.0%	0.0%
You don’t know or don’t remember	2	2	7.1%	1.4%
Not asked		110		79.7%

Q.22 Did any of the law firm’s representatives say or suggest anything about the likelihood that you would get your property free and clear of your mortgage as a result of hiring them? Please answer yes, representatives of the law firm did say or suggest something about the likelihood that you would get your property free and clear of your mortgage; no, representatives of the law firm did not say or suggest anything about the likelihood that you would get your property free and clear of your mortgage; or you don’t know or don’t remember. (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	50	138	100.0%	100.0%
Yes	43	43	86.0%	31.2%
No	2	2	4.0%	1.4%
I don't know or don't remember	5	5	10.0%	3.6%
Not asked		88		63.8%

Q.23 What did any of the law firm’s representatives say or suggest about the likelihood that you would get your property free and clear of your mortgage? Did they say or suggest that you ...? (RECORD ONE RESPONSE)

Base: All Respondents or Those Asked

	Counts		Percentages	
	Those Asked	All Respondents	Those Asked	All Respondents
Sample size	43	138	100.0%	100.0%
Definitely or probably would get your property free and clear of your mortgage (any mention)	34	34	79.1%	24.6%
Definitely would get your property free and clear of your mortgage	9	9	20.9%	6.5%
Probably would get your property free and clear of your mortgage	25	25	58.1%	18.1%
Might or might not get your property free and clear of your mortgage	6	6	14.0%	4.3%
Probably would not get your property free and clear of your mortgage	0	0	0.0%	0.0%
Definitely would not get your property free and clear of your mortgage	0	0	0.0%	0.0%
You don’t know or don’t remember	3	3	7.0%	2.2%
Not asked		95		68.8%

Q.9 What did Brookstone Law representatives say or suggest about the likelihood of winning your lawsuit against the company that holds your mortgage?

Q.13 What did the law firm’s representatives say or suggest about the likelihood that the terms of your mortgage would be changed?

Q.17 What did the law firm’s representatives say or suggest about the likelihood that you would receive any money?

Q.21 What did the law firm’s representatives say or suggest about the likelihood that you would have your mortgage voided?

Q.23 What did any of the law firm’s representatives say or suggest about the likelihood that you would get your property free and clear of your mortgage?

Did they say or suggest that you ...? (RECORD ONE RESPONSE)

Base: All Respondents

	All Respondents	
	Counts	Percentages
Sample size	138	100.0%
Definitely or probably for at least one of the items below (any mention)	111	80.4%
You would win your lawsuit (Q.9)	89	64.5%
The terms of your mortgage would be changed (Q.13)	43	31.2%
You would receive any money (Q.17)	75	54.3%
You would have your mortgage voided (Q.21)	24	17.4%
You would get your property free and clear of your mortgage (Q.23)	34	24.6%

Exhibit 7:
All Responses From All Respondents

- **Survey Data File**
- **Survey Data Map**

Survey Data File

cfmc_case_id	qa	qb	qb1	qc	person	askfirst	qn1	qn2	qn3	qn4	qn5	qn6dis	qn6
100002	1			1	1	1	1		2			1	1
100003	1			1	1	1	1		2			1	1
100004	1			1	1	1	1		2			1	1
100007	1			1	1	1	1		2			1	1
100008	1			1	1	2	1		2			1	1
100011	1			1	1	2	1		2			1	1
100012	1			1	1	1	1		2			1	1
100013	1			1	1	1	1		2			1	1
100014	1			1	1	1	1		2			1	1
100015	1			1	1	2	1		2			1	2
100016	1			1	1	1	1		2			1	1
100017	1			1	1	2	1		2			1	2
100021		1	1	1	2	2	1		2			1	1
100024	1			1	1	1	1		2			1	1
100025	1			1	1	2	1		2			1	1
100026	1			1	1	2	1		2			1	1
100029	1			1	1	2	1		2			1	1
100032	1			1	1	2	1		2			1	1
100033	1			1	1	2	1		2			1	1
100035	1			1	1	1	1		2			1	1
100036	1			1	1	1	1		2			1	1
100038	1			1	1	1	1		2			1	1
100039		1	1	1	2	2	1		2			1	1

Survey Data File

cfmc_ case_id	qn60th	Q6_ Code 1	Q6_ Code2	Q6_ Code3	Q6_ Code4	Q6_ Code5
100002	They indicated there would be a large settlement.	1				
100003	They contacted me via letter regarding my mortgage loan. The letter stated it was malpractice on my home lenders part.	9	5			
100004	They said they could help me recover from the loss of my loan. I got into a bad loan and they said they they could help me.	1	5			
100007	They said I would bring my house out of foreclosure and they would sue the loan company.	2	3			
100008	A class action from Morgan when we were losing homes, it was a bad experience.	3	9	6		
100011	A lawsuit and they were going try to get money for me.	3	1			
100012	Tried to save from foreclosure.	2				
100013	As a plaintiff you would get over \$650,000.	1	3			
100014	A monetary settlement.	1				
100015						
100016	I had a terrible mortgage and they were going to get it refinanced to get it reduced.	1	5			
100017						
100021	When everyone was losing their houses, they were with Bank of America. They came to us and wanted \$5,000 to get Bank of America. We gave it to them and they just wanted more money. We were stupid and kept giving them money.	4	3	6		
100024	The class action suit that they would be able to put into the law suit. You would get their time and the amount you put into it.	3	9	4	1	
100025	Full payoff for my property.	1				
100026	They stole my money and lied to me.	4	6			
100029	I would expose Bank of America to a certain type of fraud. They showed me some documents that supposedly had my signature.	5	9			
100032	Addressing illegal foreclosure by Bank of America.	5	2			
100033	Resolution to a house that went to short sale.	9	2			
100035	It was in regards to trying to sue Chase about them giving you a loan.	3				
100036	Something that caused us to give them money.	4				
100038	They never gave me an answer. My husband and I tried to reach them, but never got hold of them. I stopped calling and never received a response, but I spoke to the secretary very often. This happened four or five years ago. We paid Salvador from the law firm. They always lied and said the lawyer was never there.	9	4	6		
100039	We hired them about real estate regarding my house.	9				

Survey Data File

cfmc_case_id	qn7	qn8	qn9	qn10_1	qn10_2	qn10_3	qn10_4	qn10_5	qn10_6	qn10_7	qn12
100002	1	1	1	0	1	0	0	0	0	0	
100003	1	1	6	0	0	0	0	0	0	1	
100004	1	1	1	0	1	0	1	0	0	0	
100007	1	1	2	1	0	0	1	0	0	0	1
100008	1	1	1	0	1	1	1	0	0	0	
100011	2			0	1	0	0	0	0	0	
100012	1	1	2	0	0	0	0	0	0	1	
100013	1	3		1	1	1	1	0	0	0	1
100014	1	1	2	0	0	1	1	1	0	0	
100015	1	3		0	0	0	0	0	0	1	
100016	1	1	2	1	1	0	0	0	0	0	1
100017	1	1	2	1	0	0	0	1	0	0	1
100021	1	1	1	0	1	0	0	0	0	0	
100024	1	1	1	0	1	1	0	0	0	0	
100025	1	1	1	0	1	0	1	0	0	0	
100026	1	1	1	1	1	1	1	0	0	0	1
100029	1	1	1	0	1	1	0	0	0	0	
100032	1	2		0	0	0	0	0	1	0	
100033	1	1	2	0	0	0	1	0	0	0	
100035	1	1	3	0	0	0	0	1	0	0	
100036	1	3		1	1	1	1	0	0	0	1
100038	3			1	0	1	0	0	0	0	3
100039	1	1	2	0	0	0	0	0	0	1	

Survey Data File

cfmc_case_id	qn13	qn14	qn15a	qn15b	qn15c	qn15d	qn16	qn17	qn18	qn19	qn20
100002							1	2	3		
100003											
100004							1	1	1	5	
100007	2	3									
100008							1	1	1	7	3
100011							3				
100012											
100013	1	1	1	1	1	1	3				1
100014											2
100015											
100016	2	1	1	1	1	1	1	2	3		
100017	2	1	3	3	1	2					
100021							1	1	1	7	
100024							1	1	1	8	1
100025							1	1	2		
100026	1	2					1	1	1	6	1
100029							1	2	1	6	1
100032											
100033											
100035											
100036	6	1	1	1	1	1	1	6	3		1
100038											2
100039											

Survey Data File

cfmc_ case_id	qn21	qn22	qn23	qn24	qn25	Interviewer_ Completion_Date
100002				1	1	MAY 2 2017
100003				1	1	MAY 2 2017
100004		1	6	1	1	MAY 2 2017
100007		3		1	1	MAY 2 2017
100008		1	2	1	1	MAY 2 2017
100011				1	1	MAY 2 2017
100012				1	1	MAY 2 2017
100013	1	1	1	1	1	MAY 2 2017
100014		2		1	1	MAY 2 2017
100015				1	1	MAY 2 2017
100016				1	1	MAY 3 2017
100017				1	1	MAY 3 2017
100021				1	1	MAY 3 2017
100024	2			1	1	MAY 3 2017
100025		1	2	1	1	MAY 3 2017
100026	1	1	1	1	1	MAY 3 2017
100029	6			1	1	MAY 3 2017
100032				1	1	MAY 3 2017
100033		1	2	1	1	MAY 3 2017
100035				1	1	MAY 3 2017
100036	2	1	6	1	1	MAY 3 2017
100038				1	1	MAY 4 2017
100039				1	1	MAY 4 2017

Survey Data File

cfmc_case_id	qa	qb	qb1	qc	person	askfirst	qn1	qn2	qn3	qn4	qn5	qn6dis	qn6
100043	1			1	1	1	1		2			1	1
100044	1			1	1	2	1		2			1	1
100047	1			1	1	1	1		2			1	1
100049	1			1	1	1	1		2			1	1
100052	1			1	1	1	1		2			1	1
100057	1			1	1	1	1		2			1	1
100058	1			1	1	2	1		2			1	1
100059	1			1	1	1	1		2			1	1
100060	1			1	1	1	1		2			1	1
100061	1			1	1	2	1		2			1	1
100063	1			1	1	1	1		2			1	1
100064	1			1	1	2	1		2			1	1
100065	1			1	1	1	1		2			1	1
100066	1			1	1	2	1		2			1	1
100068	1			1	1	2	1		2			1	1
100071	1			1	1	2	1		2			1	1

Survey Data File

cfmc_ case_id	qn60th	Q6_ Code 1	Q6_ Code2	Q6_ Code3	Q6_ Code4	Q6_ Code5
100043	They promised me \$150,000.	1				
100044	They would be able to help our situation and we had a good case. They stated they would be able to help us and assured us of that. All they wanted was more and more money.	3	4	6		
100047	A lot of lies and promises. They took money from me and nothing happened.	4	6			
100049	We gave them a retainer and they would go through all of our loan documents to see if we had a case, so if they had no case they would give our money back.	4	9			
100052	There was a possibility that I would get compensation.	1				
100057	They were supposed to help me get a loan modification. They misrepresented too much information and I fired them. I filed a complaint with the bar.	1	6	9		
100058	They said they can save my house. They said it wouldn't go to foreclosure. They asked me to pay \$3,000. Basically, it was to save my house and do a restructuring of my loan.	2	4	1		
100059	I only made an attempt to hire them, but I never did hire them. I gave them a down payment, but I never followed up.	9	4			
100060	They promised that the mortgage issue would be resolved and be put into a class lawsuit. They demanded money from me upfront.	3	1	4		
100061	They told me I had a strong case.	3				
100063	They were going to recover money for me that I had lost at Countrywide Mortgage.	1				
100064	It was a lawsuit against Bank of America. They made us feel that there was going to be a settlement and at the end they were going to save my house at a zero balance.	3	2	1		
100065	They assured us that we would get compensation back from the original lender that we refinanced with.	1				
100066	I hired them, when I was having problems with Bank of America, to do a lawsuit to do a correction of my mortgage. They said that in order to continue I had to pay them monthly, but I understand they went out of business.	3	1	4	9	
100068	Nothing really happened. I made payments in the past and nothing really happened.	4	9	6		
100071	I was told that I had a good strong case and they recommended to use their services, because I had a strong case and nothing happened.	3	9	6		

Survey Data File

cfmc_case_id	qn7	qn8	qn9	qn10_1	qn10_2	qn10_3	qn10_4	qn10_5	qn10_6	qn10_7	qn12
100043	1	1	1	1	1	0	1	0	0	0	3
100044	1	1	2	1	1	1	0	1	0	0	1
100047	1	1	2	1	1	0	0	0	0	0	1
100049	1	1	2	1	1	1	1	0	0	0	1
100052	1	1	3	1	1	1	1	0	0	0	1
100057	1	1	2	1	0	0	0	1	0	0	1
100058	1	1	1	1	1	1	1	0	0	0	1
100059	1	1	2	0	0	0	0	0	0	1	
100060	1	1	1	0	0	1	1	0	0	0	
100061	1	1	1	0	1	1	0	0	0	0	
100063	1	1	6	0	1	0	0	0	0	0	
100064	1	2		1	0	0	0	0	0	0	1
100065	1	1	1	0	1	0	0	0	0	0	
100066	1	3		0	0	0	0	0	0	1	
100068	1	1	4	0	1	0	0	0	0	0	
100071	1	1	3	0	1	0	1	0	0	0	

Survey Data File

cfmc_case_id	qn13	qn14	qn15a	qn15b	qn15c	qn15d	qn16	qn17	qn18	qn19	qn20
100043							1	1	1	5	
100044	1	1	1	1	1	1	1	1	1	5	2
100047	1	1	1	1	1	1	1	1	3		
100049	2	2					1	6	3		3
100052	2	2					1	2	2		1
100057	2	1	1	1	1	1					
100058	1	1	1	1	1	1	1	1	1	8	1
100059											
100060											1
100061							1	1	1	5	3
100063							1	1	1	5	
100064	1	3									
100065							1	1	1	4	
100066											
100068							3				
100071							1	1	1	7	

Survey Data File

cfmc_ case_id	qn21	qn22	qn23	qn24	qn25	Interviewer_ Completion_Date
100043		1	2	1	1	MAY 4 2017
100044				1	1	MAY 4 2017
100047				1	1	MAY 4 2017
100049		1	2	1	1	MAY 4 2017
100052	2	1	2	1	1	MAY 4 2017
100057				1	1	MAY 5 2017
100058	2	1	2	1	1	MAY 5 2017
100059				1	1	MAY 5 2017
100060	1	1	1	1	1	MAY 5 2017
100061				1	1	MAY 5 2017
100063				1	1	MAY 5 2017
100064				1	1	MAY 5 2017
100065				1	1	MAY 5 2017
100066				1	1	MAY 5 2017
100068				1	1	MAY 5 2017
100071		1	2	1	1	MAY 5 2017

Survey Data File

cfmc_ case_id	qa	qb	qb1	qc	person	askfirst	qn1	qn2	qn3	qn4	qn5	qn6dis	qn6
100077	1			1	1	1	1		2			1	1
100079	1			1	1	1	1		2			1	1
100082	1			1	1	2	1		2			1	1
100085	1			1	1	2	1		2			1	1
100086	1			1	1	1	1		2			1	1
100089	1			1	1	1	1		2			1	1
100090	1			1	1	2	1		2			1	1
100093	1			1	1	1	1		2			1	1
100094	1			1	1	1	1		2			1	1
100096	1			1	1	2	1		2			1	1
100103	1			1	1	1	1		2			1	1

Survey Data File

cfmc_ case_id	qn60th	Q6_ Code 1	Q6_ Code2	Q6_ Code3	Q6_ Code4	Q6_ Code5
100077	It was in regards to the sale of a house and that they would get maximum benefits.	9				
100079	Yes. It seems like it's been a long time ago and I would have to go back to my files.	10				
100082	They called me and I met them on February 11, 2011 in Newport Beach. I met Gil Mariscal and he told me that we had a case against Bank of America. If we accepted, it would be supervised by Vitto Torchia, who was the head of the firm. They charged me \$5,000 to start and an additional \$895, because they would be filing a suit against Bank of America, Ners, and RCS. Then, in February 2011 they started deducting out of my Bank of America account \$60 a month until March 2015. It was increased to \$250 a month.	3	4	9		
100085	It was in regards to my home mortgage. I don't remember all the details, but it was about recuperating money from Wells Fargo. They were going to reinstate the lawsuit with Wells Fargo. I had paid them \$5,000 and they wanted another \$5,000 to reinstate the lawsuit, so at that point I decided to cut my losses.	1	3	4	6	
100086	They were to conduct a lawsuit against Bank of America. We were supposed to piggyback with a gentleman named John Wright on a joint lawsuit.	3	9			
100089	We were in a class case lawsuit, where we were going to lose our home. They said we were going to get a settlement.	3	1	2		
100090	They said they would represent us on a case with Bank of America. They said we would receive up to \$14,000.	1	3			
100093	That they would represent me in litigation. I don't recall a lot of the conversation, but I do have a lot of notes where they said it was worth my waiting the litigation out, because it would be a big pay out at the end.	3	1			
100094	They said they were going to sue my lender and give me a lower interest rate. Also, they would give me some money from the suit. They also said my lender was wrapped up with Deutsche Bank in Germany.	3	1	9		
100096	They told me I could get a loan on my house, but I didn't get an answer and I gave them \$1,400.	9	4	6		
100103	They were hired to help me save my home. All they did was take my money and then, they weren't available.	2	4	6		

Survey Data File

cfmc_case_id	qn7	qn8	qn9	qn10_1	qn10_2	qn10_3	qn10_4	qn10_5	qn10_6	qn10_7	qn12
100077	1	1	2	1	1	1	1	0	0	0	1
100079	1	1	1	1	0	0	0	0	0	0	1
100082	1	1	2	0	0	0	1	0	0	0	
100085	1	1	2	1	0	0	0	0	0	0	1
100086	1	1	1	0	1	0	0	1	0	0	
100089	1	1	1	0	1	0	1	0	0	0	
100090	1	1	6	0	1	0	0	0	0	0	
100093	1	1	1	0	1	0	0	0	0	0	
100094	1	1	1	1	1	1	0	0	0	0	1
100096	2			1	1	1	0	0	0	0	1
100103	3			1	0	0	0	0	0	0	1

Survey Data File

cfmc_ case_id	qn13	qn14	qn15a	qn15b	qn15c	qn15d	qn16	qn17	qn18	qn19	qn20
100077	1	1	1	1	1	1	1	1	1	6	1
100079	1	1	1	1	1	3					
100082											
100085	2	3									
100086							1	1	1	4	
100089							1	2	2		
100090							1	6	1	7	
100093							1	1	1	4	
100094	1	1	1	1	1	1	1	1	1	6	1
100096	6	1	1	1	2	2	1	2	2		1
100103	1	3									

Survey Data File

cfmc_ case_id	qn21	qn22	qn23	qn24	qn25	Interviewer_ Completion_Date
100077	2	1	2	1	1	MAY 5 2017
100079				1	1	MAY 6 2017
100082		1	2	1	1	MAY 6 2017
100085				1	1	MAY 6 2017
100086				1	1	MAY 6 2017
100089		1	2	1	1	MAY 6 2017
100090				1	1	MAY 6 2017
100093				1	1	MAY 8 2017
100094	2			1	1	MAY 8 2017
100096	6			1	1	MAY 8 2017
100103				1	1	MAY 8 2017

Survey Data File

cfmc_ case_id	qa	qb	qb1	qc	person	askfirst	qn1	qn2	qn3	qn4	qn5	qn6dis	qn6
100106	1			1	1	1	1		2			1	1
100108	1			1	1	1	1		2			1	1
100111	1			1	1	2	1		2			1	1
100112	1			1	1	1	1		2			1	1
100113	1			1	1	1	1		2			1	2
100115	1			1	1	2	1		2			1	1
100121	1			1	1	2	1		2			1	1
100124	1			1	1	2	1		2			1	1
100125	1			1	1	1	1		2			1	1
100128	1			1	1	2	1		2			1	1
100129	1			1	1	1	1		2			1	1
100130	1			1	1	2	1		2			1	2

Survey Data File

cfmc_ case_id	qn60th	Q6_ Code 1	Q6_ Code2	Q6_ Code3	Q6_ Code4	Q6_ Code5
100106	They stated they would represent me to sue my bank and I would get compensated for punitive damages in addition to a reduction or elimination of the loan. Nothing ever came about and there was no result.	3	1	6		
100108	That we would get our home loan remodified and not be foreclosed on. If any of these happened, we would try to get damages and emotional stress cash for keys.	1	2			
100111	They told me about a case. It was a case about Bank of America.	3				
100112	If we wanted to be on the appeal, we would be charged a dollar amount, but I don't recall the dollar amount. They said we could join this other legal action against trustees. So, if it was just an appeal, it would be a much lesser amount, but if I wanted to join the full case, it would include everything even the appeal and it would cost \$650 as a retainer to be deducted from my credit card on the 11th of every month. They took this deposit of \$3,000 to \$4,000, but I didn't pay it all at once.	3	4	9		
100113						
100115	That they would be able to get us money back from Washington Mutual, which was bought out by Chase. We were part of a mass joiner lawsuit. It was all a scam and we were victims of fraud.	1	3	9	6	
100121	They promised that they were going to sue Citibank in a class action lawsuit, but nothing ever came of it. They just took the money and that was the end of it.	3	4	6		
100124	It had to do with a lawsuit. If I hired them, I would receive a significant amount of money, but it never happened.	1	3	9		
100125	I don't know. I don't remember.	10				
100128	In respect to the mortgage lender we were in the midst of trying to secure a modification, but we were struggling trying to communicate with Bank of America.	1	9			
100129	They would stop my foreclosure from happening and that they had a class action lawsuit coming up against the Bank One West, because they were doing all kinds of bad stuff and that it was sure to go through. They were going to put me in that lawsuit. They are thieves and liars. I tried to get money and they said that I couldn't, because I had agreed for them to look into the case. Also, they had me write another check for the lawsuit that they said I would get back, but I never got that back.	2	3	4	6	5
100130						

Survey Data File

cfmc_ case_id	qn7	qn8	qn9	qn10_1	qn10_2	qn10_3	qn10_4	qn10_5	qn10_6	qn10_7	qn12
100106	1	1	1	1	1	1	1	1	0	0	1
100108	1	2		0	1	0	1	0	0	0	
100111	3			0	0	0	0	0	1	0	
100112	1	3		1	1	0	1	0	0	0	3
100113	1	1	2	1	1	0	0	0	0	0	1
100115	1	1	2	0	1	0	0	0	0	0	
100121	1	1	2	1	1	1	1	0	0	0	1
100124	1	1	2	0	1	1	0	0	0	0	
100125	1	1	1	1	1	0	0	0	0	0	3
100128	1	1	2	0	0	0	0	1	0	0	
100129	1	1	1	1	0	0	1	0	0	0	1
100130	3			1	1	0	1	0	0	0	1

Survey Data File

cfmc_ case_id	qn13	qn14	qn15a	qn15b	qn15c	qn15d	qn16	qn17	qn18	qn19	qn20
100106	1	1	1	1	1	1	1	1	1	4	1
100108							1	2	1	4	
100111											
100112							3				
100113	2	2					1	2	2		
100115							1	2	1	7	
100121	2	3					1	6	2		1
100124							1	1	1	8	1
100125							2				
100128											
100129	1	1	1	1	1	3					
100130	3	2					2				

Survey Data File

cfmc_ case_id	qn21	qn22	qn23	qn24	qn25	Interviewer_ Completion_Date
100106	2	1	2	1	1	MAY 8 2017
100108		1	2	1	1	MAY 8 2017
100111				1	1	MAY 8 2017
100112		3		1	1	MAY 8 2017
100113				1	1	MAY 8 2017
100115				1	1	MAY 8 2017
100121	2	1	2	1	1	MAY 8 2017
100124	2			1	1	MAY 8 2017
100125				1	1	MAY 8 2017
100128				1	1	MAY 8 2017
100129		1	2	1	1	MAY 8 2017
100130		3		1	1	MAY 8 2017

Survey Data File

cfmc_ case_id	qa	qb	qb1	qc	person	askfirst	qn1	qn2	qn3	qn4	qn5	qn6dis	qn6
100131	1			1	1	2	1		2			1	2
100135	1			1	1	2	1		2			1	2
100136	1			1	1	2	1		2			1	1
100137	1			1	1	1	1		2			1	1
100138	1			1	1	2	1		2			1	2
100139	1			1	1	2	1		2			1	1
100141	1			1	1	1	1		2			1	2
100144	1			1	1	2	1		2			1	1
100145	1			1	1	2	1		2			1	1
100146	1			1	1	1	1		2			1	1
100147	1			1	1	1	1		2			1	1

Survey Data File

cfmc_ case_id	qn60th	Q6_ Code 1	Q6_ Code2	Q6_ Code3	Q6_ Code4	Q6_ Code5
100131						
100135						
100136	They said they would lower the cost of my house by giving them upfront money and a monthly payment. They dragged it out and dragged it out for months until I told them to stop. I sent them an email that I no longer wanted to be a part of the class action suit and to stop any further action.	1	3	4	9	6
100137	That they were doing a class action suit with a bunch of homeowners who were going after Countrywide, because they had falsified the paperwork that people turned in and jacked up their income. They said that they could get my money back, so I paid them some money.	3	1	4	5	
100138						
100139	They said basically that they would take my various lenders to court and sue for whatever they were giving as a reason. It will pay down the payments and get us out of the bad loan or call it the mortgage. They said it is negative amortization.	3	1	5	9	
100141						
100144	They told us they are suing our mortgage company, City Mortgage, stating that our contract with City Mortgage was a fraud. They said that we were getting \$700,000 for me and my husband. It would be \$700,000 for me and \$700,000 for my husband. They also said that our loan on the house would be terminated and we would get our house free and clear.	3	1	5		
100145	I think there were two separate occasions. I was to delay a foreclosure proceeding. I need to think about the second one for a minute. I don't remember engaging with them the second time around. I know I did talk to them about the same property and never engaged with them. I lost my property to foreclosure and should have just let it go.	2	9			
100146	Don't Remember.	10				
100147	They said they were going to get me a loan reduction and some money, but I lost the property and paid \$11,000.	1	4	9		

Survey Data File

cfmc_case_id	qn7	qn8	qn9	qn10_1	qn10_2	qn10_3	qn10_4	qn10_5	qn10_6	qn10_7	qn12
100131	3			1	0	0	0	0	0	0	3
100135	1	3		0	0	0	0	0	0	1	
100136	1	1	1	0	1	0	0	0	0	0	
100137	1	1	1	1	1	0	0	0	0	0	1
100138	1	1	2	1	1	0	0	0	0	0	1
100139	1	1	2	0	0	0	0	0	0	1	
100141	1	3		1	1	0	0	0	0	0	1
100144	1	1	1	0	1	1	1	0	0	0	
100145	3			0	0	0	0	0	1	0	
100146	1	3		0	0	0	0	0	0	1	
100147	1	3		1	1	1	1	0	0	0	3

Survey Data File

cfmc_ case_id	qn13	qn14	qn15a	qn15b	qn15c	qn15d	qn16	qn17	qn18	qn19	qn20
100131											
100135											
100136							1	1	1	4	
100137	6	2					1	1	1	4	
100138	1	1	1	1	1	2	1	2	1	4	
100139											
100141	1	3					1	1	2		
100144							1	1	1	7	1
100145											
100146											
100147							1	1	3		3

Survey Data File

cfmc_ case_id	qn21	qn22	qn23	qn24	qn25	Interviewer_ Completion_Date
100131				1	1	MAY 8 2017
100135				1	1	MAY 8 2017
100136				1	1	MAY 8 2017
100137				1	1	MAY 8 2017
100138				1	1	MAY 8 2017
100139				1	1	MAY 8 2017
100141				1	1	MAY 8 2017
100144	1	1	1	1	1	MAY 8 2017
100145				1	1	MAY 8 2017
100146				1	1	MAY 8 2017
100147		1	1	1	1	MAY 8 2017

Survey Data File

cfmc_ case_id	qa	qb	qb1	qc	person	askfirst	qn1	qn2	qn3	qn4	qn5	qn6dis	qn6
100148	1			1	1	1	1		2			1	1
100149	1			1	1	1	1		2			1	1
100150	1			1	1	2	1		2			1	2
100153		1	1	1	2	2	1		2			1	1
100155	1			1	1	2	1		2			1	1
100156	1			1	1	1	1		2			1	1
100159	1			1	1	1	1		2			1	1
100160	1			1	1	1	1		2			1	2
100161	1			1	1	1	1		2			1	1

Survey Data File

cfmc_ case_id	qn60th	Q6_ Code 1	Q6_ Code2	Q6_ Code3	Q6_ Code4	Q6_ Code5
100148	I retained the law firm. We first received a form letter in the mail stating that we might have a case for Bank of America. The terminology in the letter said something about mortgage fraud or unfair business practice or something along those lines. I responded to that letter and called the firm to set-up an appointment. They said that it looked like I had a good case, but they would need to do an assessment and review my case. The fee for this was non-refundable and \$1,250 or might have been \$1,500, but I might have forgotten. Days later they came back with the case review and said I had a case and to set-up a second appointment. On that visit they reviewed my case and I spoke to a banking specialist and not an attorney. He said I could be joining with other plaintiffs and each would get individual damages of \$90,000. Additionally, due to the nature of the causes of action that I would be entitled to punitive damages, which could be as much as nine times the amount of the actual damages. I don't believe I ever saw or met an attorney, but I made monthly payments over 24 months. I called them to stop the payments but I kept getting letter after letter stating that I owed this money.	1	3	4	5	6
100149	They tried to send me a letter about all the people in the lawsuit and I would be included in the lawsuit against Wells Fargo and Wachovia. I gave them money to represent me.	3	4			
100150						
100153	They were going to help us get a settlement for unlawful foreclosure. They said the case was dismissed, because the judge asked them for more information. The case was thrown out, because they didn't follow through.	3	9	5	6	
100155	They said they would help me get compensated, because I lost my home to foreclosure.	1	9			
100156	I purchased a property by Bank of America. They said we would recuperate our property and help recuperate our losses, because Bank of America broke a lot of laws by inflating prices.	1	5			
100159	They were going to get me a modification on my loan. Then, they could recover \$75,000. They were going to lower the payment.	1				
100160						
100161	Don't Remember.	10				

Survey Data File

cfmc_ case_id	qn7	qn8	qn9	qn10_1	qn10_2	qn10_3	qn10_4	qn10_5	qn10_6	qn10_7	qn12
100148	1	1	2	0	1	0	0	0	0	0	
100149	3			0	1	0	0	0	0	0	
100150	3			0	0	0	0	0	0	1	
100153	1	1	2	0	1	0	0	0	0	0	
100155	1	3		0	1	0	0	0	0	0	
100156	1	1	1	0	1	0	0	0	0	0	
100159	1	3		1	0	0	0	0	0	0	1
100160	1	1	2	0	0	0	1	0	0	0	
100161	2			1	0	0	1	0	0	0	1

Survey Data File

cfmc_ case_id	qn13	qn14	qn15a	qn15b	qn15c	qn15d	qn16	qn17	qn18	qn19	qn20
100148							1	1	1	7	
100149							1	1	1	6	
100150											
100153							1	2	1	7	
100155							1	1	1	6	
100156							1	1	1	6	
100159	1	3									
100160											
100161	1	3									

Survey Data File

cfmc_ case_id	qn21	qn22	qn23	qn24	qn25	Interviewer_ Completion_Date
100148				1	1	MAY 8 2017
100149				1	1	MAY 8 2017
100150				1	1	MAY 8 2017
100153				1	1	MAY 8 2017
100155				1	1	MAY 9 2017
100156				1	1	MAY 9 2017
100159				1	1	MAY 9 2017
100160		1	2	1	1	MAY 9 2017
100161		3		1	1	MAY 9 2017

Survey Data File

cfmc_ case_id	qa	qb	qb1	qc	person	askfirst	qn1	qn2	qn3	qn4	qn5	qn6dis	qn6
100162	1			1	1	2	1		2			1	1
100163	1			1	1	1	1		2			1	1
100164	1			1	1	2	1		2			1	1
100168	1			1	1	1	1		2			1	1
100169	1			1	1	2	1		2			1	1
100170	1			1	1	1	1		2			1	1
100173	1			1	1	1	1		2			1	1
100180	1			1	1	2	1		2			1	1
100181	1			1	1	2	1		2			1	1
100182	1			1	1	2	1		2			1	1
100183	1			1	1	1	1		2			1	2
100184	1			1	1	2	1		2			1	1
100185	1			1	1	1	1		2			1	2
100186	1			1	1	2	1		2			1	1
100188		1	1	1	2	1	1		2			1	1

Survey Data File

cfmc_ case_id	qn60th	Q6_ Code 1	Q6_ Code2	Q6_ Code3	Q6_ Code4	Q6_ Code5
100162	We got involved with them in a lawsuit against our mortgage lender. At the end when we got a modification, it was very screechy and we couldn't get hold of our representative. We actually had to go to the opposing counsel for help.	3	1	9	6	
100163	I could get a lot of money due to the subprime loans for people who qualify for credit.	1	9			
100164	They told me that Bank of America would owe me money. We had a big lawsuit and the home loan had been illegal and they had a lot of clients. I was paying them \$1,200 a month out of my checking account from Wells Fargo. Every time I called them about the court date they would never advise me of the date. I drove to the office in Irvine and Newport Beach.	1	3	4	5	6
100168	Brookstone Law said they would provide legal services and help me receive fees for an improper foreclosure. They said I would be included in a lawsuit against Wells Fargo.	1	3	5		
100169	That they could possibly get my home free and clear and would work with Chase to get a loan modification done, or maybe get my home mortgage free due to wrong practice. I cannot remember more, because it was so much.	1				
100170	A settlement from Bank of America.	1				
100173	They said that I would be able to get a loan modification with no problem. They charged me a fee of \$5,000.	1	4			
100180	Good credit.	9				
100181	I paid \$6,000. They would sue Washington Mutual and that we had a strong case and they would win the case.	3	4			
100182	They couldn't guarantee anything for me. They wanted to represent me for some houses I had that I was losing, but they couldn't guarantee me any results.	9	2			
100183						
100184	They suggested after the court proceedings we would get \$400,000 and they would get 10% of the rest.	3	1	4		
100185						
100186	The exact words I cannot recall. They said they were working on a lawsuit with Bank of America, that was for me and a million other people. They were going against Bank of America.	3				
100188	They misrepresented themselves. They said we were part of a joint lawsuit against major banks that took our home. They said they would win the lawsuit against them.	3	9	6		

Survey Data File

cfmc_case_id	qn7	qn8	qn9	qn10_1	qn10_2	qn10_3	qn10_4	qn10_5	qn10_6	qn10_7	qn12
100162	1	1	2	0	1	0	0	0	0	0	
100163	1	1	2	0	1	1	1	0	0	0	
100164	1	1	1	1	1	1	1	1	0	0	3
100168	1	1	2	0	1	0	0	0	0	0	
100169	1	1	1	1	1	0	1	1	0	0	1
100170	1	1	2	0	1	1	1	0	0	0	
100173	1	1	1	0	0	1	0	0	0	0	
100180	3			1	1	0	0	0	0	0	3
100181	1	1	2	1	1	1	0	0	0	0	1
100182	1	1	1	0	1	1	1	0	0	0	
100183	1	2		0	1	0	0	0	0	0	
100184	1	1	1	0	1	0	0	0	0	0	
100185	2			1	0	0	0	0	0	0	2
100186	1	1	2	0	1	0	1	0	0	0	
100188	1	1	2	0	1	1	1	0	0	0	

Survey Data File

cfmc_ case_id	qn13	qn14	qn15a	qn15b	qn15c	qn15d	qn16	qn17	qn18	qn19	qn20
100162							1	2	2		
100163							1	2	1	8	1
100164							1	1	1	8	1
100168							3				
100169	1	1	1	1	3	3	1	3	2		
100170							3				2
100173											1
100180							1	2	2		
100181	2	3					1	2	3		3
100182							1	1	1	7	1
100183							1	6	1	7	
100184							1	2	1	6	
100185											
100186							1	2	2		
100188							1	2	1	7	1

Survey Data File

cfmc_ case_id	qn21	qn22	qn23	qn24	qn25	Interviewer_ Completion_Date
100162				1	1	MAY 9 2017
100163	2	1	2	1	1	MAY 9 2017
100164	1	1	2	1	1	MAY 9 2017
100168				1	1	MAY 9 2017
100169		1	3	1	1	MAY 9 2017
100170		1	3	1	1	MAY 9 2017
100173	1			1	1	MAY 9 2017
100180				1	1	MAY 9 2017
100181				1	1	MAY 9 2017
100182	1	1	1	1	1	MAY 9 2017
100183				1	1	MAY 9 2017
100184				1	1	MAY 9 2017
100185				1	1	MAY 9 2017
100186		1	3	1	1	MAY 9 2017
100188	2	1	2	1	1	MAY 9 2017

Survey Data File

cfmc_case_id	qa	qb	qb1	qc	person	askfirst	qn1	qn2	qn3	qn4	qn5	qn6dis	qn6
100189	1			1	1	2	1		2			1	1
100191	1			1	1	2	1		2			1	1
100193	1			1	1	1	1		2			1	1
100194	1			1	1	2	1		2			1	1
100195	1			1	1	1	1		2			1	1
100196	1			1	1	2	1		2			1	1
100199	1			1	1	1	1		2			1	1
100200		1	1	1	2	1	1		2			1	1
100204	1			1	1	1	1		2			1	1
100205	1			1	1	1	1		2			1	1
100208	1			1	1	1	1		2			1	1
100209	1			1	1	1	1		2			1	1
100213	1			1	1	1	1		2			1	1
100216	1			1	1	2	1		2			1	1
100217	1			1	1	2	1		2			1	2
100218	1			1	1	2	1		2			1	2
100227	1			1	1	1	1		2			1	1

Survey Data File

cfmc_ case_id	qn60th	Q6_ Code 1	Q6_ Code2	Q6_ Code3	Q6_ Code4	Q6_ Code5
100189	They said I was supposed to get quite a bit of money.	1				
100191	They said that they would be able to get rid of a judgment by Multibank and said they could get me out of the judgment.	9	2			
100193	They said I wouldn't lose my house. They said if I hired them, they would guarantee me modifications and they would file bankruptcy, so that I wouldn't lose my home.	2	1			
100194	There is a class action I would be part of, if I hired them. They would receive money to remodel my loan.	3	1	4		
100195	They told me that they would do a modification. They told me I was going to get a lower interest rate. They said they were going to sue the bank and I would get money.	1	3			
100196	They promised us a principal reduction on our property.	1				
100199	They were working on Bank of America and Countrywide in the effort to receive a settlement for people like me who qualify.	1				
100200	They promised to do something about the mortgage for my house and wanted me to pay them money. They wanted me to keep paying money until the problem was resolved. Then, I never heard back from them. I would like someone to call me back who speaks Spanish.	4	9	6		
100204	They said I had a good case against Bank of America through Countrywide.	3				
100205	They said I'm not 100% guaranteed about a litigation.	9				
100208	I would get my house back and compensation for my loss.	1				
100209	It's hard to recall, because it was a long time ago. They said they would help me with retaining my home during the housing crash.	1				
100213	They told me I could get a modification or a reduction on my mortgage, or I could get compensation, because I had a bad loan.	1	5			
100216	They said I had a case against Bank of America, which was my home mortgage. They never did anything and never gave me my money back. I'm not sure if it was Bank of America. I believe it was a different bank at the time.	3	4	6	9	
100217						
100218						
100227	They told me I would be included in a class action suit against Bank of America. They said I would have to pay for the litigation, so I paid for a year and they were doing nothing for me. Then, I got a bill from them for \$10,000 and I'm not paying them. It was a long time ago and it's hard to remember, but they did absolutely nothing for me.	3	4	9	6	

Survey Data File

cfmc_case_id	qn7	qn8	qn9	qn10_1	qn10_2	qn10_3	qn10_4	qn10_5	qn10_6	qn10_7	qn12
100189	2			0	1	0	0	0	0	0	
100191	1	1	2	1	1	0	0	0	0	0	1
100193	1	1	1	0	1	0	1	0	0	0	
100194	1	1	1	1	1	1	1	0	0	0	1
100195	1	1	1	1	1	0	0	0	0	0	1
100196	1	1	1	1	0	0	0	0	0	0	1
100199	1	3		0	0	0	0	0	0	1	
100200	2			0	1	0	1	0	0	0	
100204	1	1	1	1	1	0	0	0	0	0	1
100205	3			0	1	1	1	0	0	0	
100208	1	1	1	1	1	0	0	0	0	0	1
100209	1	1	1	1	1	1	1	0	0	0	1
100213	1	1	1	1	1	1	1	0	0	0	1
100216	3			0	1	0	1	0	0	0	
100217	1	3		1	0	0	0	0	0	0	1
100218	3			0	0	0	0	0	0	1	
100227	1	1	1	0	1	0	1	0	0	0	

Survey Data File

cfmc_case_id	qn13	qn14	qn15a	qn15b	qn15c	qn15d	qn16	qn17	qn18	qn19	qn20
100189							1	1	3		
100191	2	1	1	2	2	2	1	2	1	2	
100193							1	1	1	6	
100194	1	1	1	1	1	1	1	1	1	7	3
100195	1	1	1	1	1	1	1	1	1	7	
100196	1	1	1	1	1	3					
100199											
100200							1	1	2		
100204	6	3					1	2	1	4	
100205							1	4	2		2
100208	2	1	1	1	1	3	1	1	1	4	
100209	1	3					1	1	2		1
100213	1	1	1	1	1	1	1	1	2		1
100216							1	1	1	8	
100217	6	3									
100218											
100227							1	1	3		

Survey Data File

cfmc_ case_id	qn21	qn22	qn23	qn24	qn25	Interviewer_ Completion_Date
100189				1	1	MAY 9 2017
100191				1	1	MAY 9 2017
100193		1	1	1	1	MAY 9 2017
100194		1	3	1	1	MAY 9 2017
100195				1	1	MAY 9 2017
100196				1	1	MAY 9 2017
100199				1	1	MAY 10 2017
100200		1	6	1	1	MAY 10 2017
100204				1	1	MAY 10 2017
100205		1	3	1	1	MAY 10 2017
100208				1	1	MAY 10 2017
100209	1	1	1	1	1	MAY 10 2017
100213	2	1	2	1	1	MAY 10 2017
100216		2		1	1	MAY 10 2017
100217				1	1	MAY 10 2017
100218				1	1	MAY 10 2017
100227		3		1	1	MAY 11 2017

Survey Data File

cfmc_ case_id	qa	qb	qb1	qc	person	askfirst	qn1	qn2	qn3	qn4	qn5	qn6dis	qn6
100229	1			1	1	2	1		2			1	1
100230	1			1	1	1	1		2			1	1
100231	1			1	1	1	1		2			1	1
100232	1			1	1	2	1		2			1	1
100233	1			1	1	2	1		2			1	1
100235	1			1	1	1	1		2			1	1
100237	1			1	1	2	1		2			1	1
100238	1			1	1	1	1		2			1	2
100239	1			1	1	1	1		2			1	1
100240	1			1	1	1	1		2			1	1
100241	1			1	1	2	1		2			1	1

Survey Data File

cfmc_ case_id	qn60th	Q6_ Code 1	Q6_ Code2	Q6_ Code3	Q6_ Code4	Q6_ Code5
100229	That perhaps I would get some kind of reimbursement for the deception in regards to the appraisal for the property, which was appraised at \$800,000.	1	5			
100230	They dangled a carrot over our heads. They said that my wife and I would receive \$750,000 each and that we would get our home free and clear of the mortgage.	1				
100231	I hired them to do my bankruptcy.	9				
100232	They said we could be part of a lawsuit that wasn't a class or individual act but a hybrid group lawsuit. They were going to work with other law firms attempting for a settlement from our lender.	3	1			
100233	I hired them to retrieve money they promised me for my home and they stole all my savings.	1	4	6		
100235	Loan modification or substantial loan reduction.	1				
100237	I hired them, because they had a lawsuit against Chase.	3				
100238						
100239	They could get my house free and clear and up to \$75,000 in compensation. I tried to call them several times and they promised that I wouldn't lose my house.	1	2	6		
100240	I was promised they would bring down my father's mortgage by \$150,000.	1				
100241	I hired them, because they had a lawsuit and were going to save my house. They were going to modify my loan, but they didn't. Then, they charged me \$3,880, because they were going to sue the bank and modify my loan, but I never heard from them.	3	2	1	4	6

Survey Data File

cfmc_case_id	qn7	qn8	qn9	qn10_1	qn10_2	qn10_3	qn10_4	qn10_5	qn10_6	qn10_7	qn12
100229	3			0	1	0	0	0	0	0	
100230	1	1	1	1	1	1	1	0	0	0	1
100231	1	3		0	0	0	0	0	0	1	
100232	1	1	3	1	0	0	0	0	0	0	1
100233	1	1	1	1	1	0	0	0	0	0	1
100235	1	1	2	1	1	1	0	0	0	0	1
100237	1	1	2	0	1	1	1	0	0	0	
100238	1	1	1	0	1	1	0	0	0	0	
100239	1	1	2	1	0	0	1	0	0	0	1
100240	1	1	1	0	1	1	1	0	0	0	
100241	1	1	1	0	1	0	0	0	0	0	

Survey Data File

cfmc_ case_id	qn13	qn14	qn15a	qn15b	qn15c	qn15d	qn16	qn17	qn18	qn19	qn20
100229							2				
100230	1	2					1	2	1	7	1
100231											
100232	3	2									
100233	1	1	2	2	2	2	1	1	1	6	
100235	2	1	1	1	1	3	1	2	1	8	1
100237							1	2	2		1
100238							1	1	1	5	3
100239	1	2									
100240							1	1	1	3	2
100241							1	1	1	7	

Survey Data File

cfmc_ case_id	qn21	qn22	qn23	qn24	qn25	Interviewer_ Completion_Date
100229				1	1	MAY 11 2017
100230	2	1	2	1	1	MAY 11 2017
100231				1	1	MAY 11 2017
100232				1	1	MAY 11 2017
100233				1	1	MAY 11 2017
100235	3			1	1	MAY 11 2017
100237	2	1	2	1	1	MAY 11 2017
100238				1	1	MAY 11 2017
100239		1	1	1	1	MAY 11 2017
100240		1	2	1	1	MAY 11 2017
100241				1	1	MAY 11 2017

Survey Data File

cfmc_ case_id	qa	qb	qb1	qc	person	askfirst	qn1	qn2	qn3	qn4	qn5	qn6dis	qn6
100242	1			1	1	2	1		2			1	1
100243	1			1	1	2	1		2			1	1
100245	1			1	1	2	1		2			1	2
100247	1			1	1	1	1		2			1	1
100248		1	1	1	2	2	1		2			1	1
100250	1			1	1	1	1		2			1	1
100253	1			1	1	1	1		2			1	1
100255	1			1	1	2	1		2			1	1

Survey Data File

cfmc_ case_id	qn60th	Q6_ Code 1	Q6_ Code2	Q6_ Code3	Q6_ Code4	Q6_ Code5
100242	In regards to an attempt by me to get a loan modification with OCWEN out of Florida. In the initial consultation I paid \$4,000. I was told the case evaluation revealed that OCWEN acted illegally and didn't even have my mortgage note raised by Morgan Stanley. They said OCWEN had no legal holding over my mortgage and would negotiate on my behalf with OCWEN to get a loan modification. In April Brookstone told me OCWEN verbally agreed to a loan modification and was waiting on a final approval by Raymond James and Associates. I didn't hear anything until September 2013, when I came home to a foreclosure sale notice taped to my door. I made multiple attempts to contact Brookstone by phone and email between April and September. During September and October I spoke to Brookstone about the option to file bankruptcy to stop the foreclosure. I paid \$2,000 for this service, but I decided against it and requested my money back and was denied. I first heard about the group or class action lawsuit in 2011, but in 2012 they said they were just collecting statements.	1	4	2	5	6
100243	I hired them in 2014 and they were to assist me in a foreclosure. I went to their office, but they were conducting business there illegally. Then, I went to the Irvine police department.	2	9	6		
100245						
100247	What they told me is that they were collecting signatures and conducting a study about loans that were not done right for people. They were given to people and not correctly done. They were trying to help those thousands of people that were in the same situation.	9	5			
100248	I could win back my house.	2				
100250	This is regarding Bank of America. They didn't guarantee anything and were going to file a suit, because they said there were inappropriate actions by Bank of America.	3	5			
100253	They said I would keep my home.	2				
100255	I have two mortgages with them and like many Americans and millions of them we are suffering. Brookstone said they would defend my property from foreclosure.	2	9			

Survey Data File

cfmc_ case_id	qn7	qn8	qn9	qn10_1	qn10_2	qn10_3	qn10_4	qn10_5	qn10_6	qn10_7	qn12
100242	1	1	1	1	1	1	1	0	0	0	1
100243	1	1	1	0	1	0	0	0	0	0	
100245	1	1	3	0	1	0	0	0	0	0	
100247	1	1	1	0	1	0	0	0	0	0	
100248	3			0	0	0	0	0	0	1	
100250	1	1	2	1	1	0	0	0	0	0	1
100253	1	1	1	1	0	0	0	0	0	0	1
100255	1	1	2	1	1	1	1	0	0	0	1

Survey Data File

cfmc_ case_id	qn13	qn14	qn15a	qn15b	qn15c	qn15d	qn16	qn17	qn18	qn19	qn20
100242	1	1	1	1	1	1	1	2	1	6	1
100243							3				
100245							1	2	1	6	
100247							1	1	1	3	
100248											
100250	2	1	1	1	3	2	1	2	1	2	
100253	1	2									
100255	2	1	1	1	1	1	3				1

Survey Data File

cfmc_ case_id	qn21	qn22	qn23	qn24	qn25	Interviewer_ Completion_Date
100242	2	1	2	1	1	MAY 11 2017
100243				1	1	MAY 11 2017
100245				1	1	MAY 11 2017
100247				1	1	MAY 11 2017
100248				1	1	MAY 11 2017
100250				1	1	MAY 12 2017
100253				1	1	MAY 12 2017
100255	2	1	2	1	1	MAY 12 2017

Survey Data File

cfmc_ case_id	qa	qb	qb1	qc	person	askfirst	qn1	qn2	qn3	qn4	qn5	qn6dis	qn6
100256	1			1	1	2	1		2			1	1
100257	1			1	1	2	1		2			1	1
100258	1			1	1	1	1		2			1	1
100261	1			1	1	1	1		2			1	1
100262	1			1	1	2	1		2			1	1

Survey Data File

cfmc_ case_id	qn60th	Q6_ Code 1	Q6_ Code2	Q6_ Code3	Q6_ Code4	Q6_ Code5
100256	We were taking Countrywide to court in a mass joiner. We were on it for five or six years. We had to pay \$2,000 as a rejoiner. Then, we had to pay \$1,500 and that was on top of the \$60 a month for a retainer. The crash was in 2008 and we lost our house in 2010. They kept posting things on the website that looked very encouraging, but it just kept going on and on.	3	4	9	6	
100257	They said they had a legal case against Bank of America and I was going to receive a settlement between \$75,000 to \$750,000 per person for me and my wife.	1	3			
100258	They reached out to me and said that because of unlawful practices by Wells Fargo, they were in some lawsuit and I was included since they had foreclosed on my house. I paid them \$3,000 and made monthly payments of \$200 or \$300 a month, but I cannot remember. Then, when I asked to speak to an attorney, they kept saying they were in court, so I went to the bank and had them stop the automatic withdrawals to pay them. I had paid them for over a year plus the \$3,000.	3	4	9	5	6
100261	They said that they could win forgiveness on our mortgage and file a lawsuit against Chase Bank for fraudulent mortgage practices. We gave them about \$15,000 and they packed and left town like a bunch of thieves.	3	1	6	4	
100262	They said they would help me with the bank by getting the losses on my mortgage back, but they gave me no results with the process.	1	6			

Survey Data File

cfmc_ case_id	qn7	qn8	qn9	qn10_1	qn10_2	qn10_3	qn10_4	qn10_5	qn10_6	qn10_7	qn12
100256	1	1	3	0	1	0	0	1	0	0	
100257	1	1	2	0	0	0	0	1	0	0	
100258	1	1	2	0	1	0	0	0	0	0	
100261	1	1	3	1	1	1	1	0	0	0	1
100262	1	1	2	1	1	0	0	0	0	0	1

Survey Data File

cfmc_ case_id	qn13	qn14	qn15a	qn15b	qn15c	qn15d	qn16	qn17	qn18	qn19	qn20
100256							1	2	1	7	
100257											
100258							1	2	2		
100261	2	1	1	1	1	1	1	2	1	7	1
100262	6	3					3				

Survey Data File

cfmc_ case_id	qn21	qn22	qn23	qn24	qn25	Interviewer_ Completion_Date
100256				1	1	MAY 12 2017
100257				1	1	MAY 12 2017
100258				1	1	MAY 12 2017
100261	3	1	3	1	1	MAY 13 2017
100262				1	1	MAY 13 2017

Q QA

Hello. My name is _____. I am calling on behalf of MMR Strategy Group and we are conducting a brief survey sponsored by the Federal Trade Commission.

A) May I speak with \:fname1:?

(INTERVIEWER: IF NAME 1 IS NOT AVAILABLE, OR CANNOT COME TO THE PHONE, ASK FOR CALL BACK TIME.
IF RESPONDENT IS NOT AT NUMBER LISTED, ASK IF THERE IS ANOTHER NUMBER TO CALL.)

[INTERVIEWER: IF NAME 1 ASKS ANYTHING ABOUT THE PURPOSE OR SPONSOR OF THE SURVEY, OR WHAT THE SURVEY INVOLVES, SAY THE FOLLOWING AND NO MORE: "I am calling on behalf of MMR Strategy Group and we are conducting a brief survey sponsored by the Federal Trade Commission. Although sponsored by the FTC, the FTC will not have access to your specific answers."]

(RECORD ONE)

01	Contacted respondent
02	Call later
03	Call different phone number
04	No answer
05	Busy number
06	Answering Machine/Voicemail
07	Non working number
08	Non Household number
09	Language Barrier
10	FAX/Modem/Electronic Device
11	Refused/Hung-up

Q QB

B) May I speak with \:fname2:?

(INTERVIEWER: IF NAME 2 IS NOT AVAILABLE, OR CANNOT COME TO THE PHONE, ASK FOR CALL BACK TIME.
IF RESPONDENT IS NOT AT NUMBER LISTED, ASK IF THERE IS ANOTHER NUMBER TO CALL.)

(RECORD ONE)

- 01 Contacted respondent
- 02 Call later
- 03 Call different phone number
- 04 No answer
- 05 Busy number
- 06 Answering Machine/Voicemail
- 07 Non working number
- 08 Non Household number
- 09 Language Barrier
- 10 FAX/Modem/Electronic Device
- 11 Refused/Hung-up

Q QB1

B1 Hello. My name is _____. I am calling on behalf of MMR Strategy Group and we are conducting a brief survey sponsored by the Federal Trade Commission.

[INTERVIEWER: IF NAME 2 ASKS ANYTHING ABOUT THE PURPOSE OR SPONSOR OF THE SURVEY, OR WHAT THE SURVEY INVOLVES, SAY THE FOLLOWING AND NO MORE:

"I am calling on behalf of MMR Strategy Group and we are conducting a brief survey sponsored by the Federal Trade Commission. Although sponsored by the FTC, the FTC will not have access to your specific answers."]

1 Continue

Q QC

C. I appreciate your time to answer a few brief survey questions.

I'm not trying to sell you anything. Your individual answers to this survey will not be used to identify you personally in any way, or for any sales or marketing.

For any question, if you don't know how to answer or don't remember, simply indicate that you don't know or don't remember. Please do not guess. This call may be monitored for quality assurance purposes.

(INTERVIEWER: IF RESPONDENT ASKS HOW YOU GOT THEIR NAME OR PHONE NUMBER, ANSWER, "I was provided your name and phone number as part of a list provided by the Federal Trade Commission. Would you be willing to participate?")

(RECORD ONE)

01	Respondent agrees or indicates agreement
02	Call later
11	Refused/Hung-up

Q PERSON

1	First
2	Second

Q ASKFIRST

1	ask 1/2 first
2	ask 3 first

Q QN1

1. Have you ever hired a law firm called Brookstone Law? By hired, I mean that you signed a contract for them to conduct legal work for you. Please answer yes, you have hired Brookstone Law; no, you have never hired Brookstone Law; or you don't know or don't remember.

1	Yes
2	No
3	I don't know or don't remember

Q QN2

2. Have you ever hired a law firm called Advantis Law? By hired, I mean that you signed a contract for them to conduct legal work for you. Please answer yes, you have hired Advantis Law; no, you have never hired Advantis Law; or you don't know or don't remember.

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN3

3. Have you ever hired a law firm called Darcy Law? By hired, I mean that you signed a contract for them to conduct legal work for you.

Please answer yes, you have hired Darcy Law; no, you have never hired Darcy Law; or you don't know or don't remember.

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN4

4. If you know, has \:fname2: ever hired a law firm called Brookstone Law?

Please answer yes, they did hire a law firm called Brookstone Law; no, they did not hire a law firm called Brookstone Law; or you don't know or don't remember.

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN5

5. If you know, has \:fname2: ever hired a law firm called Advantis Law?

Please answer yes, they did hire a law firm called Advantis Law; no, they did not hire a law firm called Advantis Law; or you don't know or don't remember.

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN6DIS

- 1 Brookstone Law
- 2 Advantis Law

Q QN6

I will now ask you some questions about your experience with \:qn6disd:.

6. What, if anything, did \:qn6disd: representatives say or suggest to you about what you would achieve by hiring them?
If you don't know or don't remember, please say you don't know or don't remember. Please be as specific as possible.

- 1 Verbatim response:
- 2 I don't know or don't remember

Q QN6OTH

6. Verbatim Response.

Q QN7

7. Did any of the law firm's representatives say or suggest that they would file a lawsuit against the company that holds your mortgage?
Please answer yes, representatives of the law firm did say or suggest that they would file a lawsuit against the company that holds your mortgage;
no, representatives of the law firm did not say or suggest that they would file a lawsuit against the company that holds your mortgage; or you don't know
or don't remember.

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN8

8. Did any of the law firm's representatives say or suggest anything about the likelihood of winning your lawsuit against the company that holds your mortgage?

Please answer yes, representatives of the law firm did say or suggest something about the likelihood of winning your lawsuit; no, representatives of the law firm did not say or suggest anything about the likelihood of winning your lawsuit; or you don't know or don't remember.

(DO NOT READ LIST) (RECORD ONE RESPONSE)

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN9

9. What did \:qn6disd: representatives say or suggest about the likelihood of winning your lawsuit against the company that holds your mortgage? Did they say or suggest that you ...?

- 1 definitely would win your lawsuit
- 2 probably would win your lawsuit
- 3 might or might not win your lawsuit
- 4 probably would not win your lawsuit
- 5 definitely would not win your lawsuit
- 6 You don't know or don't remember

Q QN10

10. Although you may have already mentioned it, which, if any, of the following did \:qn6disd: representatives say or suggest you would achieve by hiring them?

- 1 426^1 The terms of your mortgage would be changed
- 2 427^1 You would receive money
- 3 428^1 You would have your mortgage voided
- 4 429^1 You would get your property free and clear of your mortgage
- 5 430^1 Something else not listed here
- 6 431^1 Nothing
- 7 432^1 You don't know or don't remember

Survey Data Map

Q QN12

12. Did any of the law firm's representatives say or suggest anything about the likelihood that the terms of your mortgage would be changed as a result of hiring them? Please answer yes, representatives of the law firm did say or suggest something about the likelihood that the terms of your mortgage would be changed; no, representatives of the law firm did not say or suggest anything about the likelihood that the terms of your mortgage would be changed; or you don't know or don't remember.

(DO NOT READ LIST) (RECORD ONE RESPONSE)

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN13

13. What did the law firm's representatives say or suggest about the likelihood that the terms of your mortgage would be changed? Did they say or suggest that the terms of your mortgage...?

- 1 definitely would be changed
- 2 probably would be changed
- 3 might or might not be changed
- 4 probably would not be changed
- 5 definitely would not be changed
- 6 You don't know or don't remember

Q QN14

14. Did any of the law firm's representatives say or suggest anything about how the terms of your mortgage would be changed? Please answer yes, representatives of the law firm did say or suggest something about the terms of how your mortgage would be changed; no, representatives of the law firm did not say or suggest anything about how the terms of your mortgage would be changed; or you don't know or don't remember.

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN15A

15a. Did any of the law firm's representatives say or suggest anything about the following types of changes to the terms of your mortgage as a result of hiring them? -
Lower your interest rate

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN15B

15b. Did any of the law firm's representatives say or suggest anything about the following types of changes to the terms of your mortgage as a result of hiring them? -
Lower your monthly payment

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN15C

15c. Did any of the law firm's representatives say or suggest anything about the following types of changes to the terms of your mortgage as a result of hiring them? -
Lower the total amount owed on your loan

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN15D

15d. Did any of the law firm's representatives say or suggest anything about the following types of changes to the terms of your mortgage as a result of hiring them? -
Forgive late payments

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN16

16. Did any of the law firm's representatives say or suggest anything about the likelihood that you would receive any money as a result of hiring them?
Please answer yes, representatives of the law firm did say or suggest something about the likelihood that you would receive any money;
no, representatives of the law firm did not say or suggest anything about the likelihood that you would receive any money; or you don't know or don't remember.

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN17

17. What did the law firm's representatives say or suggest about the likelihood that you would receive any money?
Did they say or suggest that you ...?

- 1 definitely would receive any money
- 2 probably would receive any money
- 3 might or might not receive any money
- 4 probably would not receive any money
- 5 definitely would not receive any money
- 6 You don't know or don't remember

Q QN18

18. Did any of the law firm's representatives say or suggest anything about the amount of money that you would receive?
Please answer yes, representatives of the law firm did say or suggest something about the amount of money that you would receive;
no, representatives of the law firm did not say or suggest anything about the amount of money that you would receive;
or you don't know or don't remember.

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN19

19. Which of the following best describes the amount of money the law firm's representatives said or suggested you would receive?

(READ LIST) (RECORD ONE RESPONSE)

- | | |
|---|--|
| 1 | Less than twenty-five thousand dollars |
| 2 | Twenty-five thousand dollars to less than fifty thousand dollars |
| 3 | Fifty thousand dollars to less than seventy-five thousand dollars |
| 4 | Seventy-five thousand dollars to less than one hundred and fifty thousand dollars |
| 5 | One hundred and fifty thousand dollars to less than three hundred thousand dollars |
| 6 | Three hundred thousand dollars to less than five hundred thousand dollars |
| 7 | Five hundred thousand dollars or more |
| 8 | You don't know or don't remember |

Q QN20

20. Did any of the law firm's representatives say or suggest anything about the likelihood you would have your mortgage voided as a result of hiring them? Please answer yes, representatives of the law firm did say or suggest something about the likelihood that you would have your mortgage voided; no, representatives of the law firm did not say or suggest anything about the likelihood that you would have your mortgage voided; or you don't know or don't remember.

- | | |
|---|--------------------------------|
| 1 | Yes |
| 2 | No |
| 3 | I don't know or don't remember |

Q QN21

21. What did the law firm's representatives say or suggest about the likelihood that you would have your mortgage voided? Did they say or suggest that you ...?

(READ LIST) (RECORD ONE RESPONSE)

- | | |
|---|--|
| 1 | definitely would have your mortgage voided |
| 2 | probably would have your mortgage voided |
| 3 | might or might not have your mortgage voided |
| 4 | probably would not have your mortgage voided |
| 5 | definitely would not have your mortgage voided |
| 6 | You don't know or don't remember |

Q QN22

22. Did any of the law firm's representatives say or suggest anything about the likelihood that you would get your property free and clear of your mortgage as a result of hiring them? Please answer yes, representatives of the law firm did say or suggest something about the likelihood that you would get your property free and clear of your mortgage; no, representatives of the law firm did not say or suggest anything about the likelihood that you would get your property free and clear of your mortgage; or you don't know or don't remember.

- 1 Yes
- 2 No
- 3 I don't know or don't remember

Q QN23

T 23. What did any of the law firm's representatives say or suggest about the likelihood that you would get your property free and clear of your mortgage?
T Did they say or suggest that you ...?

- 1 definitely would get your property free and clear of your mortgage
- 2 probably would get your property free and clear of your mortgage
- 3 might or might not get your property free and clear of your mortgage
- 4 probably would not get your property free and clear of your mortgage
- 5 definitely would not get your property free and clear of your mortgage
- 6 You don't know or don't remember

Q QN24

24. In the next few days, you may receive a follow-up phone call from someone checking to make sure I completed this survey properly. That follow-up phone call will only take a moment of your time. I would appreciate it if you would answer the few questions that person asks.

- 1 Question read

Q QN25

25. Thank you for completing our survey.

- 1 Question read

Interviewer_Completion_Date
Interview date

1 BENJAMIN J. THEISMAN, *pro hac vice*
btheisman@ftc.gov
2 GREGORY J. MADDEN, *pro hac vice*
gmadden@ftc.gov
3 FEDERAL TRADE COMMISSION
600 Pennsylvania Ave. NW, CC-9528
4 Washington, DC 20580
Tel: (202) 326-2223, -2426; Fax: (202) 326-3197
5

6 THOMAS SYTA, Cal. Bar No. 116286
tsyta@ftc.gov
7 FEDERAL TRADE COMMISSION
10877 Wilshire Blvd., Suite 700
Los Angeles, CA 90024
8 Tel: (310) 824-4343; Fax: (310) 824-4380

9 Attorneys for Plaintiff
10 FEDERAL TRADE COMMISSION

11 **UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

12 FEDERAL TRADE COMMISSION,
13

14 Plaintiff,

15 v.

16 DAMIAN KUTZNER, et al.,

17 Defendants.
18

No. SACV16-00999-BRO (AFMx)

**PLAINTIFF'S REPLY
MEMORANDUM IN SUPPORT OF
SUMMARY JUDGMENT AGAINST
DEFENDANTS JEREMY FOTI
AND CHARLES MARSHALL AS
TO ALL COUNTS**

Date: August 28, 2017
Time: 1:30 pm
Location: Courtroom 7C

United States Courthouse
350 West 1st Street
Los Angeles, CA 90012
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I. THE FTC HAS PRESENTED UNCONTROVERTED EVIDENCE ENTITLING IT TO RELIEF EVEN WITHOUT THE EMAILS, EVIDENCE FOUND ON THE BUSINESS PREMISES, OR CONSUMER SURVEY..... 2

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IV. THE EXPERT REPORT IS SOUND, AND DEVASTATING..... 8

V. THE OBJECTIONS TO THE MONETARY RELIEF ARE MERITLESS..... 10

VI. CONCLUSION..... 11

1 Neither Jeremy Foti nor Charles Marshall have identified or created any
2 genuine disputes as to any material facts concerning the Federal Trade
3 Commission’s (“FTC”) proof that the defendants¹ stole more than \$18 million
4 from consumers through bogus “mass joinder” lawsuits. Foti’s response on
5 summary judgment consists of his ineffective self-serving declaration, specious
6 arguments about the authentication of the Corporate Defendants’ business records,
7 unfounded attacks on the consumer survey confirming that the Corporate
8 Defendants made the misrepresentations at issue, and a faulty argument about the
9 FTC’s monetary calculations. Foti’s response is an implicit admission that the
10 mountain of facts and evidence adduced conclusively establish his liability.
11 Having come to this realization, he baselessly asks the Court to ignore all evidence
12 except, of course, his most recent self-serving declaration. Marshall seemingly
13 joins in these arguments. Unfortunately for them, their admissions, their
14 declarations, and the consumer declarations alone, establish their liability. They
15 offer no evidence to controvert a material fact to justify denying summary
16 judgment. Of course, the receivership documents and the expert report are
17 admissible and confirm their liability. Finally, the minimal objections to the
18 monetary relief are also baseless. Because the FTC is limited to 10 pages in its
19 combined reply, discussion of these defendants’ arguments will be brief. Given
20 they lack merit, a short discussion is all they deserve.²

21
22 ¹ “Corporate Defendants” means Brookstone Law P.C. (California),
23 Brookstone Law P.C. (Nevada), Advantis Law P.C., and Advantis Law Group P.C.
24 “Brookstone” means both Brookstone Law P.C. (California) and Brookstone Law
25 P.C. (Nevada). “Advantis” means Advantis Law P.C. and Advantis Law Group
26 P.C. “Advantis Law” means Advantis Law P.C. alone, while “Advantis Law
Group” means Advantis Law Group P.C. alone.

27 ² Foti and Marshall’s oppositions have a number of factual inaccuracies, the
28 most salient of which are addressed in the accompanying Declaration of Gregory J.
Madden.

1 **I. The FTC Has Presented Uncontroverted Evidence Entitling it to Relief**
2 **Even Without the Emails, Evidence Found on the Business Premises, or**
3 **Consumer Survey.**

4 Foti, and Marshall to an extent, seem to argue that the FTC’s case falls apart
5 if the emails from the computers on site, the documents found on site, and the
6 consumer survey are all ignored. Even without that evidence, they have each
7 admitted or not controverted all of the basic details regarding who the Corporate
8 Defendants were, including the facts necessary to establish Brookstone and
9 Advantis were a common enterprise. USF ¶¶ 1-31, 64-67, 78, 80-81, 84. They
10 also fail to controvert the consumer declarations that, combined with their
11 admissions, establish their violations of the MARS Rule and the FTC Act.³

12 **A. The Corporate Defendants Violated the MARS Rule.**

13 The uncontroverted consumer declarations establish that consumers received
14 defendants’ mailers offering to void their mortgage notes, USF ¶ 100, and then
15 were told that mass joinder litigation is also a way to obtain a loan modification or
16 principal reduction on their mortgage. USF ¶ 139, 158. The consumers then report
17 that they paid defendants advance fees. USF ¶¶ 168-70. Crucially, none of the
18 mailers or retainer agreements consumers testify to receiving and signing contain
19 the disclosures required under 12 C.F.R. § 1015.4 (failing to make the disclosures
20 “is a violation of this rule”). USF ¶ 185.

21 Neither Foti nor Marshall can assert a defense to these violations. Marshall
22 does not even try. Foti attempts to incorporate by reference his argument from his
23 separate summary judgment motion that the MARS Rule is inapplicable. But, as

24 ³ Marshall inaccurately asserts the FTC must prove its case by clear and
25 convincing evidence. He wrongly cites to the standard to prove “fraud on the
26 court” for relief under Rule 60, not the burden of proof in an FTC action. This is a
27 civil action with the familiar preponderance of the evidence standard. *See, e.g.,*
28 *FTC v. Commerce Planet Inc.*, 878 F. Supp. 2d 1048, [1055](#) (C.D. Cal. 2012)
(entering judgment based on “preponderance of the evidence”), *aff’d in relevant*
part, [815 F.3d 593](#) (9th Cir. 2016); *FTC v. Ross*,

1 the FTC detailed in its opposition to Foti’s motion, he admitted the Corporate
2 Defendants were MARS providers in his answer, has waived the “attorney
3 exemption” defense, and could not establish the facts necessary to assert such a
4 defense because, among other reasons, the Corporate Defendants acted unethically
5 and did not use client trust accounts. See DE [303](#) at Page ID 9314-20.

6 **B. The Corporate Defendants Violated Section 5.**

7 The defendants have *not* controverted the FTC’s consumer declarations,
8 which span interactions over multiple years with multiple sales people. As noted
9 above, the consumers declare they were solicited with mailers, claiming, among
10 other things, that the mass joinder litigation would seek to “void your note(s),” and
11 that “our team of experienced lawyers offers you a superior alternative or
12 recovery.” USF ¶¶ 99-102. At in person meetings, sales people made various
13 false claims regarding consumers’ likelihood of success and monetary relief,
14 including: they had “a very strong case;” prevailing in the litigation was “basically
15 a done deal;” “it was not a question of whether I would win my cases, but how
16 much money I would get;” “the minimum amount I would get would be \$75,000;”
17 we “were entitled to a refund as a result of litigation between the Department of
18 Justice and Bank of America;” and “Brookstone Law would succeed eventually.”
19 USF at ¶¶ 149, 153, 155, 161-62; see also USF at ¶¶ 136-39, 147-48, 150-51, 154,
20 156-60, 163-66.⁴ Objective, uncontroverted evidence establishes that none of
21 these claims were true. The Corporate Defendants did not seek to void notes, did
22

23
24 ⁴ At one point, Foti criticizes the FTC’s proof, claiming that even the survey
25 identifies only 138 dissatisfied consumers. Other defendants have made this
26 argument before, and it has been rejected. *FTC v. Gill*, 71 F. Supp. 2d 1030, [1040](#)
27 (C.D. Cal. 1999) (“The defendants miss the point. Plaintiff does not need to
28 submit a declaration for every single injured customer to meet its burden. If so,
this courthouse would be buried under a mountain of paper.”), *aff’d*, [265 F.3d 944](#)
(9th Cir. 2001).

1 not have the promised experience or capabilities, and have never prevailed in a
2 mass joinder, thus failing to obtain the represented relief. USF ¶¶ 187-97, 199,
3 200-204.

4 Foti and Marshall both argue that the marketing was non-deceptive by
5 focusing on certain claims they assert are true. But, even if those extraneous
6 claims were in fact true, it does not alter the deceptiveness of the claims identified
7 in the consumer declarations, such as the likelihood of prevailing or obtaining
8 monetary relief. *Gill*, 71 F. Supp. 2d at [1044](#) (“[B]ecause each representation must
9 stand on its own merit, even if other representations contain accurate, non-
10 deceptive information, that argument fails.”) (citing *Removatron Int’l Corp. v.*
11 *FTC*, 884 F.2d 1489, [1496](#)-97 (1st Cir. 1989)). Additionally, several of the claims
12 they highlight are in fact false. Although the defendants said they would add
13 consumers to mass joinder lawsuits, some were not. USF ¶ 199. Although
14 consumers were told the lawsuits would seek to void their mortgages, that was not
15 true. USF ¶ 197. Although the mailers claimed the defendants were experienced
16 and had the ability to prosecute the mass joinders, that was not true. USF ¶¶ 200-
17 204. Notably, neither Foti nor Marshall even attempt to defend the other
18 representations they list.

19 Foti argues that the disclaimer in the retainer agreement saves him, but his
20 argument does not address, and is rendered irrelevant by, the case law the FTC
21 cited in its moving papers. *See, e.g., Resort Car Rental v. FTC*, [518 F.2d 962](#) (9th
22 Cir. 1975) (“The Federal Trade Act is violated if [the advertising] induces the first
23 contact through deception, even if the buyer later becomes fully informed before
24 entering the contract.”); *FTC v. Gill*, 71 F. Supp. 2d at [1044](#) (disclaimers in
25 contract consumers received after initial sales pitch were not sufficient to defeat
26 summary judgment). Indeed, he admits a sales person told a consumer that the
27 disclaimer “was just legal words in the retainer and they had to use them in the
28 agreement, but there was no risk of losing.” USF ¶ 150.

C. The Evidence Establishes Individual Liability.

1 Foti argues that without the receivership documents, he cannot be held
2 individually liable. But, his declarations and admissions establish his control,
3 participation, and knowledge. He declared to the Court that he performed:

- 4 (1) “[M]anagement services related to referral services, hiring/recruiting, vendor relations, IT relations, and data sources;”
- 5 (2) “Obtain[ing] estimates and costs for expenses associated with day to day operations;”
- 6 (3) “Obtain[ing] or arrang[ing] for the preparation of law firm supplied creative content, advertising, campaign management and other related services;” and
- 7 (4) “Audit[ing] all invoices and expenses provided by third-parties to ensure accuracy, including but not limited to payroll bonuses and employee compensation.”

8
9
10 USF ¶ 231. Foti frequently cites to Torchia’s bar trial testimony, without noting
11 Torchia’s testimony that “**Jeremy Foti pretty much takes care of business development.**” DE [303-2](#) at Page ID 9703; *see also* DE [304-1](#) at Page ID 9760-67
12 ¶¶ 14-20; (Foti admitting he arranged marketing, with knowledge of its contents),
13 9779 ¶ 55 (admitting he received complaints). This is enough. *FTC v. Medicor LLC*, 217 F. Supp. 2d 1048, [1055-56](#) (C.D. Cal. 2002) (“consultant” with input on
14 hiring, financial matters, and marketing, but no final authority, held liable); *FTC v. American Standard Credit Systems, Inc.*, 874 F. Supp. 1080, [1089](#) (C.D. Cal. 1994)
15 (“marketing director” liable because he “implemented the company’s policies and procedures, and monitored the marketing activities of ASCS’s third-party
16 marketers. . . .”).⁵ As the FTC detailed in its opposition to Foti’s motion for summary judgment, his assertion that others also had control or participated does
17 not affect *his* liability. DE [303](#) at Page ID 9327-28, 9330. His deep role, and admitted knowledge of complaints, establishes his knowledge. *FTC v. Affordable*
18
19
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24
25 ⁵ Because Foti repeatedly cites Damian Kutzner’s employment agreement as
26 evidence that Foti could not have control, the FTC conducted a search to see if
27 such an agreement existed for Foti. Indeed, Foti and Marshall signed a nearly
28 identical version, naming Foti the “Chief Operations Manager” in charge of “all ‘Non-Legal’ operations” of Advantis. Madden Decl. ¶ 7.

1 *Media*, 179 F.3d 1228, [1235](#) (9th Cir. 1999). His (incredible) statements that he
2 believed in the marketing and thought there were benefits is not a defense. *See*
3 *FTC v. Publishing Clearing House Inc.*, 104 F.3d 1168, [1171](#) (9th Cir. 1997)
4 (intent to defraud not required); *Affordable Media*, 179 F.3d at 1235 (defendants’
5 claim to have done due diligence regarding truth of claims does not defeat
6 “knowledge” component of FTC Act liability standard).

7 For his part, Marshall does not contest control of Advantis as part of the
8 common enterprise. Indeed, he admits the relevant facts. USF ¶¶ 19-31, 56-69.
9 He is, therefore, liable for injunctive relief. He only argues that he cannot be
10 monetarily liable because he lacked “full knowledge.” Unfortunately for him, he
11 admits he knew of Kutzner’s and Broderick’s history, the allegations of ethical
12 misconduct related to Brookstone’s mass joinder scheme, and chose to do business
13 with them anyway. USF ¶¶ 321-32. He therefore meets the knowledge standard,
14 having an “awareness of a high probability of fraud along with an intentional
15 avoidance of the truth.” *FTC v. Grant Connect LLC*, 763 F.3d 1094, [1101](#)-02 (9th
16 Cir. 2014); *Publishing Clearing House, Inc.*, 104 F.3d at [1171](#) (9th Cir. 1999)
17 (nominal president had “knowledge” when she knew principal was accused of
18 other crimes).

19 Importantly, neither Foti nor Marshall have introduced any documents or
20 testimony disputing this evidence. At best, both offer self-serving declarations.⁶
21 This is not sufficient. *Publishing Clearing House, Inc.*, 104 F.3d at [1171](#) (9th Cir.
22 1999) (self-serving affidavits do not create genuine disputes). Without such
23 evidence, they cannot defeat summary judgment.

24 _____

25 ⁶ Foti’s only supporting witness is Peter Rodriguez, who claims he did “not
26 make any promises or guarantees,” but does not say what he actually told
27 consumers. DE [308](#) at Page ID 10147 ¶ 4. As the FTC has proven, the
28 defendants’ other sales staff told consumers they had a high likelihood of success.
Rodriguez’s declaration does not controvert that proof.

II. Foti’s Argument that the Emails are Inauthentic is Specious.

1 The Receiver found the emails in question on the defendants’ premises, then
2 copied them, and produced them to the FTC. DE [23](#) at Page ID 2354 and DE [57](#) at
3 Page ID 3088 (detailing that the Receiver is made the custodian of all the
4 Receivership’s documents and assets). These documents are, therefore, authentic,
5 and business records certified by the Receiver. *MGM Studios Inc. v. Grokster,*
6 *Ltd.*, 454 F. Supp. 2d 966, [972](#) (C.D. Cal. 2006) (emails of individual employees
7 authenticated through production by corporate defendant); *Burgess v. Premier*, 727
8 F.2d 826, [835-36](#) (9th Cir. 1984) (documents found on the defendants’ premises
9 were authentic).⁷ The majority of the emails are further authenticated by having
10 been found on one of Foti’s computers. DE [284-8](#), Theisman Decl., at Page ID
11 7483-84 ¶¶ 2-4 (detailing, with declarations in support, how all emails with the
12 FTC-RAD-001 prefix were found on computers in Foti’s office). As further
13 indicated in *Burgess*, to overcome this prima facie showing, Foti would need to
14 prove there was a “motive . . . to store false documents.” 727 F.2d at [835](#). He
15 asserts that Kutzner could have altered them, but provides no basis for why
16 Kutzner would alter the documents at issue, let alone evidence to support such
17 conjecture.⁸ Indeed, because the documents are at least as damning for Kutzner, it
18

19
20 ⁷ The FTC need only establish a *prima facie* case of authenticity. *E.W.*
21 *French & Sons, Inc. v. General Portland Inc.*, 885 F.2d 1392, [1398](#) (9th Cir. 1988).
22 Once it has done so, the emails are deemed authentic and Foti is limited to
23 introducing evidence to contradict that finding. *Id.*; *Orr v. Bank of Am., NT & SA*,
24 285 F.3d 764, [776](#) (9th Cir. 2002) (“We now hold that when a document has been
25 authenticated by a party, the requirement of authenticity is satisfied as to that
26 document with regards to all parties, subject to the right of any party to present
27 evidence to the ultimate fact-finder disputing its authenticity.”)

28 ⁸ Any argument that all of the emails must be inauthentic because somebody
else at the office had access to employee email accounts ignores reality. At an
office with an enterprise email system there are always other people who can
access an individual’s computer and emails. This is why the law requires that Foti
establish a motive.

1 would have been against Kutzner’s interest to have forged and then stored them.
2 Nonetheless, Foti would have the court believe, without any proof of actual
3 manipulation of any the documents⁹ or motive for doing so, that they are all
4 inherently inauthentic. This is not the law. *See Scott v. Harris*, 550 U.S. 372, [380](#)
5 (2007) (“When opposing parties tell two different stories, one of which is blatantly
6 contradicted by the record, so that no reasonable jury could believe it, a court
7 should not adopt that version of the facts for purposes of ruling on a motion for
8 summary judgment.”).

9 **III. Arguments that Documents Found on Site are Inadmissible Because**
10 **They Were Not in the Hands of Consumers are Also Specious.**

11 The documents found on site are not “irrelevant,” as Foti appears to argue.
12 Without any basis, he asserts that evidence of mailers, scripts, and correspondence
13 confirming the allegations in the FTC’s consumer declarations are “irrelevant.” He
14 cites no support for this contention, because he cannot. These documents are
15 plainly relevant because they have a “tendency to make a fact more or less
16 probable than it would be without the evidence.” FRE [401](#)(a). Furthermore, like
17 the emails, these documents have been authenticated by the Receiver.

18 **IV. The Expert Report is Sound, and Devastating.**

19 As Dr. Isaacson explains in his concurrently filed response, none of Foti’s
20 criticisms have any merit. Dr. Isaacson testifies that he asked appropriate
21 questions in accordance with generally accepted procedures, appropriately blinded
22 the study to hide the purpose of the study from the respondents while giving the
23 respondents comfort in the legitimacy of the survey, determined that the response
24 rate was more than sufficient, and determined there were no inherent biases. As
25 Dr. Isaacson forcefully explains, his survey is not like the one in *In re Autozone*,

26
27 ⁹ Foti has in his possession all of the available metadata associated with the
28 emails.

1 *Inc.*, [2016 U.S. Dist. LEXIS 105746](#) (N.D. Cal. Aug. 10, 2016), and suffers from
2 none of the alleged defects of that survey. Unlike that survey, Dr. Isaacson’s
3 survey did not disclose the nature or purpose of the survey and has a much higher
4 response rate, greater than 20%. As Dr. Isaacson explains, even if this study had a
5 low response rate, it does not follow that it suffered from nonresponse bias or self-
6 interest bias. Furthermore, Dr. Isaacson explains that there is no basis to conclude
7 that the respondents answered with any biases, for or against the FTC.

8 While the FTC has put forward competent expert testimony on the nature
9 and sufficiency of the survey, neither Marshall nor Foti have countered with any
10 contrary expert testimony, either in the form of their own survey or expert critique
11 of Dr. Isaacson’s survey. The Court, therefore, has uncontroverted testimony
12 establishing the legitimacy of this study. *FTC v. Stefanchik*, 559 F.3d 924, [929](#)
13 (9th Cir. 2009) (criticizing survey not sufficient to defeat summary judgment).
14 Even were that not the case, any critiques like those levelled by Foti’s lay lawyer
15 would only go to weight, not admissibility. *See, e.g., Fortune Dynamic, Inc. v.*
16 *Victoria’s Secret Stores Brand Mgmt, Inc.*, 618 F.3d 1025, [1036](#) (9th Cir. 2010)
17 (“We have long held that survey evidence should be admitted ‘as long as [it is]
18 conducted according to accepted principles and [is] relevant.’ Furthermore, we
19 have made clear that ‘technical inadequacies’ in a survey, ‘including the format of
20 the questions or the manner in which it was taken, bear on the weight of the
21 evidence, not its admissibility.’”) (internal citations omitted); *FTC v. John Beck*
22 *Amazing Profits LLC*, 865 F. Supp. 2d 1052, [1065](#) (C.D. Cal. 2012) (admitting
23 consumer survey in FTC case where FTC was identified as a sponsor and the
24 consumers were told that the FTC’s mission is “protect[ing] American consumers
25 by monitoring and regulating businesses”). As a result, Foti and Marshall are left
26 with a devastating survey, establishing the Corporate Defendants systematically
27 lied to consumers.
28

V. The Objections to the Monetary Relief are Meritless.

1 The FTC has met its burden in proving revenues to establish the claimed
2 equitable monetary relief judgment. Because the uncontroverted testimony is that
3 all or nearly all of the Corporate Defendants’ revenue came from the mass joinder
4 business at issue, the FTC’s accountant reviewed the bank statements to determine
5 revenue, less chargebacks and refunds. Having done so, the defendants now have
6 the burden of showing what amounts, if any, should be further deducted. *FTC v.*
7 *Commerce Planet, Inc.*, 815 F.3d 593, [603](#)-04 (9th Cir. 2016) (describing burden
8 shifting process in determining redress figures in FTC cases). Marshall does
9 nothing to challenge the FTC’s evidence or calculation.¹⁰ Foti claims the figures
10 are not reliable because they are not consistent with revenue figures on an
11 unrelated client list. DE [304](#) at Page ID 9751. He has the banking records and the
12 spreadsheet the FTC’s accountant relied on to establish if the customer list shows
13 an actual conflict. He has not done so. Furthermore, there is no testimony or basis
14 for concluding that this separate spreadsheet accounts for all revenues. *See FTC v.*
15 *Inc21.com Corp.*, 745 F. Supp. 2d 975, [1013](#) fn.25 (N.D. Cal. 2010) (opposing
16 billing spreadsheet “bereft of foundation or analysis” insufficient to create an issue
17 for summary judgment). Foti also complains unquantified further amounts should
18 be deducted, but it is his burden to identify any such appropriate amounts. *Id.* at
19 1013; *Commerce Plant, Inc.*, 815 F.3d at [604](#) (“Any risk of uncertainty at this
20 second step ‘fall[s] on the wrongdoer whose illegal conduct created the
21 uncertainty.’) (quoting *FTC v. Bronson Partners LLC*, 654 F.3d 359, [368](#) (2d Cir.
22 2011)). As Brookstone’s “CFO,” and a person who reviewed Brookstone’s income
23 and invoices, Foti would appear to be well suited to make those determinations.
24

25
26
27 ¹⁰ At most, he mischaracterizes the FTC’s explicit argument, failing to note the
28 FTC is seeking from him approximately \$2 million, the amount of revenues while
he had control. DE [284-1](#) at Page ID 7062-63; DE [284-2](#) at Page ID 7074.

VI. Conclusion

1 Foti and Marshall defrauded consumers out of millions of dollars. Summary
2 judgment is appropriate and they deserve orders holding them monetarily liable for
3 their misconduct and preventing them from engaging in similar misconduct in the
4 future.

5
6 /s/ Benjamin J. Theisman
7 BENJAMIN J. THEISMAN
8 GREGORY J. MADDEN

9 Attorneys for Plaintiff
10 FEDERAL TRADE COMMISSION

11 Executed this 14th day of August, 2017.
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PROOF OF SERVICE

1 I, Benjamin J. Theisman, on August 14, 2017, served the PLAINTIFF'S
2 REPLY MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT
3 AGAINST DEFENDANTS JEREMY FOTI AND CHARLES MARSHALL AS
4 TO ALL COUNTS, and all supporting documents, through the ECF system.

5 /s/ Benjamin J. Theisman
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1 BENJAMIN J. THEISMAN, *pro hac vice*
btheisman@ftc.gov
2 GREGORY J. MADDEN, *pro hac vice*
gmadden@ftc.gov
3 FEDERAL TRADE COMMISSION
600 Pennsylvania Ave. NW, CC-9528
4 Washington, DC 20580
Tel: (202) 326-2223, -2426; Fax: (202) 326-3197

5 THOMAS SYTA, Cal. Bar No. 116286
tsyta@ftc.gov
6 FEDERAL TRADE COMMISSION
10877 Wilshire Blvd., Suite 700
7 Los Angeles, CA 90024
8 Tel: (310) 824-4343; Fax: (310) 824-4380

9 Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 FEDERAL TRADE COMMISSION,
13 Plaintiff,
14 v.
15 DAMIAN KUTZNER, et al.,
16 Defendants.

No. SACV16-00999-BRO (AFMx)

**PLAINTIFF'S UNDISPUTED
STATEMENT OF FACTS AND
CONCLUSIONS OF LAW ON
REPLY IN SUPPORT OF
SUMMARY JUDGMENT AGAINST
DEFENDANTS JEREMY FOTI
AND CHARLES MARSHALL AS
TO ALL COUNTS**

Date: August 28, 2017
Time: 1:30 pm
Location: Courtroom 7C

United States Courthouse
350 West 1st Street
Los Angeles, CA 90012

22 The Federal Trade Commission (“FTC”) submits this update to its
23 Undisputed Statement of Facts and Conclusions of Law, incorporating each of the
24 Defendants’ responses. Although both defendants failed to accurately number
25 their factual responses, at times incorrectly listing the FTC’s paragraph number
26 and then providing a response to that incorrectly identified paragraph, the FTC has,
27 to the best of its ability, correlated their responses to the correct paragraphs.
28

1 Marshall, in his responses, frequently claimed that he lacked knowledge or
2 information to answer, that the fact does not apply to him, or otherwise relied on
3 his unsupported, self-serving declaration. He has, therefore, not disputed any of
4 the facts listed. As to the items where he claims he lacks knowledge or that the
5 fact does not apply to him, it is unclear why he did not stipulate to those facts when
6 the FTC met and conferred on this motion.

7 Foti, in his responses, almost exclusively makes formulaic objections, such
8 as “irrelevant” and “hearsay,” without explaining how or why the objections apply.
9 As explained in this Court’s standing order, these formulaic objections should be
10 overruled. DE 108 at Page ID 3823 (“Do not submit blanket or boilerplate
11 objections to the opponent’s statement of undisputed fact. The boilerplate
12 objections will be overruled and disregarded.”). The relevance objection is
13 particularly common and unexplained, unless Foti is admitting the Corporate
14 Defendants committed the acts alleged in the Complaint and, therefore, the facts
15 supporting those allegations do not need to be proven. He also frequently asserts
16 that the evidence is not authenticated, presumably based on his baseless assertion
17 that the Receiver is incapable of authenticating the documents found on the
18 Receivership premises. The FTC’s response to this objection is detailed in its
19 Reply memorandum. Furthermore, Foti has frequently stated “DENY” in response
20 to narrowly tailored facts, without offering a cognizable objection or evidence to
21 controvert the fact. Instead, he attempts to characterize the fact in such a way that
22 it is not inculpatory. But, that is not an objection and does not render the fact
23 disputed. His arguments about the import of a fact should have been limited to his
24 memorandum in opposition. None of Foti’s evidentiary objections have merit, and
25 he has not offered any evidence that actually controverts any of the listed facts.

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>was incorporated on November 20, 2014 by Corporate Legal. DE 14, <i>Gales Decl.</i> at Page ID 1125, Att. 7.</p>	<p>lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: Admit</p>	<p>Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>
<p>4. In a November 20, 2014 Articles of Incorporation filing with the Nevada Secretary of State, "ST OCONNOR" from 3050 Sirius Ave, Ste 104, Las Vegas, NV 89102 is identified as the sole Board of Director/Trustee of Brookstone Nevada. DE 14, <i>Gales Decl.</i> at Page ID 1125, Att. 7.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: Admit</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>
<p>5. In a March 3, 2015 corporate filing with the Nevada Secretary of State, "ST OCONNOR" from 3050 Sirius Ave, Ste 104, Las Vegas, NV</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>89102 is identified as the President, Secretary, Treasurer, and Director of Brookstone Nevada. DE 14, <i>Gales Decl. at Page ID 1126, Att. 7.</i></p>	<p>Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --. Foti: Admit</p>	<p>Undisputed as to Foti.</p>
<p>6. In the March 3, 2015 corporate filing with the Nevada Secretary of State, Dr. Connor O'Shea provides the "Signature of Officer or Other Authorized Signature" for the Brookstone Nevada filing. DE 14, <i>Gales Decl. at Page ID 1126, Att. 7.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --. Foti: Admit</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti.</p>
<p>7. In a June 12, 2015 corporate filing with the Nevada Secretary of State, John Mortimer from 3050 Sirius Ave, Ste 104, Las Vegas, NV 89102, is identified as the President of Brookstone Nevada. DE 14, <i>Gales Decl. at</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<i>Page ID 1127, Att. 7.</i>	this action. Marshall Decl., at ¶ --. Foti: Admit	Undisputed as to Foti.
<p>8. In the June 12, 2015 corporate filing with the Nevada Secretary of State, "ST OCONNOR" from 3050 Sirius Ave, Ste 104, Las Vegas, NV 89102 is identified as the Secretary, Treasurer, and Director of Brookstone Nevada.</p> <p>DE 14, Gales Decl. at <i>Page ID 1127, Att. 7.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: Admit</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>
<p>9. In the June 12, 2015 corporate filing with the Nevada Secretary of State, Dr. Connor O'Shea provides the "Signature of Officer or Other Authorized Signature" for the Brookstone Nevada filing.</p> <p>DE 14, Gales Decl. at <i>Page ID 1127, Att. 7.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>10. Damian Kutzner and Jeremy Foti are identified as Board of Directors/Trustees with the address 3050 Sirius Ave, Ste 104, Las Vegas, NV 89102 on a purported March 30, 2015 Nevada Secretary of State Articles of Incorporation filing for Brookstone Nevada. DE 69-2, Declaration of Edward Chang (“Chang July 2016 Decl.”) at Page ID 3269, Att. 2.</p>	<p>Foti: Admit</p> <p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; no foundation the email or document is genuine, was actually filed, that Mr. Foti sent or received a copy of it, knew about it or had anything to do with it.</p> <p><i>Compare DE 69-2, Chang July 2016 Decl. at Page ID 3267-3269, Att. 2 with DE 14, Gales Decl. at Page ID 1125-27, Att. 7; Foti Decl., ¶ 36, 37; Thurman Decl. ¶ 2.a.; Thurman Decl., Attachment 46; FTC Fact</i></p>	<p>Undisputed as to Foti.</p> <p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The documents are authenticated as indicated in the FTC’s original factual citation for this paragraph. The evidence is not hearsay as a statement of a party opponent and to the extent not offered for the truth of the matter asserted. It does not matter if Foti ever saw or knew of the particular pieces of evidence.</p> <p>For support, Foti does not offer any admissible evidence capable of</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>Nos. 11-14;</i>	controverting the fact at issue.
<p>11. The purported March 30, 2015 Nevada Secretary of State Articles of Incorporation for Brookstone Nevada are different from the November 20, 2014, Articles of Incorporation filing with the Nevada Secretary of State provided to the FTC by the Nevada Secretary of State.</p> <p><i>Compare DE 69-2, Chang July 2016 Decl. at Page ID 3269, Att. 2; with DE 14, Gales Decl. at Page ID 1125-27, Att. 7.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; no foundation the email or document is genuine, was actually filed, that Mr. Foti sent or received a copy of it, knew about it or had anything to do with it.</p> <p><i>Compare DE 69-2, Chang July 2016 Decl. at Page ID 3267-3269, Att. 2 with DE 14, Gales Decl. at Page ID 1125-27, Att. 7; Foti Decl., ¶ 36, 37; Thurman Decl. ¶ 2.a.; Thurman Decl.,</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The documents are authenticated as indicated in the FTC's original factual citation for this paragraph. The evidence is not hearsay as a statement of a party opponent and to the extent not offered for the truth of the matter asserted. It does not matter if Foti ever saw or knew of the particular pieces of evidence.</p> <p>For support, Foti does not offer any admissible</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>Attachment 46; FTC Fact Nos. 11-14;</i>	evidence capable of controverting the fact at issue.
<p>12. Barbara Cegavske was the Nevada Secretary of State in 2015, and Ross Miller was the Nevada Secretary of State in 2014. DE 14, <i>Gales Decl. at Page ID 1125-26, Att. 7.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; no foundation the email or document is genuine, was actually filed, that Mr. Foti sent or received a copy of it, knew about it or had anything to do with it. <i>Compare DE 69-2, Chang July 2016 Decl. at Page ID 3267-3269, Att. 2 with DE 14, Gales Decl. at Page ID 1125-27, Att. 7; Foti Decl., ¶ 36, 37; Thurman Decl. ¶ 2.a.;</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The documents are authenticated as indicated in the FTC's original factual citation for this paragraph. The evidence is not hearsay as a statement of a party opponent and to the extent not offered for the truth of the matter asserted. It does not matter if Foti ever saw or knew of the particular pieces of evidence. For support, Foti does not</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>Thurman Decl., Attachment 46; FTC Fact Nos. 11-14;</i>	offer any admissible evidence capable of controverting the fact at issue.
<p>13. The purported March 30, 2015 Nevada Secretary of State Articles of Incorporation for Brookstone Nevada filing identifies Ross Miller as the Nevada Secretary of State at that time.</p> <p>DE 69-2, <i>Chang July 2016 Decl. at Page ID 3269, Att. 2</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; no foundation the email or document is genuine, was actually filed, that Mr. Foti sent or received a copy of it, knew about it or had anything to do with it.</p> <p><i>Compare DE 69-2, Chang July 2016 Decl. at Page ID 3267-3269, Att. 2 with DE 14, Gales Decl. at Page ID 1125-27, Att. 7; Foti Decl., ¶ 36, 37;</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The documents are authenticated as indicated in the FTC's original factual citation for this paragraph. The evidence is not hearsay as a statement of a party opponent and to the extent not offered for the truth of the matter asserted. It does not matter if Foti ever saw or knew of the particular pieces of evidence.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>Thurman Decl. ¶ 2.a.; Thurman Decl., Attachment 46; FTC Fact Nos. 11-14;</i>	For support, Foti does not offer any admissible evidence capable of controverting the fact at issue.
<p>14. The purported March 30, 2015 Nevada Secretary of State Articles of Incorporation for Brookstone Nevada accompanied a health insurance application for Damian Kutzner and Jeremy Foti. DE 69-2, <i>Chang July 2016 Decl. at Page ID 3267-77, Att. 2.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; no foundation the email or document is genuine, was actually filed, that Mr. Foti sent or received a copy of it, knew about it or had anything to do with it. <i>Compare DE 69-2, Chang July 2016 Decl. at Page ID 3267-3269, Att. 2 with DE 14, Gales Decl. at Page ID 1125-27, Att. 7;</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The documents are authenticated as indicated in the FTC's original factual citation for this paragraph. The evidence is not hearsay as a statement of a party opponent and to the extent not offered for the truth of the matter asserted. It does not matter if Foti ever saw or knew of the particular pieces of</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Foti Decl.</i>, ¶ 36, 37; <i>Thurman Decl.</i> ¶ 2.a.; <i>Thurman Decl.</i>, <i>Attachment 46; FTC Fact Nos. 11-14;</i></p>	<p>evidence. For support, Foti does not offer any admissible evidence capable of controverting the fact at issue.</p>
<p>15. Jeremy Foti is identified as “CFO” of Brookstone Law on the health insurance application he signed on December 16, 2015, seeking health insurance through Brookstone Nevada. <i>DE 69-2, Chang July 2016 Decl. at Page ID 3273, 3277, Att. 2.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; no foundation the email or the written "CFO" is genuine, that Mr. Foti sent or received a copy of it, knew about it or had anything to do with it in the form presented here. Although Mr Foti has admitted he signed the healthcare application, he denies he wrote or saw</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The documents are authenticated as indicated in the FTC’s original factual citation for this paragraph. The evidence is not hearsay as a statement of a party opponent. For support, Foti does not offer any admissible evidence capable of controverting the fact at</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	the "CFO" on the document. <i>Foti Decl., ¶ 36, 37; DE 69-2, Chang July 2016 Decl. at Page ID 3267-3268, 3273, 3277, Att. 2.</i>	issue. Furthermore, Foti previously admitted that the document, including the identification of Foti as "CFO," was genuine and authentic. DE 284-8 at Page ID 7507 (Response to RFA No. 8).
16. A voided check from Brookstone Law PC, 3050 Sirius Ave, Ste 104, Las Vegas, NV, 89102 from the Bank of America account ending in 7366 accompanied the healthcare application. <i>DE 69-2, Chang July 2016 Decl. at Page ID 3272, Att. 2.</i>	Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --. Foti: Deny -Objections to email (irrelevant; failure to authenticate; hearsay; no foundation the email or document is genuine, that Mr. Foti sent or received a copy of it, knew about it or had anything to do with it. Objections to check (failure to authenticate; irrelevant; hearsay). No evidence Mr. Foti was a	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. The documents are authenticated as indicated in the FTC's original factual citation for this paragraph. The evidence is not hearsay as a statement of a party opponent and to the extent not offered for the truth of the matter asserted. It

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Jonathan Tarkowski is Brookstone Nevada's managing attorney, and that Geoffrey Broderick is an attorney for Brookstone Nevada.</p> <p><i>DE 14-5, Gales Decl. at Page ID 1408-09, Att. 20.</i></p>	<p>fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: Admit <i>DE 14-5, Gales Decl. at Page ID 1408-09, Att. 20 (demonstrates that Mr. Foti was not a signer and did not have any authority over or access to regarding the account.)</i></p>	<p>issue</p> <p>Undisputed as to Foti.</p>
<p>19. Advantis Law P.C. ("Advantis Law") is a California Professional Corporation.</p> <p><i>DE 94, Foti Answer at Page ID 3758, ¶ 8 (admitting ¶ 7 of DE 61, Complaint); DE 14, Gales Decl. at Page ID 1114-18.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: Admit</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue</p> <p>Undisputed as to Foti.</p>
<p>20. Advantis Law Group P.C. ("Advantis</p>	<p>Marshall: Undisputed.</p>	<p>Undisputed as to both Marshall and Foti</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Law Group”) is a California Professional Corporation. DE 94, Foti Answer, at Page ID 3758, ¶ 8 (admitting ¶ 7 of DE 61, Complaint); DE 14, Gales Decl. at Page ID 1108-13.</p>	<p>Foti: Admit</p>	
<p>21. Brookstone Law P.C. (California) and Brookstone Nevada (collectively, “Brookstone”) maintained an office at 18400 Von Karman, Suite 1000, Irvine, CA. DE 94, Foti Answer at Page ID 3758 at ¶ 7 (admitting ¶ 6 of DE 61, Complaint); DE 17, Declaration of Diane Samar Ayoub (“Ayoub Decl.”) at Page ID 1942, ¶ 6, and Page ID 1944, ¶ 15; DE 186-3, Declaration of Jonathan Tarkowski (“Tarkowski Decl.”) at Page ID 5356, ¶¶ 4-5; DE 284-14, Declaration of Gregory Madden (“Madden July 2017 Decl.”) Page ID 8126, 8416 ¶ 3, Att. 15, Decl Plaintiff's First</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact did not involve Defendant, or Defendant’s involvement with Advantis Law Group, P.C.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: Admit</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue</p> <p>Undisputed as to Foti.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 <i>Requests for Admission</i></p> <p>2 <i>Issued to Charles</i></p> <p>3 <i>Marshall Pursuant to</i></p> <p>4 <i>Federal Rule of Civil</i></p> <p>5 <i>Procedure 36</i></p> <p>6 <i>("Marshall's First</i></p> <p>7 <i>RFAs"), RFA 40 admitted</i></p> <p>8 <i>pursuant to FRCP</i></p> <p>9 <i>36(a)(3); DE 41-4 at</i></p> <p>10 <i>Page ID 2596</i></p> <p>11 <i>(Brookstone Fee</i></p> <p>12 <i>Agreement); DE 284-4,</i></p> <p>13 <i>Declaration of Edward</i></p> <p>14 <i>Chang Pursuant to 28</i></p> <p>15 <i>U.S.C. § 1746 ("Chang</i></p> <p>16 <i>Decl.") at Page ID 7248.</i></p>		
<p>17 22. Advantis Law and</p> <p>18 Advantis Law Group</p> <p>19 (collectively, "Advantis")</p> <p>20 maintained an office at</p> <p>21 18400 Von Karman, Suite</p> <p>22 1000, Irvine, CA.</p> <p>23 DE 94, Foti Answer at</p> <p>24 Page ID 3758 at ¶ 8</p> <p>25 (admitting ¶ 7 of DE 61,</p> <p>26 <i>Complaint); DE 14, Gales</i></p> <p>27 <i>Decl. at Page ID 1110-11,</i></p> <p>28 <i>1116-17; DE 284-14, at</i></p> <p><i>Page ID 8126, 8416,</i></p> <p><i>Madden July 2017 Decl. ¶</i></p> <p><i>3, Att. 15 Marshall's First</i></p> <p><i>RFAs, RFA 41 admitted</i></p> <p><i>pursuant to FRCP</i></p> <p><i>36(a)(3).</i></p>	<p>Marshall: Disputed.</p> <p>Advantis Law and</p> <p>Advantis Law Group are</p> <p>not related and should not</p> <p>be collectively referred to</p> <p>as the same entity or</p> <p>common identity.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: Admit</p>	<p>Undisputed as to</p> <p>Marshall. He does not</p> <p>offer any admissible</p> <p>evidence capable of</p> <p>controverting the fact at</p> <p>issue, including his self-</p> <p>serving declaration, which</p> <p>cannot be used to create a</p> <p>genuine dispute as to a</p> <p>material fact on summary</p> <p>judgment.</p> <p>Undisputed as to Foti.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>23. Brookstone maintained an office at 6 Hutton Centre Drive, Suite 1000, Santa Ana, CA. <u>DE 94</u>, Foti Answer, at Page ID 3758, ¶ 7 (admitting ¶ 6 of <u>DE 61</u>, Complaint); <u>DE 17</u>, Ayoub Decl. at Page ID 1942, ¶ 6 and Page ID 1944, ¶ 15; <u>DE 284-14</u>, at Page ID 8126, 8417, Madden July 2017 Decl. ¶ 3, Att. 15, Marshall's First RFAs, RFA 43 admitted pursuant to FRCP 36(a)(3); <u>DE 13</u>, Declaration of Gregory J. Madden ("Madden May 2016 Decl.") at Page ID 886-93, Att. 46.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --. Foti: Admit</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti.</p>
<p>24. Advantis maintained an office at 6 Hutton Centre Drive, Suite 1000, Santa Ana, CA. <u>DE 94</u>, Foti Answer at Page ID 3758, ¶ 8 (admitting ¶ 7 of <u>DE 61</u>, Complaint); <u>DE 17</u>, Ayoub Decl. at Page ID 1942, ¶ 6 and Page ID 1944, ¶ 15; <u>DE 284-14</u>, at</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Defendant was not involved with</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Page ID 8126, 8417, Madden July 2017 Decl. at ¶ 3, Att. 15, Marshall's First RFAs, RFA 44 admitted pursuant to FRCP 36(a)(3).</p>	<p>Advantis Law, P.C. Marshall Decl., at ¶ --. Foti: Admit</p>	<p>Undisputed as to Foti.</p>
<p>25. Brookstone and Advantis (collectively, "Corporate Defendants") offered mortgage assistance relief services ("MARS") as defined in 12 C.F.R. § 1015.2. DE 94, Foti Answer at Page ID 3578, ¶¶ 7-8 (admitting ¶¶ 6-7 of DE 61, Complaint, which alleged that the Corporate Defendants "advertised, marketed, distributed, or sold mortgage assistance relief services to consumers in this district. [Brookstone/Advantis] is a 'law firm' offering mortgage assistance relief services to consumers by representing them in litigation against their lenders."); DE 17-6, Declaration of Mario Rios ("Rios Decl.") at Page ID 2135 ("You may</p>	<p>Marshall: Disputed. Advantis Law Group, P.C. offered litigation to challenge the banks' rights to foreclose on clients' properties. Marshall Decl., at ¶ --. Foti: DENY - Not a statement of fact but a conclusion of law. Objections (failure to authenticate; irrelevant; hearsay) - no showing Mr. Foti had anything to do with the documents or that they were used with any consumer. <i>Foti Answer, para. 23</i>; DENY - Not a statement of fact but a conclusion of law. Objections (failure to authenticate; irrelevant;</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment. Undisputed as to Foti. The fact is relevant. The documents are authenticated as indicated in the FTC's original factual citation for this paragraph, including emails sent by or to Foti. The evidence is not hearsay as a statement of a party opponent. Aside from the emails he sent or received, it does not matter if Foti ever saw or knew of the particular pieces of evidence.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>become a joined plaintiff in a significant lawsuit that will seek, among other things, to void your note(s), and/or to award you relief and monetary damages.”); DE 17-6, Rios Decl. at Page ID 2148-53 (Pre-Litigation Settlement Agreement); DE 17, Declaration of Jesse Chapman (“Chapman Decl.”) at Page ID 1946, ¶ 7 (hired Brookstone “to get a refund from Bank of America or a modification to our loan”); <i>id.</i> at Page ID 1948 (“You may become a joined named plaintiff in a significant lawsuit that will seek, among other things, to void your note(s), and/or to award you relief and monetary damages.”); DE 17-7, Declaration of Malu Lujan (“Lujan Decl.”) at Page ID 2170, ¶ 8 (“Richard Taylor told me that Brookstone would probably be able to get me ‘free and clear’ on my loan, that I would owe</i></p>	<p>hearsay) - no showing Mr. Foti sent or received or had anything to do with the documents or that they were used with any consumer. <i>Foti Answer, para. 23; Foti Depo., 117:2 to 119:12</i></p> <p>DENY - Not a statement of fact but a conclusion of law. Objections (failure to authenticate; irrelevant; hearsay) - no showing Mr. Foti sent or received or had anything to do with the documents or that they were used with any consumer. <i>Foti Answer, para. 23;</i></p> <p>[Foti included three responses to this paragraph, so the FTC has included each one here]</p>	<p>For support, Foti’s cited “evidence” is limited to his answer, which is not evidence and cannot controvert a fact on summary judgment, or his self-serving testimony, which also does not controvert this fact.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>nothing on my mortgage due to my lender's fraud."); DE 17-4, Declaration of Michael Nava ("Nava Decl.") at Page ID 2095, ¶ 7 ("He said I could get the \$75,000, and the bank would try to negotiate the \$750,000 claim by lowering my loan amount."); DE 41-2 at Page ID 2517 and 2523 (scripts claiming services will help consumers "struggling to pay your mortgage" or "facing foreclosure"); DE 284-4, Chang Decl., at Page ID 7248 ¶¶ 4.e & 4.f; Ex. 75 at FTC-RAD-001-0221284 to 0221285 (offering foreclosure relief; stating "We are attorneys that focus on foreclosure defense and can offer immediate solutions to your problem. You must know well in advance what your legal rights and options are so you don't lose your home;" and further stating "Available forms</i></p>		

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>of relief include, reduction of unpaid principal balances, refinancing for borrowers whose homes are worth less than what they owe, payments to borrowers who were wrongly foreclosed on; and the opportunity for a short sale”); Ex. 87 at FTC-RAD-001-0089958 (“Keep in mind that this is the first lawsuit of its kind, and is keeping homeowners in there [sic] homes.”); DE 284-8, Declaration of Benjamin J. Theisman in Support of Plaintiff’s Motion for Summary Judgment Against Defendants Jeremy Foti and Charles Marshall as to all Counts (“Theisman Decl.”) at Page ID 7485-86, 7576-7577, 7609-7614 ¶ 4.n & 4.u; DE 284-14, Madden July 2017 Decl. at Page ID 8126-28, 8423-26 ¶¶ 4-5, Att. 16 (excerpts of Defendant Charles T. Marshall’s Responses to Plaintiff’s First Set of</i></p>		

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Interrogatories</i> (“<i>Marshall First Int. Resp.</i>”), <i>Int. Nos. 7-8, identifying no defenses and identifying no individuals or entities with information suggesting any Defendant is not liable</i>), <i>Att. 17, (excerpts of Defendant Marshall’s Objections and Response to Plaintiff’s First Requests for Production of Documents (“Marshall First RFP Resp.”), RFP Nos. 19, 21, identifying no documents tending to disprove or call into question that Corporate Defendants were “mortgage assistance relief providers.”)</i>.</p>		
<p>26. Damian Kutzner is an individual who was an owner or executive of the Corporate Defendants. DE 41-4 at Page ID 2620-27 (<i>agreement making Kutzner COO of Brookstone</i>); DE 41-5 at Page ID 2640-41 (<i>phone directories identifying Kutzner as</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>“management”); <i>id.</i> at Page ID 2668-72 (payment schedule listing Kutzner as an “executive”); <i>id.</i> at Page ID 2681 (“Deal Memo”); DE 284-4, Chang Decl. at Page ID 7249 ¶¶ 4.s, 4.u, 4.z, 4.bb; DE 186-4, Declaration of Vito Torchia, Jr. (“Torchia Decl.”), at Page ID 5370-72, 5375-76, 5378-80, ¶¶ 3-8, 15-17, 21, 23-25; DE 284-13, Theisman Decl. at Page ID 8056 ¶ 15, Att. 12, March 22, 2017 Excerpts of Deposition of Jeremy Foti (“Foti Depo.”) at 48:15-18 (“I mean, I would give my input, but the final decision always lied [sic] with Vito, or Damian if Vito wasn't around, or one of Vito’s managing attorneys.”); <i>id.</i> at 65:10-18 (“Damian was actually an officer of the corporation. . . . Damian could approve anything . . .”); DE 218-2, Declaration of Gregory J. Madden in Support of</p>	<p>Marshall Decl., at ¶ --. Foti: No response</p>	<p>Undisputed as to Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Plaintiff's Opposition to Motion to Dissolve or Otherwise Modify Preliminary Injunction as to Defendant Charles T. Marshall ("Madden April 2017 Decl.") at Page ID 6063, Att. 16, March 20, 2017 Deposition of Charles Marshall ("Marshall Depo."), at 48:17-21 (Marshall understood Kutzner to be a "principal"); DE 284-7, Declaration of Josephine Lobo ("Lobo Decl.") at Page ID 7477 ¶¶4-5, Att.</i></p>		
<p>27. Vito Torchia Jr. is an individual who was an owner or executive of the Corporate Defendants. DE 14, <i>Gales Decl.</i> at Page ID 1108, 1114, 1119; DE 186-4, <i>Torchia Decl.</i> at Page ID 5370, ¶ 3; DE 41-6 at Page ID 2742-44; DE 284-4, <i>Chang Decl.</i> at Page ID 7249 ¶ 4.kk.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: No response</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>
<p>28. Geoffrey Broderick is an individual who was an owner or executive of</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>the Corporate Defendants. DE 14, <i>Gales Decl.</i> at Page ID 1110, 1116; DE 186-4, <i>Torchia Decl.</i> at Page ID 5379-80, ¶¶ 23 & 25; DE 41-6 at Page ID 2742-44; DE 284-4, <i>Chang Decl.</i> at Page ID 7249 ¶ 4.kk; DE 284-14, <i>Madden July 2017 Decl.</i> at Page ID 8126, 8414 ¶ 3, Att. 15, <i>Marshall's First RFAs, RFA 10</i> admitted pursuant to <i>FRCP 36(a)(3)</i>.</p>	<p>dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. <i>Marshall Decl.</i>, at ¶ --.</p> <p>Foti: No response</p>	<p>evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>
<p>29. Jonathan Tarkowski is an individual who was a lawyer for the Corporate Defendants. DE 186-3, <i>Declaration of Jonathan Tarkowski ("Tarkowski Decl.")</i> at Page ID 5356-58 ¶¶ 4-7.</p>	<p>Marshall: Disputed. Tarkowski was not a lawyer for Advantis Law Group, P.C. <i>Marshall Decl.</i>, at ¶ --.</p> <p>Foti: No response</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>
<p>30. Charles Marshall is an individual who was an owner or executive of Advantis Law Group. DE 14, <i>Gales Decl.</i> at Page ID 1110; DE 41-6</p>	<p>Marshall: Marshall does not dispute that he was nominally listed as an executive for Advantis Law Group PC for some period of time; he</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>at Page ID 2746-52 (<i>Advantis Law Group shareholder agreement</i>); DE 284-4, <i>Chang Decl.</i> at Page ID 7249 ¶ 4.ll.</p>	<p>disputes any inferences the FTC might draw from this fact.</p> <p>Foti: No response</p>	<p>serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>
<p>31. Jeremy Foti is an individual who was an owner or executive of the Corporate Defendants. DE 41-5 at Page ID 2640-41 (<i>phone directories identifying Foti as "management"</i>); <i>id.</i> at Page ID 2668-72 (<i>payment schedule listing Foti as an "executive"</i>); <i>id.</i> at Page 2681 (<i>"Deal Memo"</i>); DE 284-4, <i>Chang Decl.</i> at Page ID 7249 ¶¶ 4.u, 4.z, and 4.bb; DE 186-4, <i>Torchia Decl.</i> at Page ID 5370-72, 5375-76, 5378-80, ¶¶ 3-8, 15-17, 21, 23-25; DE 69-2, <i>Chang July 2016 Decl.</i> at Page ID 3269 (<i>purported Articles of Incorporation listing Jeremy Foti as member of the board of directors or trustee</i>); <i>id.</i> at Page ID 3273-77 (<i>Foti signing</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; no foundation the emails or documents are genuine, who prepared them, that Mr. Foti sent or received them, knew about them or had anything to do with them.</p> <p><i>Foti Answer, para. 23; Foti Decl. ¶ 15, 16, 19, 30, 33, 34, 36, 37, 39, 40, 41, 86 (office directories, "Deal Memo", Vito</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The documents are authenticated as indicated in the FTC's original factual citation for this paragraph, including emails sent by or to Foti. The evidence is not hearsay because it is a statement of an opposing party. Aside from the emails he sent or received, it does not matter if Foti ever saw or</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>health insurance application claiming to be CFO); Madden April 2017 Decl. Page ID 6063, Att. 16, Marshall Depo. at 48:17-21 (Foti was a "principal" for Advantis whom Marshall was negotiating with); DE 284-7, Lobo Decl. at Page ID 7466-67 ¶¶ 4-5; DE 284-8, at Page ID 7486, DE 284-10, at Page ID 7752-53, Theisman Decl. ¶ 4.qq; <i>id.</i> DE 284-8, at Page ID 7487, DE 284-10, Page ID 7776 at ¶ 4.aaa; <i>id.</i> at ¶ 4.qqq, DE 284-8, Page ID 7487, DE 284-11, 7854; <i>id.</i> at ¶ 4.k, DE 284-8, Page ID 7485, 7541-7640; <i>id.</i> at ¶ 7, DE 284-8, Page ID 7489, 7503-16 (attaching excerpts of Foti's answers to RFAs in which he admits he occupied the office identified as number 111 and admitting the office locations of Kutzner and Broderick, responses to RFAs 111-13); <i>id.</i> at ¶ 4.ggg, DE 284-8, Page ID</i></p>	<p><i>Declaration, Marshall negotiations, Josie "only manager's claim, 50/50 split with DK, "we're partners now" Deal Memo email, everyone had a key; his job description; office leases); 287-4 - Thurman MSJ Decl., Attachments 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 13, 14, 16, 17,18, 19, 20, 21, 22, 23, 24, 25, 26; Thurman Decl., Attachment 47 (MOU between Broderick and Marshall); Thurman Decl., Attachment 46 (Nevada Secretary of State document); Thurman Decl., Attachment 48 (Damian Kutzner's Executive Employment Agreement); Theisman Decl. at ¶ 4.aaa, MSJ Evid p. 241, 530 (authenticating and attaching FTC-RAD-001-0080085) - (Josie email dated 10/4/11 stating that Vito said he was authorized to approve refunds - FTC failed to produce any emails</i></p>	<p>knew of the particular pieces of evidence. For support, Foti's cited evidence does not controvert the fact. He cites to his answer, which is not evidence and cannot controvert a fact on summary judgment. He cites to his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment. He cites to evidence that others also may have had control, which does not controvert the fact.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>7487, DE 284-10, Page ID 7798-02 (authenticating and attaching FTC-RAD-001-0163703 to 0163707, cover email on memo regarding Brookstone's bonus structure, from Torchia to Kutzner and Foti, stating "Confidential. Do not distribute."); <i>id.</i> at ¶ 4.hhh, DE 284-8, Page ID 7487, DE 284-10, DE 284-11, Page ID 7803-7822 (authenticating and attaching FTC-RAD-001-0164070 to 0164089, cover email from Torchia is to just Kutzner and Foti); <i>id.</i> at ¶ 4.iii, DE 284-8, Page ID 7487, DE 284-11, Page ID 7823-27 (authenticating and attaching FTC-RAD-001-0164311 to 0164315, cover email on memo regarding Brookstone's claim to be a national law firm, from Torchia to Kutzner and Foti, stating "This is Confidential Memo not to be distributed."); DE 284-7,</p>	<p>reflecting Mr. Foti ever approved a single refund); DE-284-7 - Lobo Decl., para. 2 ("From October 2013 until August 2014, I worked part-time for Brookstone from my home for approximately 15 hours a week. From August 2014 until mid-October 2014, I did very little work for Brookstone Law. From November 2014 until September 2015, I did no work for Brookstone. I worked for Brookstone part time from September 2015 to June 2016."); Response to FTC Nos. 10, 15 above.</p>	

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Lobo Decl. at Page ID 7467 ¶ 7; Ex. 69 (email from Kutzner to Pepe Abad, copying Foti, attaching the Deal Memo, and stating “Psss. . Look at the Deal memo we all signed. . . . I am sending this to you as we are partners NOW and you should understand all sides! Not just one!”); DE 78-1, Foti July Decl. at Page ID 3538-39, ¶ 10; DE 78-1, Foti July Decl. at Page ID 3546; DE 152-1, Declaration of Jeremy Foti in Support of Defendant’s Response to Plaintiff’s Objections to Proposed Findings of Fact and Receiver’s Supplemental Report (“Foti Nov. Decl.”) at Page ID 4757; DE 41 at Page ID 2479 (“He operates from a large, and upon our arrival locked, office next to Mr. Kutzner’s office.”); DE 41-2 at 2498-99 (identifying Foti’s office as the “VP Office” designated as “I” or</i></p>		

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
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<p>“111”); DE 186-3, <i>Tarkowski Decl. at Page ID 5359</i>, ¶ 9.</p>		
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In Late 2010, Foti Teamed Up With Torchia and Kutzner to Run Brookstone's Mass Joinder Scheme		
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<p>32. Defendants initially built their mass joinder practice with the advice and support of Phil Kramer and Mitch Stein. <i>Ex. 2</i>, DE 18 at Page ID 2250-54, 2259-63; DE 186-4, <i>Torchia Decl. at Page ID 5370-71</i>, ¶ 4 (“Initially, Brookstone engaged in debt relief work, but subsequently followed the model of three other attorneys, Mitchell Stein, Philip Kramer, and Kenin Spivak and began signing up clients for ‘mass joinder’ lawsuits. In a mass joinder lawsuit, tens, or hundreds, of plaintiffs bring a single case against a common defendant, such as Bank of America. Philip Kramer and Mitch Stein contacted Damian Kutzner and then approached me to have</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: Admit, except as to Defendant. <i>Foti Decl., para. 12.</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. He does not attempt to dispute the fact in general, merely relying on his self-serving declaration to assert he was not involved in the fact at issue. His self-serving declaration both does not address this fact and could not controvert a fact on summary judgment.</p>
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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Brookstone interview potential clients/clients, gather documents, and communicate with clients while Mitch Stein would be the lead litigation counsel for the mass joinders against national banks. I did not have the experience to be lead counsel in a mass joinder case against national banks because I lacked any trial experience.”)</i></p>		
<p>33. Foti began working with Brookstone in late 2010. DE 78-1, Declaration of Jeremy Foti in Support of Opposition to Preliminary Injunction, dated July 25, 2016 (“Foti July Decl.”), at Page ID 3538, ¶ 9, and 3544-50; Ex. 91 (email dated 11/18/10 from Foti to Kutzner attaching a draft script for Brookstone); DE 284-8, Theisman Decl. at Page ID 7486, 7653-56 ¶ 4.w; <i>id.</i> at ¶ 4.vvvv, DE 284-8, Page ID 7489, DE 284-12, Page ID 7973-74 (attaching and</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: ADMIT - Objections to emails dated 11/18/10 and 11/30/10 (irrelevant; failure to authenticate; hearsay; no foundation the emails or document is genuine, who prepared them, whether Mr. Foti</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>authenticating email from Foti to Brookstone personnel dated 11/30/10, FTC-RAD-002-0457531 to 0457532, stating: "It is go time let's hit it full throttle."</i>)</p>	<p>sent or received them, knew about them or had anything to do with them or whether draft script was ever presented to any consumer. <i>Foti Decl., 16.d. and 18</i></p>	
<p>34. Kramer and Stein are now disbarred for running an illegal mass joinder scheme. DE 13, <i>Madden May 2016 Decl. at Page ID 745-802, Atts 33 & 34</i>; DE 16-2, <i>Kennedy Decl. at Page ID 1699-1723, Att. 4 (bar information related to Mitchell J. Stein)</i>; DE 16-2 and 16-3, <i>Kennedy Decl. at Page ID 1724-44, Att. 5 (bar information related to Philip Kramer)</i>.</p>	<p>Marshall: This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant, hearsay, misleading based on FRE 403 where no evidence Mr. Foti had any awareness or involvement of any violations by Mr. Stein or Mr. Kramer) <i>Foti Decl., para. 12.</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The documents are not hearsay for the purpose offered. Rule 403 does not bar the evidence or require a showing of Foti's knowledge of the fact to permit the evidence to be admitted. For support he cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
		the cited reference to the Foti Decl. does not address the fact at issue.
<p>35. Stein is in prison. <i>Ex. 2, DE 18 at Page ID 2251-2; DE 16-2, Kennedy Decl. at Page ID 1699-1723, Att. 4 (bar information related to Mitchell J. Stein).</i></p>	<p>Marshall: This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant, hearsay, misleading based on FRE 403 where no evidence Mr. Foti had any awareness or involvement of any violations by Mr. Stein or Mr. Kramer) <i>Foti Decl., para. 12.</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The documents are not hearsay for the purpose offered. Rule 403 does not bar the evidence or require a showing of Foti's knowledge of the fact to permit the evidence to be admitted. For support he cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
36. Later, Kramer was	Marshall: This Defendant	Undisputed as to

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>alleged to have run another mass joinder fraud with Broderick while using an alias. DE 284-14, <i>Madden July 2017 Decl. at Page ID 8126, 8366, 8374 ¶ 2.n, Att. 14.</i></p>	<p>lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant, hearsay, misleading based on FRE 403 where no evidence Mr. Foti had any awareness or involvement of any violations by Mr. Stein or Mr. Kramer) <i>Foti Decl., para. 12.</i></p>	<p>Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The documents are not hearsay for the purpose offered. Rule 403 does not bar the evidence or require a showing of Foti's knowledge of the fact to permit the evidence to be admitted. For support he cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>37. At times, Brookstone used mailers and sales scripts claiming the <i>Ronald v. Bank of America</i> lawsuit was</p>	<p>Marshall: This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Brookstone's lawsuit. <i>Ex. 88 at FTC-RAD-002-0133016 to 0133017; Ex. 73 at FTC-RAD-002-0284832</i> (mailer stating that recipients may be a plaintiff in <i>Ronald v. Bank of America</i>); DE 284-8, <i>Theisman Decl. at Page ID 7486, 7485, 7615-52</i> ¶¶ 4.v & 4.l</p>	<p>fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; no foundation the mailers or scripts are genuine, who prepared them, whether Mr. Foti ever sent or received them, knew about them or had anything to do with them or whether draft mailer or script was ever presented to any consumer. <i>Foti Decl., ¶ 16.d. and 18</i></p>	<p>issue.</p> <p>Undisputed as to Foti. The fact is relevant. The documents are authenticated as indicated in the FTC's original factual citation for this paragraph, including emails sent by or to Foti. The evidence is not hearsay as a statement of a party opponent. Aside from the emails he sent or received, it does not matter if Foti ever saw or knew of the particular pieces of evidence. The evidence in fact shows that the mailers and scripts were used. He cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.</p>
<p>38. <i>Ronald v. Bank of</i></p>	<p>Marshall: <i>This Defendant</i></p>	<p>Undisputed as to</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>America</i> was Stein's mass joinder lawsuit. Ex. 2, DE 18 at Page ID 2249-50.</p>	<p>lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - objection (hearsay)</p>	<p>Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The cited testimony, "I was approached by seasoned attorneys that were in the process of prosecuting a lawsuit called Ronald v. Bank of America," is not hearsay. The testimony is not relating conversations with non-parties, it is relating Vito Torchia's knowledge regarding the Ronald lawsuit. Furthermore, conversations with Kramer and Stein are conversations with co-conspirators.</p>
<p>39. By January 2011, Brookstone had started its mass joinder business, filing <i>Wright v. Bank of</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>America in February 2011. From that point forward, its business was focused on mass joinder litigation.</p> <p>DE 12, <i>Madden May 2016 Decl. at Page ID 620, Att. 28</i>; DE 13, <i>Madden May 2016 Decl. at Page ID 803-04, Att. 35</i>; DE 14-4, <i>Gales Decl., at Page ID 1274, Att. 17</i>; DE 284-13, <i>Theisman Decl. at Page ID 8062 ¶ 13, Att. 10, Foti Depo. at 104:6-14; Ex. 2, DE 18 at Page ID 2237, 2244-47, 2253 (Torchia State Bar testimony explaining Brookstone originally did debt settlement work and then switched to mass joinder litigation at the end of 2010)</i>; DE 186-4, <i>Torchia Decl. at Page ID 5570-71, ¶ 4.</i></p>	<p>undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY <i>Foti Decl., ¶ 13</i></p>	<p>controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>40. Brookstone then filed additional mass joinder lawsuits against other mortgage lenders, including JPMorgan Chase, Wells Fargo, Ally, Indymac, and Citibank.</p> <p>DE 12, <i>Madden May</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>2016 Decl. at Page ID 512, Att. 21, Page ID 463, Att. 14, Page ID 435, 439, Atts. 9-10, Page ID 498-99, Att. 19, Page ID 582, Att. 24.</p>	<p>Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: ADMIT</p>	<p>Undisputed as to Foti.</p>
<p>41. By January 1, 2016, courts had dismissed all of Brookstone's mass joinder lawsuits except for <i>Wright v. Bank of America</i>. DE 12, Madden May 2016 Decl. at Page ID 353, Att. 1, Page ID 361, Att. 2, Page ID 377, Att. 4, Page ID 414, 418, Att. 6, Page ID 419-20, 434, Atts. 7-8, Page ID 435, 438-439, 455, Atts. 9-11, Page ID 457, Att. 12, Page ID 463, 480, 482, Atts. 14 & 16, Page ID 489, Att. 17; Page ID 498, Att. 19, Page ID 512, 515, Att. 21, Page ID 600, 603, Att. 26; DE 13, Madden May 2016 Decl. at Page ID 726-27, 732, Att. 29.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY <i>Thurman Decl., Attachment 49, 50, 51, and 52 (Cases still pending after January 1, 2016: Abdullah Aslami vs. National Default Servicing Corporation (30-2016-00844390-CU-OR-CJC); Lawley vs. Bank of America NA (37-2016)-00011715-CU-OR-CTL); Karie Wasinack vs. Quality Loan Service Corp. (RIC 1601230); John P. Wright vs. Bank</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. He cites only evidence of additional cases filed after January 1, 2016, which does not controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>causes of action: intentional misrepresentation, negligent misrepresentation, unfair competition, and wrongful foreclosure. The first three apply to all plaintiffs, the foreclosure claim to only 90 of them. The wrongful foreclosure claim, interestingly enough, presents as pristine a common issue of law as it is possible to imagine: Its theory is that the various individual foreclosures were all unlawful because the eventual trustees who foreclosed on the loan were not the original agents designated in the loan papers. The claim thus presents a tidy, discrete question of law common to all 90 foreclosure plaintiffs.” Peterson v. Bank of America Corp., 232 Cal. App. 4th 238, 246 (Cal.App. 2014).</i></p>	

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
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With Torchia Facing Bar Difficulties, the Corporate Defendants Created Advantis and Marshall Became an Owner.

<p>44. In 2014, Vito Torchia faced a trial in the State Bar Court of California regarding ethics violations concerning Brookstone Law P.C. clients who had retained Brookstone Law P.C. for representation in mass joinder lawsuits against their lenders. DE 16, Kennedy Decl. at Page ID 1562-64, Att. 1.C</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - objection (irrelevant) <i>Foti Decl.</i>, ¶ 57 and 58</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
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<p>45. On August 6, 2014, Judge Richard A. Platel of the State Bar Court of California entered a ruling finding that Torchia had violated his ethics obligations to Brookstone clients. DE 16, Kennedy Decl. at Page ID 1562-1604, Att.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>
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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>I.C.</i></p>	<p>defendants in this action.</p> <p>Foti: DENY - objection (irrelevant) <i>Foti Decl., ¶ 57 and 58</i></p>	<p>Undisputed as to Foti. The fact is relevant. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>46. On February 13, 2015, the California Bar filed a Notice of Disciplinary Charges against Vito Torchia, Case No. 14-O-03311, alleging ethics violations arising out of Brookstone's mass joinder services. <i>DE 16</i>, <i>Kennedy Decl. at Page ID 1618-22, Att. 1.G</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - objection (irrelevant) <i>Foti Decl., ¶ 57 and 58</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>47. On May 6, 2015, the California Bar filed a Notice of Disciplinary Charges against Vito Torchia, Case Nos. 14-O-04441, 14-O-04507, 14-O-04926, 14-O-4968, 14-O-05192, alleging ethics violations arising out of Brookstone's mass joinder services.</p> <p>DE 16, <i>Kennedy Decl.</i> at <i>Page ID 1623-32</i>, <i>Att. 1.H.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - objection (irrelevant) <i>Foti Decl.</i>, ¶ 57 and 58</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>48. On May 14, 2015, the State Bar Court of California entered a default against Vito Torchia for failing to respond to ethics charges in Case Nos. 13-O-14835 and 14-O-01008, and enrolled Vito Torchia as an inactive member of the California Bar.</p> <p>DE 16, <i>Kennedy Decl.</i> at</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<i>Page ID 1633-34, Att. 1.I.</i>	Foti: DENY - objection (irrelevant) <i>Foti Decl., ¶ 57 and 58</i>	Undisputed as to Foti. The fact is relevant. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.
49. On June 3, 2015, the State Bar Court of California entered a default against Vito Torchia for failing to respond to ethics charges in Case No. 14-O-03311, and enrolled Vito Torchia as an inactive member of the California Bar. <i>DE 16, Kennedy Decl. at Page ID 1635-36, Att. 1.J.</i>	Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action. Foti: DENY - objection (irrelevant) <i>Foti Decl., ¶ 57 and 58</i>	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.
50. On July 7, 2014, the California Bar filed a	Marshall: <i>This</i> Defendant lacks the knowledge or	Undisputed as to Marshall. He does not

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Notice of Disciplinary Charges against Vito Torchia, Case Nos. 13-O-14835 and 13-O-15422, alleging ethics violations arising out of Brookstone's mass joinder services. DE 16, <i>Kennedy Decl. at Page ID 1555-61, Att. 1.B.</i></p>	<p>information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - objection (irrelevant) <i>Foti Decl., ¶ 57 and 58</i></p>	<p>offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>51. On November 12, 2015, Judge Yvette D. Roland of the State Bar Court of California entered an order of involuntary and inactive enrollment as to Vito Torchia for his failure to respond to 19 ethics charges related to Brookstone's mass joinder services. DE 16 and 16-1, <i>Kennedy Decl. at Page ID 1637-46,</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - objection (irrelevant)</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<i>Att. I.K.</i>	<i>Foti Decl., ¶ 57 and 58</i>	For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.
<p>52. On November 20, 2014, the California Bar filed a Notice of Disciplinary Charges against Vito Torchia, Case Nos. 14-O-01008, 14-O-02316, 14-O-02698, alleging ethics violations arising out of Brookstone's mass joinder services.</p> <p>DE 16, <i>Kennedy Decl. at Page ID 1608-14, Att. I.E.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - objection (irrelevant)</p> <p><i>Foti Decl., ¶ 57 and 58</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
53. Vito Torchia's disbarment became effective on May 29, 2016.	Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact	Undisputed as to Marshall. He does not offer any admissible evidence capable of

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>DE 284-14, <i>Madden July 2017 Decl. at Page ID 8125, 8259-62 ¶ 2.f, Att. 6.</i></p>	<p>undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - objection (irrelevant) <i>Foti Decl., ¶ 57 and 58</i></p>	<p>controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>54. Torchia registered Advantis Law P.C. with the California Secretary of State on September 30, 2014. DE 14, <i>Gales Decl. at Page ID 1114-15, Att. 5.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: ADMIT</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>
<p>55. Torchia registered Advantis Law Group P.C. with the California</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to</p>	<p>Undisputed as to Marshall. He does not offer any admissible</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Secretary of State on October 27, 2014. DE 14, <i>Gales Decl. at Page ID 1108-09, Att. 4.</i></p>	<p>dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: ADMIT</p>	<p>evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>
<p>56. By November of 2014, Foti and Kutzner were negotiating with Marshall for Marshall to become an owner of Advantis. <i>Ex. 30, DE 218-2, Madden April 2017 Decl. at Page ID 6055-57, Att. 15; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8286-87 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 30 at 80:16-18, 81:11-82:5); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5.</i></p>	<p>Marshall: References in this paragraph are inherently vague and ambiguous as to what is meant by 'Advantis'. Marshall did not understand until his deposition of March 20, 2017 (check date) that there was a completely separate corporate entity called Advantis Law (for whom he was never an officer/executive/owner—nor has any evidence ever been presented with a claim that he was) he knew nothing about until same deposition was held, during which deposition based upon various FTC questions it became clear at some point that there was a separate corp entity</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>called Advantis Law PC, with whom Marshall never had dealings, and whose existence Marshall was not apprised of. As for negotiations to become an owner of Advantis Law Group, yes those began in November of 2014.</p> <p>Foti: DENY - Objections (irrelevant; inadmissible opinion of law [sic] witness (FRE 701); original writing rule (FRE 1002); no foundation for basis of witness' belief or understanding where there is no evidence Mr. Foti had any ownership interest in any of the Corporate Defendants; best evidence of the identities of the principals is the Memorandum of Understanding Mr. Marshall signed with Mr. Broderick. <i>Thurman Decl. Attachment 47 (Marshall MOU (RFP-0130771, 0130782-788)</i></p>	<p>Undisputed as to Foti. The fact is relevant. Marshall's testimony is appropriate because it is "rationally based on the witness's perception" of his actions, who he was negotiating with, and the nature of his negotiations. The best evidence rule is not implicated by the fact, which does not concern the contents of a document. Foti's other objections are not on point because the fact at issue does not indicate the identity of any "principals." Foti's cited evidence does not controvert the fact at issue.</p>
57. In January 2015,	Marshall: Again this	Undisputed as to

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Kutzner emailed Marshall and Foti that “ADVANTIS LAW” needed to move forward and should leverage the existing “[Brookstone] clients” because Brookstone was a “dead hoarse” [sic] and “circl[ing] the drain.” <i>Ex. 32; Madden July 2017 Decl. at ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 32 at 93:18-94:10); DE 284-8, Theisman Decl. at Page ID 7485, 7518 ¶ 4.a.</i></p>	<p>email is not specifically referencing Advantis Law Group. Any response I would have had would have only been directed to ALG, as I did not know at that time (or anytime prior to March 20, 2017) of the Advantis Law entity. Any response I had to that email would have been to the effect of using Advantis Law Group to use as a vessel for potential clients in future joinder cases. Any emails exchanged at that time, would have been fairly vague as to how the clients would be generated. I specifically was not working with Brookstone clients. If I were intending to work exclusively or even primarily with Brookstone clients, I would have simply become a corporate officer of Brookstone, which I pointedly and intentionally did not due at that time or not time later because of liability</p>	<p>Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>and other issues with those cases.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; no foundation the emails are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl, ¶ 33</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay as a statement of a party opponent and to the extent not offered for the truth of the matter asserted.</p> <p>For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>58. In multiple email exchanges, Marshall's negotiations regarding his ownership of Advantis and other important Advantis-related matters would be between Foti, Kutzner, and sometimes James Macklin, with</p>	<p>Marshall: Though at times I did occasionally refer to 'we three' to exclude Macklin, in fact everyone knew, and I had mentioned a number of times, that Macklin was important to the Advantis Law Group idea because</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Marshall sometimes referring to "we three" to indicate himself, Foti, and Kutzner. <i>Ex. 34; Ex. 36; Ex. 38; Ex. 51; Ex. 53; DE 284-8, Theisman Decl. at Page ID 7485, 7518-32, 7536-37 ¶¶ 4.b, 4.c, 4.d, 4.g, & 4.h; DE 218-2, Madden April 2017 Decl., at Page ID 6013, 6078, 6006, 6007-08 (attaching Exs. 35, 54, 55, and 57); DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8290-91, 8293, 8302, 8304-05, 8307-08 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Exs. 34-36, 38, 51, 53-55, and 57 at 98:14-99:8, 101:19-102:18, 121:16-122:7, 148: 9-18, 150:8-12, 203:25-204:18, 210:13-211:13, 215:4-216:7, 222: 4-14, 226:24-227:11); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5.</i></p>	<p>of his expertise in analyzing and generating mortgage loan analyses and associated reports.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; original writing rule (FRE 1002); best evidence of the identities of the principals is the Memorandum of Understanding Mr. Marshall signed with Mr. Broderick. No foundation the email is genuine, who prepared it, whether Mr. Foti ever received it, knew about it or had anything to do with it.) <i>Thurman Decl. Attachment 47 (Marshall MOU (RFP-0130771, 0130782-788))</i></p>	<p>material fact on summary judgment.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact at issue.</p> <p>Foti's cited evidence does not controvert the fact at issue.</p>
<p>59. Marshall testified that during his negotiations for</p>	<p>Marshall: If I actually called them principals of Advantis (I am not sure</p>	<p>Undisputed as to Marshall. He does not offer any admissible</p>

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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
<p>ownership of Advantis, he understood Foti and Kutzner to be principals for Advantis. <i>DE 218-2, March 20, 2017 Marshall Depo. at Page ID 6063-65, at 48:17-21, 80:2-8.</i></p>	<p>that I did—the transcript may use that term I do not know), I did not mean that in the since of them being co-executives, etc. They were never listed as executives. So here we dispute. If I used the term ‘principal’ it was not meant to convey that they were co-executives or owners. Clearly they were never formally or legally either, and no document was ever created or signed indicating such executive or ownership capacity.</p> <p>Foti: DENY - Objections (irrelevant; inadmissible opinion of law witness (FRE 701); original writing rule (FRE 1002); no foundation for basis of witness' belief or understanding where there is no evidence Mr. Foti had any ownership interest in any of the Corporate Defendants; best evidence of the identities of the principals is the Memorandum of Understanding Mr.</p>	<p>evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti. The fact is relevant. Marshall’s testimony is appropriate because it is “rationally based on the witness’s perception” of his actions, who he was negotiating with, and the nature of his negotiations. The best evidence rule is not implicated by the fact. Marshall, as a participant, can testify to who he understood he was negotiating with and the authority he thought they</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	Marshall signed with Mr. Broderick. <i>Thurman Decl. Attachment 47 (Marshall MOU (RFP-0130771, 0130782-788))</i>	had in the negotiations. Foti's cited evidence does not controvert the fact at issue.
60. On February 25, 2015, Marshall agreed to the terms of his ownership of Advantis. <i>Ex. 34, DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8290 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 34 at 98:14-99:8); DE 284-8, Theisman Decl. at Page ID 7485, 7519-26 ¶ 4.b.</i>	Marshall: I signed something to that effect on that date yes, as to only Advantis Law Group PC. This claim is disputable as it does not identify whether Advantis Law Group or Advantis Law is being referenced. Foti: DENY - Objections (Irrelevant, failure to authenticate, hearsay, original writing rule (FRE 1002) (plaintiff offers an unsigned copy). <i>Thurman Decl. Attachment 47 (Marshall MOU (RFP-0130771, 0130782-788))</i>	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The best evidence rule is not implicated by the fact. The cited evidence does not controvert the fact at issue.
61. On February 27, 2015, Marshall formally signed the Advantis Law	Marshall: I signed something to that effect on that date yes.	Undisputed as to Marshall. He does not offer any admissible

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Group shareholder agreement. DE 41-6 at Page ID 2746-52; DE 284-4, <i>Chang Decl.</i> at Page ID 7249 ¶ 4.ll.</p>	<p>Foti: ADMIT <i>Thurman Decl. Attachment 47 (Marshall MOU (RFP-0130771, 0130782-788))</i></p>	<p>evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>
<p>62. On February 27, 2015, Broderick submitted new documents to the California Secretary of State, identifying himself and Marshall as Advantis Law Group's officers. DE 14, <i>Gales Decl.</i> at Page ID 1110, Att. 4.</p>	<p>Marshall: True. Foti: ADMIT</p>	<p>Undisputed as to both Marshall and Foti.</p>
<p>63. On March 19, 2015, Marshall sent an email to Foti including the following statement: "The paperwork situation is absurd, to put the matter succinctly. I will deal with it. You legally represent that Advantis Law Group is a group of</p>	<p>Marshall: Undisputed. Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; no foundation the email is genuine, who prepared it, whether Mr. Foti ever received it, knew about it or had anything to do with</p>	<p>Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>attorneys, yet I am the only attorney moving forward with papers, etc. Maybe you did the same thing with Brookstone (via Vito), and got away with it. News Flash: I am not Vito, which is good news all the way around, for you, for me, for the future prospects of Advantis.”</p> <p><i>Ex. 37, DE 218-2, Madden April 2017 Decl. at Page ID 6053, Att. 14; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8295 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 37 at 129:11-130:10); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5.</i></p>	<p>it.)</p>	<p>not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>64. Brookstone and Advantis shared office space at 18400 Von Karman Ave., Suite 1000, Irvine, CA.</p> <p><i>DE 13-1, Madden Decl. at Page ID 833-344; DE 14, Gales Decl. at Page ID 1110, 1116; DE 17, Ayoub Decl. at Page ID</i></p>	<p>Marshall: No response</p> <p>Foti: ADMIT</p>	<p>Undisputed as to both Marshall and Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1942, 1944, ¶¶ 6, 15; DE 186-3, Tarkowski Decl. at Page ID 5356-58, ¶¶ 4-6; DE 41-4 at Page ID 2596; DE 284-4, Chang Decl. at Page ID 7248 ¶ 4.q; DE 284-14, Madden July 2017 Decl. at Page ID 8126, 8416 ¶ 3, Att. 15, Marshall's First RFAs, RFA 42 admitted pursuant to FRCP 36(a)(3).</p>		
<p>65. Brookstone and Advantis shared office space at 18831 Von Karman Ave., Suite 400, Irvine, CA. DE 13-2, Madden May 2016 Decl. at Page ID 857, 860, Atts. 42-43; DE 14, Gales Decl, at Page ID 1108, 1114, Atts. 4-5; Madden July 2017 Decl. at ¶ 3, Att. 15, Marshall's First RFAs, RFA 39 admitted pursuant to FRCP 36(a)(3).</p>	<p>Marshall: No response Foti: ADMIT</p>	<p>Undisputed as to both Marshall and Foti.</p>
<p>66. Brookstone and Advantis shared office space at 6 Hutton Centre, Suite 1000, Santa Ana, CA. DE 13-2 at Page ID 886,</p>	<p>Marshall: No response Foti: ADMIT</p>	<p>Undisputed as to both Marshall and Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Madden May 2016 Decl. Att. 46; DE 17 at Page ID 1942, 1944, Ayoub Dec. ¶¶ 6, 15; DE 186-3 at Page ID 5356, Tarkowski Dec. ¶ 5; DE 41-4 at Page ID 2607; DE 284-4, Chang Decl. at Page ID 7249 ¶ 4.r; DE 284-14, Madden July 2017 Decl. at Page ID 8126, 8417 ¶ 3, Att. 15, Marshall's First RFAs, RFA 45 admitted pursuant to FRCP 36(a)(3).</i></p>		
<p>67. Advantis Law Group, P.C. signed a lease for the office space at 6 Hutton Centre, Suite 1000, Santa Ana, CA for the period beginning December 1, 2015 and ending on August 31, 2017. DE 284-4, Chang Decl. at Page ID 7252-64 ¶ 5, Att. 1.</p>	<p>Marshall: No response Foti: ADMIT</p>	<p>Undisputed as to both Marshall and Foti.</p>
<p>68. Advantis began marketing for Advantis clients by at least June 2015. DE 284-8, Theisman Decl. at Page ID 7488, DE 284-11, DE 284-12,</p>	<p>Marshall: No response Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the email are genuine, who prepared</p>	<p>Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Page ID 7892-7895 ¶ 4.cccc.</p>	<p>them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>69. Anthony Stout was soliciting clients for Advantis by at least June 2015. DE 284-8, <i>Theisman Decl. at Page ID 7488</i>, DE 284-11, DE 284-12, Page ID 7892-7895 ¶ 4.cccc.</p>	<p>Marshall: No response Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the email are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the</p>

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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
<p>70. Marshall understood that clients resulting from Advantis marketing were Advantis clients, including stating: “[A]ny Plaintiff’s lawsuit will go under Advantis for sure.” DE 284-8, <i>Theisman Decl. at Page ID 7488</i>, DE 284-11, DE 284-12, <i>Page ID 7892-7895 ¶ 4.cccc.</i></p>	<p>Marshall: I understood no such thing, and do not recall this issue coming up at the deposition—though I guess it did. Clearly if I did make such a statement via email or otherwise, I would have understood that issue to be restricted to Advantis Law Group. Again, FTC here is purposely conflating Advantis Law Group with Advantis Law since they know the vast majority of any marketing docs they possess and they have shoved into their pleadings referenced Advantis Law, and even to this day, I don’t believe there is a single sample referencing Advantis Law Group by itself. In other words, probably 95% of ‘marketing’ docs they have a la Advantis reference AL, not ALG. Moreover, even where ALG is referenced in their marketing material, usually it is a logo only—and the rest refers to AL,</p>	<p>fact at issue. Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>not ALG—I don't believe a single document marketing shows ONLY ALG. And I personally never signed ANY marketing doc, and anything that went out under my name I did not review or even know about specifically.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; mischaracterizes terms of a purported email by Mr. Foti, which asks a question. No foundation the email are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>71. Marshall understood that an "Advantis referral" could come from more than one</p>	<p>Marshall: I never had any understanding other than the following: Wherever the referral came from,</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 “legal firm name.” 2 <u>DE 284-8</u>, <i>Theisman</i> 3 <i>Decl. at Page ID 7488</i>, 4 <u>DE 284-11</u>, <u>DE 284-12</u>, 5 <i>Page ID 7892-7895 ¶</i> 6 <i>4.cccc.</i></p>	<p>7 the client would have to 8 be personally vetted as an 9 Advantis Law Group 10 client. As I have 11 maintained many times, 12 not a single client to my 13 knowledge ever became 14 an ALG foreclosure client 15 (and none became joinder 16 clients), other than Jason 17 Le the one individual 18 Advantis lawsuit I had.</p> <p>19 20 21 22 23 24 25 26 27 28</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the email are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>controversing the fact at issue, including his self- serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>72. Foti stated that “Charles is Advantis so</p>	<p>Marshall: No response</p>	<p>Undisputed as to Marshall.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>ANY clients taken in are under the Advantis firm!" and that clients coming from the marketing "should only know Advantis." DE 284-8, <i>Theisman Decl. at Page ID 7488</i>, DE 284-11, DE 284-12, <i>Page ID 7892-7895 ¶ 4.cccc.</i></p>	<p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the email are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>73. Marshall directed Anthony Stout on setting the Advantis retainer fees. <i>Ex. 43</i>; , DE 284-14, <i>Madden July 2017 Decl. at 1051Page ID 8297 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 43 at 172:7-21)</i>; DE 284-8, <i>Theisman Decl. at Page ID 7485, 7535 ¶ 4.f.</i></p>	<p>Marshall: There were a number of persons (including Stout) involved with discussing what Advantis Law Group retainer fees would be. That issue was always a work-in-progress, with no definitive definition to the fees because we never reached a point where ALG foreclosure clients were being actually brought on board—again</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>with the exception of Jason Le. I never 'directed' as in commanded anything to anyone; lots of discussions and hypothetical suggestions.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the email are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>74. Tarkowski was hired by Advantis Law Group. DE 186-3, <i>Tarkowski Decl. at Page ID 5356</i>, ¶¶ 4-5.</p>	<p>Marshall: No response</p> <p>Foti: DENY <i>Thurman Decl., Attachment 68</i></p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The cited evidence does not controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
75. Tarkowski performed work for both Brookstone and Advantis. DE 186-3 , Tarkowski Decl. at Page ID 5356-57, ¶¶ 5-6.	Marshall: No response Foti: ADMIT	Undisputed as to both Marshall and Foti.
76. On his financial statement, Tarkowski identifies simultaneous employment by both Brookstone and Advantis. DE 42 at Page ID 2771.	Marshall: No response Foti: ADMIT	Undisputed as to both Marshall and Foti.
77. A phone directory found on-site for the Corporate Defendants identified the company as both Brookstone and Advantis, and included both Brookstone and Advantis email addresses for employees. DE 41-5 at Page ID 2639; DE 284-4 , Chang Decl. at Page ID 7249 ¶ 4.u.	Marshall: No response Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the document is genuine, who prepared it, whether Mr. Foti ever received, knew about or had anything to do with it.) Foti Decl, ¶ 30	Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Foti cites no evidence to controvert the fact at issue. He cites only his self-serving declaration, which cannot controvert a fact on summary judgment.
78. Employees had phone lines and emails for	Marshall: No response	Undisputed as to both Marshall and Foti.

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 both Advantis and 2 Brookstone, and the same 3 employees would make 4 and receive calls for both 5 entities. 6 DE 41-5 at Page ID 7 2639; DE 284-4, Chang 8 Decl. at Page ID 7249 ¶ 9 4.u; DE 17, Ayoub Decl. 10 at Page ID 1944, ¶ 15; 11 DE 284-8, Theisman 12 Decl. at Page ID 7487, 13 DE 284-11, Page ID 7834 14 ¶ 4.iii; DE 284-14, 15 Madden July 2017 Decl. 16 at Page ID 8125, 8417 ¶ 17 3, Att. 15, Marshall's First RFAs, RFA 46 admitted pursuant to FRCP 36(a)(3).</p>	<p>Foti: ADMIT? [sic]</p>	
<p>18 79. The Receiver found 19 numerous Advantis 20 marketing materials at the 21 Brookstone/Advantis 22 office on June 2, 2016, 23 including an Advantis 24 mailer urging consumers 25 to call, stating "[i]f you are 26 behind on your payments 27 act now to preserve your 28 legal rights because the law is on your side." DE 41-2 at Page ID 2511, 2515, 2523-27; DE 284-4,</p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The documents are authenticated as indicated in the FTC's original factual citation, including emails sent by or to Foti. The evidence is not hearsay as a statement of a party opponent. That the marketing materials were found on-site in fact</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Chang Decl. at Page ID 7248 ¶¶ 4.b, 4.d, 4.f.</i></p>	<p><i>Foti Decl., ¶ 16.d. and 18</i></p>	<p>makes it more likely that the marketing materials were used. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>80. The Advantis website featured both Charles Marshall and Geoffrey Broderick as “Directors.” <u>DE 14-4</u>, <i>Gales Decl. at Page ID 1374, Att. 18; Ex. 60; DE 284-8, <i>Theisman Decl. at Page ID 7485, 7538-39 ¶ 4.i; DE 218-2, <i>Marshall Depo. at Page ID 6073, Testimony 243:11-20; DE 284-14, <i>Madden July 2017 Decl. at Page ID 8126, 8414 ¶ 3, Att. 15, Marshall’s First RFAs, RFAs 8-9 admitted pursuant to FRCP 36(a)(3).</i></i></i></i></p>	<p>Marshall: At one time I believe yes I was listed as a director—though again, I saw that as only re Advantis Law Group—not knowing about that Advantis Law or Advantis otherwise named was different corporate entity.</p> <p>Foti: ADMIT?[sic]</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>
<p>81. Both the Advantis and Brookstone websites advertised the <i>Wright v.</i></p>	<p>Marshall: No response</p> <p>Foti: DENY - Objection</p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 <i>Bank of America</i> case as 2 its own using identical 3 language. 4 DE 14-4, <i>Gales Decl.</i> at 5 Page ID 1275, 1367, Atts. 6 17-18; DE 16-4, <i>Kennedy</i> 7 <i>Decl.</i> at Page ID 8 1821,1854, Atts. 8-9; DE 9 284-14, <i>Madden July</i> 10 <i>2017 Decl.</i> at Page ID 11 8126, 8414 ¶ 3, Att. 15, 12 <i>Marshall's First RFAs</i>, 13 <i>RFA 11 admitted</i> pursuant to <i>FRCP</i> 36(a)(3).</p>	<p>(Irrelevant as to Mr. Foti, who had no involvement with the Brookstone and Advantis websites) <i>Foti Decl.</i>, ¶ 29</p>	<p>The fact is relevant. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>14 82. The Receiver found 15 both Brookstone and 16 Advantis retainer agreements on-site. 17 DE 41-3 at Page ID 18 2578-84; DE 41-4 at 19 Page ID 2586-618; DE 20 284-4, <i>Chang Decl.</i> at 21 Page ID 7248-49 ¶¶ 4.o, 4.p, 4.q, 4.r.</p>	<p>Marshall: No response Foti: ADMIT</p>	<p>Undisputed as to both Marshall and Foti.</p>
<p>22 83. The Receiver found 23 a joint retainer agreement, 24 where a client retained both Brookstone and 25 Advantis. 26 DE 41-4 at Page ID 27 2585-94; DE 284-4, 28 <i>Chang Decl.</i> at Page ID 7248 ¶ 4.p.</p>	<p>Marshall: No response Foti: ADMIT</p>	<p>Undisputed as to both Marshall and Foti.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>84. The Advantis website used the same language as the Brookstone website to describe its real estate services. DE 14-4 at Page ID 1282, Gales Decl. Att. 17; DE 284-14, Madden July 2017 Decl. at Page ID 8126, 8414 ¶ 3, Att. 15, Marshall's First RFAs, RFA 12 admitted pursuant to FRCP 36(a)(3).</p>	<p>Marshall: No response</p> <p>Foti: DENY - Objection (Irrelevant as to Mr. Foti, who had no involvement with the Brookstone and Advantis websites) Foti Decl., ¶ 29</p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. For support, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>85. The Receiver found sales scripts for Brookstone and Advantis that were nearly identical. DE 41-2 at Page ID 2517-27; DE 284-4, Chang Decl. at Page ID 7248 ¶¶ 4.e, 4.f; DE 284-13, Theisman Decl. at Page ID 8078 ¶ 15, Att. 12, Foti Depo. at 183:4-9, (describing the two scripts as "pretty close.").</p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) Foti Decl., ¶ 16.d. and 18; <i>In addition, the documents speak for themselves. No promises</i></p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. For support Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5,</i></p>	<p>does not address the fact at issue. The other evidence he cites also does not address the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i>	
86. "Main Floor" scripts for the intake personnel at 6 Hutton Centre included both Brookstone and Advantis scripts, which make many of the same misrepresentations. DE 41-2 at Page ID 2517-19, 2523-25; DE 284-4 , <i>Chang Decl. at Page ID 7248 ¶¶ 4.e, 4.f.</i>	Marshall: No response Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)	Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. For support Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue. The other evidence he cites also does not address the fact at issue.
87. Both Main Floor scripts tell the intake staff to tell callers: "[Brookstone Law/Advantis Law] is a nationwide law firm."	Marshall: No response Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents	Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>“[Brookstone Law/Advantis Law] has teamed up with some of the top trial lawyers in the country. These attorneys have filed multi-plaintiff litigation cases against some of the country’s largest banks.” DE 41-2 at Page ID 2517, 2523; DE 284-4, Chang Decl. at Page ID 7248 ¶¶ 4.e, 4.f.</p>	<p>are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>Foti Decl., ¶ 16.d. and 18; In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID</i></p>	<p>established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. For support Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue. The other evidence he cites also does not address the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</p>	
<p>88. Both Main Floor Scripts tell the intake staff to direct callers to their respective websites, www.advantislaw.com and www.brookstonelaw.com, and further tells the caller in identical language: "The home page of our website features many of the different services that [Advantis/Brookstone] has to offer and displays some of the Mass Tort complaints that we have filed to date;</p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p><i>Foti Decl., ¶ 16.d. and 18; In addition, the documents speak for</i></p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. For support Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p> <p>“[Brookstone Law/Advantis Law] is comprised of legal professionals and attorneys who specialize in Real Estate and financial transactions. Already these lawyers have filed multiple mass tort actions against Bank of America, JP Morgan Chase, Citibank, GMAC, Aurora, Wells Fargo, and numerous individual complaints;”</p> <p>“[on] our website you will see a list of some important case results that we have achieved as of today.</p> <p>[Brookstone/Advantis] is a Pioneer in Mass Tort litigation and all of our landmark cases are still going through the court system. We have had some phenomenal results in our individual cases and have been able to save hundreds of homes and have achieved many confidential settlements.”</p> <p>“What we need to do next is analyze your situation</p>	<p><i>themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at</i></p>	<p>reference to the Foti Decl. does not address the fact at issue. The other evidence he cites also does not address the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>to see if it meets the parameters of our cases. Before we can do this I need to take your file to our Legal Department where they will either accept or deny your case for the next stage of the process.” <u>DE 41-2</u> at Page ID 2519, 2525; <u>DE 284-4</u>, Chang Decl. at Page ID 7248 ¶¶ 4.e, 4.f.</p>	<p><i>Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>89. Foti coordinated substituting Advantis mailers for Brookstone mailers, directing technical support to convert a Brookstone mailer to an Advantis mailer. <u>DE 284-8</u>, Page ID 7488, <u>DE 284-12</u>, Page ID 7918-22, <i>Theisman Decl.</i> ¶¶ 4.llll and 4.mmmm.</p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>Foti Decl., ¶ 16.d. and 18; In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no</i></p>	<p>Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. For support Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue. The other evidence he cites also</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118;</i></p>	<p>does not address the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>DE 17-5 Navarro Decl. at Page ID 2123-24).</i>	
<p>90. Foti coordinated sending out Advantis Law Group marketing mailers beginning in at least August 2015. DE 284-8, Page ID 7488, DE 284-12, Page ID 7915-17, 7899-7902, <i>Theisman Decl.</i> ¶¶ 4.kkkk and 4.ffff.</p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p><i>Foti Decl.</i>, ¶ 16.d. and 18; <i>In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046;</i></p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. For support Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue. The other evidence he cites also does not address the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>91. The costs for Advantis mailers were billed to Brookstone. DE 284-8, Page ID 7488, DE 284-12, Page ID 7908-13, <i>Theisman Decl.</i> ¶ 4.iii.</p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about</p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	or had anything to do with them and whether any of them were ever used in any presentations to consumers.)	the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.

a. The Corporate Defendants Solicited Consumers Through Mass Mailers Followed By Phone Calls and In-Person Meetings.

92. The Corporate Defendants would contact consumers through mailed advertisements. <i>DE 17, Declaration of Jesse Chapman ("Chapman Decl.") at Page ID 1945, ¶ 2; DE 17, Declaration of Corina Durrett ("C. Durrett Decl.") at Page ID 1965-66, ¶ 3; DE 17-1, Declaration of Teresa Irannejad ("Irannejad Decl.") at Page ID 1976, ¶¶ 3-7; DE 17-2, Declaration of Ronald Kolodziej ("Kolodziej Decl.") at Page 1998 at ¶ 3; DE 17-4, Declaration</i>	Marshall: No response Foti: ADMIT - Objections (irrelevant; failure to authenticate; hearsay. No foundation the emails and any accompanying documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether such documents were ever used in any presentations to consumers.)	Undisputed as to both Marshall and Foti.
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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 of Richard Leonido 2 ("Leonido Decl.") at 3 Page 2076 , ¶ 2; DE 17-4, 4 Declaration of Michael 5 Nava ("Nava Decl.") at 6 Page ID 2094, ¶ 3; DE 7 17-5, Declaration of 8 Raymond Navarro 9 ("Navarro Decl.") at 10 Page ID 2107, ¶ 3; DE 11 17-6, Declaration of 12 Mario Rios ("Rios 13 Decl.") at Page ID 2131, 14 ¶ 3; DE 17-7, Declaration 15 of Malu Lujan ("Lujan 16 Decl.") at Page ID 2168, 17 ¶ 3; DE 41-2 at Page ID 18 2507-08; DE 41-2 at 19 Page ID 2511; DE 20 284-4, Chang Decl. at 21 Page ID 7248 ¶ 4 22 (authenticating 23 documents filed with DE 24 41); DE 284-13, 25 <i>Theisman Decl.</i> at Page 26 ID 8062 ¶ 15, Att. 12, 27 <i>Foti Depo.</i> at 104:15- 28 105:21.</p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No</p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Page ID 1945, ¶ 3; DE 17, C. Durrett Decl. at Page ID 1966 at ¶ 8; DE 17-1, Irannejad Decl. at Page ID 1976, ¶ 4; DE 17-2, Kolodziej Decl. at Page ID 1998, ¶ 3; DE 17-4, Leonido Decl. at Page ID 2076, ¶ 4; DE 17-7, Lujan Decl. at Page ID 2168, ¶ 4; DE 17-4, Nava Decl. at Page ID 2094, ¶ 4; DE 17-5, Navarro Decl. at Page ID 2107, ¶ 4; DE 17-6, Rios Decl. at Page ID 2131, ¶ 5; DE 41-2 at Page ID 2517-2527 (inbound telemarketing scripts for Corporate Defendants); DE 284-4, Chang Decl. at Page ID 7248 ¶¶ 4.e, 4.f.</p>	<p>foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p>	<p>and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>94. After calling the Corporate Defendants, most consumers would have an in person sales meeting with a "Banking Specialist," a non-attorney sales representative. DE 41-2 at Page ID 2520, 2526 (scripts showing meetings are being set up with Banking Specialists);</p>	<p>Marshall: No response Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in</p>	<p>Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent or a</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>DE 41-5 at Page ID 2640-41 (office directories identifying Banking Specialists Anthony Stout, Dwight Watanabe, Robert Geist, and Richard Taylor); DE 284-4, Chang Decl. at Page ID 7248-49 ¶¶ 4.e, 4.f, & 4.u; DE 17, Chapman Decl. at Page ID 1945-47, ¶¶ 3 & 10 (met with Anthony Stout and Dwight Watanabe but not with any attorney); DE 17-1, Irannejad Decl. at Page ID 1978-79, ¶¶ 10-14 (met with Anthony Stout); DE 17, C. Durrett Decl. at Page ID 1966-68, ¶¶ 8-13 (met with Dwight Watanabe); DE 17-2, Kolodziej Decl. at Page ID 1998-2000, ¶¶ 3-10 (met with Robert Geist, an attorney only took part in a portion of one meeting); Ex. 86 at FTC-RAD-001-0171366 to 0171369 (“CLR Workflow” explaining that the CLR sets up meeting with Banking Specialist); DE 284-8, Theisman</p>	<p>any presentations to consumers.) <i>Thurman Decl.</i>, Attachment 53; <i>Torchia Decl.</i>, ¶ 14.</p>	<p>sworn declaration. Foti’s cited evidence does not controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<i>Declaration at Page ID 7485, 7592-7608 ¶ 4.t.</i>		
<p>95. Brookstone received ethics advice stating: "We cannot too strongly emphasize the riskiness of using non-lawyers as a material part of any law firm's communications with clients and prospective clients."</p> <p>DE 284-8, Page ID 7487, DE 284-10, DE 284-11, Page ID 7803-7822, <i>Theisman Decl. at ¶ 4.hhh.</i></p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims in this action.)</p> <p><i>Thurman Decl., Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576)</i></p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay to the extent not offered for the truth of the matter asserted. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See Madden 8-14-17 Decl. ¶ 5.</p> <p>Foti's cited evidence does not controvert the fact at issue.</p>
<p>96. Brookstone received ethics advice that</p>	<p>Marshall: No response</p>	<p>Undisputed as to Marshall.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>its Banking Specialists were likely “runners and cappers” in violation of the law: “As to the banking specialists, given that the attorney-client relationship typically is formalized at this initial office visit and that an attorney is not present during a significant part of this meeting or at all, arguably the banking specialist is acting for the ‘procurement of business for’ Brookstone in violation of Cal. Bus. & Prof. Code Section 6152.” DE 284-8, Page ID 7487, DE 284-10, DE 284-11, Page ID 7803-7822, <i>Theisman Decl. at ¶ 4.hhh.</i></p>	<p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims in this action.) <i>Thurman Decl., Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576)</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay to the extent not offered for the truth of the matter asserted. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See Madden 8-14-17 Decl. ¶ 5. Foti's cited evidence does not controvert the fact at issue.</p>
<p>97. Torchia testified in 2014 that he knew it would be “highly illegal” to be “splitting fees with non-attorneys,” and stating “I didn’t want to</p>	<p>Marshall: No response Foti: ADMIT</p>	<p>Undisputed as to both Marshall and Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>be one of these 'shops,' quote/unquote." <i>Ex. 2, DE 18, Torchia Transcript at Page ID 2268-69.</i></p>		
<p>98. Brookstone received ethics advice regarding possible unauthorized practice of law by its Banking Specialists: "We believe the risk is great that the Brookstone Banking specialists are engaged in UPL. We understand that they have no script for dealing with clients, which heightens the risk. . . The fact that a lawyer might be in the room with a banking specialist and client or potential client does not immunize the banking specialist from UPL issues." <i>DE 284-8, Page ID 7487, DE 284-10, DE 284-11, Page ID 7803-7822, Theisman Decl. at ¶ 4.hhh.</i></p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims in this action.) <i>Thurman Decl., Attachment 54 (Vito clawback request - FTC-</i></p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay to the extent not offered for the truth of the matter asserted. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See Madden 8-14-17 Decl. ¶ 5. Foti's cited evidence does not controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>99. Mailers sent to consumers state: “[Y]ou may be a potential plaintiff against your lender.”</p> <p>DE 17-6, <i>Rios Decl. at Page ID 2135</i>; DE 17-5, <i>Navarro Decl. at Page ID 2128-29</i>; DE 17, <i>Chapman Decl. at Page ID 1948</i>; DE 17, <i>C. Durrett Decl. at Page ID 1972</i>; <i>Ex. 73 at FTC-RAD-002-0284832</i> (“RECORDS INDICATE YOU ARE A POTENTIAL PLAINTIFF IN THE FOLLOWING CASES: <u>Ronald vs. Countrywide & Wright v. Bank of America</u>”); <i>Ex. 76 at FTC-RAD-002-0373032</i> (“You have been identified as a potential plaintiff due to 1 or more of the following reasons. . .”); <i>Ex. 77 at FTC-RAD-002-0373017</i> (“You have been identified as a potential plaintiff. . .”); DE 284-8, <i>Theisman Decl. at Page ID 7485</i>, 7571-74, 7579-85 ¶¶ 4.1,</p>	<p><i>RFP-0149575-0149576)</i></p> <p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p><i>No evidence Exh. 73, 76 and 77, FTC-RAD-001-0183728 to 0183731, FTC-RAD-001-0065189 to 0065190 or RAD-001-0064644 to 0064646 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page</i></p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>4.o. & 4.p; <i>id.</i> DE 284-8 at Page ID 7487, DE 284-11, Page ID 7843-46 ¶ 4.000 , (authenticating and attaching FTC-RAD-001-0183728 to 0183731, claiming “YOU ARE A POTENTIAL PLAINTIFF AGAINST YOUR LENDER”); <i>id.</i> DE 284-8, at Page ID 7486, DE 284-10, at Page ID 7757-58 ¶ 4.ss (authenticating and attaching FTC-RAD-001-0065189 to 0065190, stating “Our records indicate that you may be a potential plaintiff against your lender.”); <i>id.</i> DE 284-8, Page ID 7486, DE 284-10, 7754-56 at ¶ 4.rr (attaching and authenticating FTC-RAD-001-0064644 to 0064646, at FTC-RAD-001-0064645 stating “Our records indicate that you may be a potential plaintiff against your lender.”).</p>	<p>ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</p>	
<p>100. Mailers sent to consumers state that mass joinder litigation is a way to “void your note(s),</p>	<p>Marshall: No response Foti: DENY - Objections (irrelevant; failure to</p>	<p>Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. The</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>and/or to award you relief and monetary damages.” DE 17-6, <i>Rios Decl. at Page ID 2135</i>; DE 17-5, <i>Navarro Decl. at Page ID 2128-29</i>; DE 17, <i>Chapman Decl. at Page ID 1948</i>; DE 17, <i>C. Durrett Decl. at Page ID 1972</i>; <i>Ex. 73 at FTC-RAD-002-0284832 (“void your note(s), to give you your home free and clear, and/or to award you relief and monetary damages”)</i>; DE 284-8, <i>Theisman Decl. at Page ID 7485, 7571-74 ¶ 4.1 (authenticating and attaching Ex. 73)</i>; <i>id.</i> DE 284-8, <i>at Page ID 7487</i>, DE 284-11, <i>at Page ID 7843-46 ¶ 4.000, (authenticating and attaching FTC-RAD-001-0183728 to 0183731, at FTC-RAD-001-0183729 claiming “void your note(s), to give you your home free and clear, and/or to award you relief and monetary damages.”)</i>; <i>id.</i> DE 284-8, <i>at Page ID 7486</i>, DE</p>	<p>authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence Exh. 73, 76 and 77, FTC-RAD-001-0183728 to 0183731, FTC-RAD-001-0065189 to 0065190 or RAD-001-0064644 to 0064646 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046;</i></p>	<p>document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>284-10, at Page ID 7757-58 ¶ 4.ss, (authenticating and attaching FTC-RAD-001-0065189 to 0065190, stating “void your note(s), to give you your home free and clear, and/or to award you relief and monetary damages.”); <i>id</i> DE 284-8, at Page ID 7486, DE 284-10, at 7754-56 ¶ 4.rr (attaching and authenticating FTC-RAD-001-0064644 to 0064646, stating “void your note(s), to give you your home free and clear, and/or to award you relief and monetary damages.”).</p>	<p><i>DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>101. Mailers sent to consumers state: “[O]ur team of experienced lawyers offers you a superior alternative for recovery.” DE 17-6, <i>Rios Decl. at Page ID 2135</i>; DE 17-5, <i>Navarro Decl. at Page ID</i></p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about</p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>2128-29; DE 17, <i>Chapman Decl. at Page ID 1948</i>; DE 17, C. <i>Durrett Decl. at Page ID 1972</i>; DE 284-8, Page ID 7486, DE 284-10, Page ID 7757-58, <i>Theisman Decl. at ¶ 4.ss; id. DE 284-8</i>, at Page ID 7486, DE 284-10, at 7754-56 ¶ 4.rr. See also Ex. 79 at FTC-RAD-001-0088987 (“BROOKSTONE LAW, P.C.: Headquartered in Newport Beach, Calif., and with offices in Los Angeles, Calif., and Ft. Lauderdale, Fla., Brookstone Law, PC is a law firm comprised of attorneys with experience and success in business, corporate and personal finance, employment, entertainment and media, art and museum, intellectual property and real estate law. The firm has a network of more than 40 affiliate attorneys nationwide and employs highly trained specialists, paralegals, paraprofessionals and</p>	<p>or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence Exh. 73, 76 and 77, FTC-RAD-001-0183728 to 0183731, FTC-RAD-001-0065189 to 0065190 or RAD-001-0064644 to 0064646 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-</i></p>	<p>the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20</p> <p><i>administrative staff dedicated to serving clients.”); Ex. 73 at FTC-RAD-002-0284832 (“Our team of Lawyers specializes in Lender fraud and we are notifying you to discuss settlement arrangements. The attorneys are at the top firms in the nation and have represented hundreds of homeowners with these causes. Prior settlements with these Banks have been successful which have included Cash Settlement and properties rewarded Free and Clear homes.”); DE 284-8, Theisman Decl. at Page ID 7485, 7587-89, 7571-74 ¶¶ 4.r & 4.l.</i></p>	<p><i>1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>21 22 23 24 25 26 27 28</p> <p>102. Mailers sent to consumers state: “It may be necessary to litigate your claims against your lender to get the help you need and our lawyers know how to do so.” DE 17-6, Rios Decl. at Page ID 2136; DE 17-5, Navarro Decl. at Page ID</p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with</p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>2128; DE 17-6, Navarro Decl. at Page ID 2130; DE 17, Chapman Decl. at Page ID 1948; DE 284-8, at Page ID 7487, DE 284-11, at Page ID 7843-46 Theisman Decl. ¶ 4.000, (authenticating and attaching FTC-RAD-001-0183728 to 0183731, at FTC-RAD-001-0183729 claiming “Our team of lawyers specialize in lender fraud and related claims. We are notifying you to discuss your potential involvement in our team’s efforts. Our attorneys have represented hundreds of homeowners. Prior settlements with banks have included Cash Settlement and properties retained Free and Clear. However, a settlement is not always available. It may be necessary to litigate to seek a better result and our lawyers know how to do so.”); <i>id.</i> DE 284-8, at Page ID 7486, DE 284-10, at Page ID 7757-58 ¶ 4.ss</p>	<p>them and whether any of them were ever used in any presentations to consumers.) <i>No evidence Exh. 73, 76 and 77, FTC-RAD-001-0183728 to 0183731, FTC-RAD-001-0065189 to 0065190 or RAD-001-0064644 to 0064646 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at</i></p>	<p>not hearsay because it is an opposing party’s statement. Finding documents on a receivership computer from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes it more likely it was used. Foti’s cited evidence does not address and/or controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
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<p>(attaching and authenticating FTC-RAD-001-0065189 to 0065190, at FTC-RAD-001-0065190 claiming “Our team of lawyers, coordinated by Brookstone Law, P.C., specialize in lender fraud and related claims. We are notifying you to discuss your potential involvement in our team’s efforts. Our attorneys have represented hundreds of homeowners. Prior settlements with banks have included cash settlement and properties retained free and clear. However, a settlement is not always available. It may be necessary to litigate to seek a better result and our lawyers know how to do so.”); <i>id.</i> DE 284-8, at Page ID 7486, DE 284-10, at 7754-56 ¶ 4.rr (authenticating and attaching FTC-RAD-001-0064644 to 0064646, at FTC-RAD-001-0064645 claiming “Our</p>	<p>Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</p>	
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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
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<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14</p> <p><i>team of lawyers, coordinated by Brookstone Law, P.C., specializes in lender fraud and related claims. We are notifying you to discuss your potential involvement in our team's efforts. Our attorneys have represented hundreds of homeowners. It may be necessary to litigate to seek a better result and our lawyers know how to do so."</i></p>		
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<p>15 16 17 18 19 20 21 22 23 24 25 26 27 28</p> <p>103. One mailer from 2011 asserted plaintiffs in the <i>Wright v. Bank of America</i> litigation would be entitled to "\$75,000 in damages per individual." <i>Ex. 73 at FTC-RAD-002-0284832; DE 284-8, Theisman Decl. at Page ID 7485, 7571-74 ¶ 4.1 (authenticating and attaching Ex. 73).</i></p>	<p>Marshall: No response</p> <p>Foti: Lack of foundation (no evidence Exh. 73 was sent out). FTC has Vito as a witness, yet no testimony on this. Hearsay.</p> <p><i>No evidence Exh. 73 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-</i></p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the</p>
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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	<p>receivership in fact makes it more likely it was used.</p> <p>Foti's cited evidence he cites does not address the fact at issue.</p>
104. One mailer sent to	Marshall: No response	Undisputed as to

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
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<p>1 consumers in 2011 stated: 2 “That each Plaintiff shall 3 receive a judicial 4 determination that the 5 mortgage lien alleged to 6 exist against their 7 particular property is null 8 and void <i>ab initio</i>. The 9 case is covered by the 10 settlement is defined [sic] 11 as follows: all Florida 12 and California residents 13 who purchased a loan by 14 any of these lenders from 15 January 1, 2004 through 16 February 5, 2009 (the 17 ‘Settlement Class’). Your 18 current lender will pay up 19 to \$75,000 in cash and 20 certificates for (i) valid 21 claims submitted by 22 Settlement Class 23 members, (ii) notice to the 24 Settlement Class, (iii) 25 administrative costs of the 26 settlement, (iv) Settlement 27 Class Counsel’s attorneys 28 fees and costs not to exceed \$793,750, and (v) incentive awards to the Plaintiffs not to exceed \$5,000 for each Plaintiff (‘Settlement Fund’).” <i>Ex. 79 at FTC-RAD-001-</i></p>	<p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence Ex. 79 or Ex. 80 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE- 41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039- 2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID</i></p>	<p>Marshall. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party’s statement. Finding documents on a receivership computer from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes it more likely it was used. Foti’s cited evidence does not address and/or controvert the fact at issue.</p>
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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>0088987 (including cover email indicating the mailer was sent to consumers and then the two page mailer); Ex. 80 (email indicating that this mailer was a mailer that had been in use for more than one set of mailings); DE 284-8, Theisman Decl. at Page ID 7485, 7587-91 ¶¶ 4.r & 4.s.</p>	<p>2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</p>	
<p>105. Foti sent an email to Torchia attaching a mailer that stated, among other items: "I'm sure you may share a similar situation as many of our clients either being lied to, mislead, or wrongfully denied a loan modification. As you</p>	<p>Marshall: No response Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with</p>	<p>Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>may already know, <<BANK>> is under great scrutiny for questionable business practices, negligence in processing loan modifications, and illegal foreclosures.” <i>Ex. 75 at FTC-RAD-001-0221284; DE 284-8, Theisman Decl. at Page ID 7485, 7576-78 ¶ 4.n.</i></p>	<p>them and whether any of them were ever used in any presentations to consumers.) <i>No evidence Ex. 75 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido</i></p>	<p>not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>106. Foti sent an email to Kutzner including a draft mailer that stated: "Mortgage Lenders Have Profited Now It Is Time To Make Them Pay!" "You have been identified as a potential plaintiff due to 1 or more of the following reasons: You received an NOD or a NOS within the last 3 years which could entitled [sic] you to damages. Even if you are in default your loan may be 'current'. Home has been foreclosed on under a noncompliant process that could have</p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p><i>No evidence Ex. 76 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All</i></p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 violated your legal rights. 2 Have received a 3 temporary Loan 4 Modification or didn't 5 have a single point of 6 contact try to help you 7 stay in your home. 8 You were foreclosed on 9 while you had a loan 10 Modification application 11 in process. 12 Laws AB 1950, SB 1474 13 extends the statute of 14 limitations to file claims 15 for fraud." 16 "If you have received a 17 Notice of Default or 18 Notice of Sale within the 19 last 3 years you could be 20 entitled to damages!" 21 "If you have been 22 foreclosed on if [sic] 23 could have been done 24 illegally. New laws that 25 protect homeowners 26 under the new 27 Homeowner Bill of 28 Rights act are on your side. Major Banks are settling for billions of dollars and you may be entitled to part of these settlements." Ex. 76 at FTC-RAD-002-</p>	<p><i>clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID</i></p>	<p>it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>0373032; DE 284-8, <i>Theisman Decl. at Page ID 7485, 7579-82 ¶ 4.o.</i></p>	<p>2114; <i>DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>107. Foti sent an email identifying a mailer as “the final one” making the following statements: “5 Major Banks agree to <u>\$25 BILLION</u> dollar settlement which you could be entitled to.” “Bank of America just settled for <u>\$16.5 BILLION</u> dollars for homeowner relief.” “You received an NOD or NOS within the last 3 years which could entitle you to damages.” “Even if you are in default your loan may be ‘current’ because of a special provision in your mortgage note/deed.” “Home has been foreclosed on under a noncompliant process that could have violated your legal rights.” “Have received a temporary Loan Modification or didn’t have a single point of</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence Ex. 77 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party’s statement. Finding documents on a receivership computer from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>contact try to help you stay in your home.” “You were foreclosed on while you had a loan Modification application in process.” “Laws AB 1950, SB 1474 extends the statute of limitations to file claims for fraud.” “If you are late on your mortgage call today before you lose your rights.” “If you have received a Notice of Default or Notice of Sale within the last 3 years you could be entitled to damages!” “If you have been foreclosed on, or in the process of foreclosure, it could have been illegal. New laws that protect homeowners under the Homeowner Bill of Rights Act are on your side. Major Banks are settling for billions of dollars and you may be entitled to part of these settlements.” <i>Ex. 77 at FTC-RAD-002-0373017; DE 284-8,</i></p>	<p><i>clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3 Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID</i></p>	<p>it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<i>Theisman Decl. at Page ID 7485, 7583-85 ¶ 4.p.</i>	<i>2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i>	
<p>108. Some versions of mailers sent to consumers reference the Department of Justice's multibillion dollar settlements with certain banks.</p> <p>DE 17-8, <i>Lujan Decl. at Page ID 2194</i> (“<i>Your property may be eligible to receive settlement funds to be released in 2015. Bank of America entered into an agreement with Federal Banking Regulators-the office of Comptroller of Currency and board of Governors of the Federal Reserve System. By accepting this settlement you do not waive any legal claims against Bank of America and are entitled to still sue your Trustee. It is important that you call us to discuss these details further.</i>”); <i>Ex. 76 at FTC-RAD-002-0373032</i> (“<i>Major Banks are settling for billions of</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p><i>No evidence Exs. 75,76 or 77 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>dollars and you may be entitled to part of these settlements.”); Ex. 77 at FTC-RAD-002-0373016 (“5 Major Banks agree to \$25 BILLION dollar settlement which you could be entitled to.”); id. (“Bank of America just settled for \$16.5 BILLION dollars for homeowner relief.”); DE 284-8, Theisman Decl. at Page ID 7485, 7579-85 ¶¶ 4.o & 4.p. See also Ex. 75 at FTC-RAD-001-0221285 (“The California Attorney General has obtained a broad-ranging settlement against <<BANK>>. If you are a homeowner struggling to pay your mortgage or facing foreclosure, or have already lost a home to foreclosure, it is possible that this settlement could help you.”); DE 284-8, Theisman Decl. at Page ID 7485, 7576-78 ¶ 4.n; DE 41-2 at Page ID 2508; DE 284-4, Chang Decl. at Page ID 7248 ¶ 4.a.</i></p>	<p><i>are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5,</i></p>	<p><i>it more likely it was used. Foti’s cited evidence does not address and/or controvert the fact at issue.</i></p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24). Thurman Decl., Attachment 65</i></p>	
<p>109. A mailer sent to consumers in 2015 made the following statements: “We have been trying to reach you to discuss our landmark victory against Bank of America in California’s Supreme Court. This decision is NOW LAW which opens up many different legal channels on your case. Brookstone Law is preparing to sue the trustee assigned to foreclose on your property for wrongful foreclosure and demand that they immediately cancel your auction date scheduled for 8/26/2015.” “Your property may be eligible to receive settlement funds to be released in 2015. Bank of America entered into an agreement with Federal</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred without this Defendant’s involvement in Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>The documents speak for themselves. No promises are made. All clients</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party’s statement. A consumer testified to receiving this mailer. Foti’s cited evidence does not address and/or</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Banking Regulators-the office of Comptroller of Currency and board of Governors of the Federal Reserve System. By accepting this settlement you do not waive any legal claims against Bank of America and are entitled to still sue your Trustee. It is important that you call us to discuss these details further.” DE 17-8, Lujan Decl. at Page ID 2194.</p>	<p><i>signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3 Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID</i></p>	<p>controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).	
110. The Receiver found a mailer for Advantis that referenced both Advantis Law and Advantis Law Group and stated that Marshall was the attorney issuing the marketing. DE 41-2 at Page ID 2511 (containing "Advantis Law Group" in header and then stating: "Advantis Law, PC (attorney Charles Marshall, esq) is a CA licensed law firm. . . ."); DE 284-4 , Chang Decl. at Page ID 7248 ¶ 4.b.	Marshall: This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred without this Defendant's involvement in Advantis Law Group, P.C. or the other individual defendants in this action. Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) No evidence DE 41-2 at Page ID 2511 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page</i></p>	<p>it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>
<p>111. A mailer for Advantis touts in bold type that consumers might be entitled to relief as a result of multibillion-dollar settlements with banks.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>DE 41-2 at Page ID 2511 (“5 Major Banks agree to \$25 BILLION dollar settlement which you could be entitled to;” “Bank of America just settled for \$16.5 BILLION dollars for homeowner relief;” and “Major Banks are settling for billions of dollars and you may be entitled to part of these settlements.”); DE 284-4, Chang Decl. at Page ID 7248 ¶ 4.b.</p>	<p>with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p>No evidence DE 41-2 at Page ID 2511 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>112. The mailers included phone numbers for consumers to call to get more information. DE 41-2 at Page ID 2511; DE 284-4, Chang</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Decl. at Page ID 7248 ¶ 4.b; Exs. 73, 75-77, 79; DE 284-8, Theisman Decl. at Page ID 7485, 7571-74, 7576-85, 7587-89 ¶¶ 4.l, 4.n, 4.o, 4.p & 4.r; DE 41-2 at Page ID 2508; DE 284-4, Chang Decl. at Page ID 7248 ¶ 4.a; DE 17-5, Navarro Decl. at Page ID 2128; DE 17-6, Navarro Decl. at Page ID 2130; DE 17, Chapman Decl. at Page ID 1948; DE 284-8, Page ID 7487, DE 284-11, Page ID 7843-46 Theisman Decl. at ¶ 4.ooo; <i>id.</i> DE 284-8, Page ID 7486, DE 284-10, Page ID 7757-58 at ¶ 4.ss; <i>id.</i> DE 284-8, Page ID 7486, DE 284-10, 7754-56 at ¶ 4.rr.</i></p>	<p>Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p><i>No evidence the mailers were used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
	<p><i>17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>113. Brookstone received ethics advice indicating its mailers may contain deceptive statements: “In the</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>current mailing, there are a few phrases that could be misleading. One is the case validation expiration date. We're not sure why there is an expiration date and if it has any basis. If it does not have any basis, it is possible the expiration date could be taken as putting false pressure on a potential client. Also, is it correct that Brookstone Law has obtained settlements for clients of cash and properties retained free and clear? As you can see, we have some questions on whether the current mailing could be in violation of CRPC 1-400. It might be helpful to go over the language of the current mailing with you to consider alternative phrasing that might be less likely to run afoul of CRPC 1-400." DE 284-8, at Page ID 7487, DE 284-10, DE 284-11, at Page ID 7803-7822, <i>Theisman Decl.</i> ¶ 4.hhh.</p>	<p>fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims relating to this action.) <i>Thurman Decl., Attachment 54 (Vito clawback request - FTC-</i></p>	<p>issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay to the extent not offered for the truth of the matter asserted. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See <i>Madden 8-14-17 Decl.</i> ¶ 5. Foti's cited evidence does not controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>114. Some consumers completed the sales process entirely over the phone. <u>DE 17-4</u>, Nava Decl. at Page ID 2094-96 ¶¶ 4-11; <u>DE 41-2</u> at Page ID 2520 (script stating phone appointments are available for people more than 3 hours away); <u>DE 284-4</u>, Chang Decl. at Page ID 7248 ¶ 4.e.</p>	<p>RFP-0149575-0149576)</p> <p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>115. The Corporate Defendants preferred the</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or</p>	<p>Undisputed as to Marshall. He does not</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>sales process to be completed through an in person meeting with the consumer because they believed they were more likely to close a deal if the person physically came to the office.</p> <p>DE 41-2 at Page ID 2520 (“If anyone lives more than a three (3) hour drive away then we will allow phone appointments, however be aware of the fact that these appointments close at a smaller percentage in comparison to in office appointments.”); DE 41-2 at Page ID 2526 (same); DE 284-4, Chang Decl. at Page ID 7248 ¶¶ 4.e & 4.f; Ex. 87 at FTC-RAD-001-0089958 (in large type “In office appointment (preferred)”); Ex. 88 at FTC-RAD-002-0133018 (stating that everyone within 150 miles must come in for an in person appointment); DE 284-8, Theisman Decl. at Page ID 7486, 7609-7652 ¶¶</p>	<p>information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p>	<p>offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant’s computer or on-site at the receivership defendant’s premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>4.u & 4.v.</p> <p>116. At least one script directed the sales people to say the following when setting an in person appointment: "The legal department has informed me that due to the strength of your case they would like to schedule a time to have you come down to our office to meet with the attorney at no charge to go over your potential case as soon as possible." <i>Ex. 87 at FTC-RAD-001-0089958; Ex. 88 at FTC-RAD-002-0133017 ("The legal department has informed me that due to the strength of your case they would like to schedule a time to have you come down to our office to meet with the attorney to go over your potential case as soon as possible."); DE 284-8, Theisman Decl. at Page ID 7486, 7609-7652 ¶¶ 4.u & 4.v.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p><i>No evidence Exs. 87 or 88 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118;</i></p>	<p>controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>DE 17-5 Navarro Decl. at Page ID 2123-24).</i>	
<p>117. At times, Corporate Defendants' sales people would tell consumers that the Corporate Defendants' lawyers "previously represented these very same banks we are suing." <i>Ex. 86 at FTC-RAD-001-0171373 ("The nation's top trial lawyers have banded together. These are the lawyers who previously represented these very same banks we are suing; (Now let's go to the second paragraph) the lawyers who know their way around the courthouses better than anyone."); DE 284-8, Theisman Decl. at Page ID 7485, 7592-7608 ¶ 4.t.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence Ex. 86 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118;</i></p>	<p>not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>DE 17-5 Navarro Decl. at Page ID 2123-24).</i>	
<p>118. The Corporate Defendants' sales scripts instructed sales people to tell consumers: "[Brookstone Law/Advantis Law] is a nationwide law firm that focuses [mainly] on civil litigation." DE 41-2 at Page IDs 2517 & 2523; DE 284-4, <i>Chang Decl. at Page ID 7248 ¶ 4.e & 4.f.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence SE-41-2 at Page IDs 2517 & 2523 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID</i></p>	<p>not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>2114; <i>DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>119. Sales scripts instruct sales people to say: “We are currently reviewing potential litigation cases from bank records and we feel your file fits our nationwide litigation case against the Banks.” <i>Ex. 86 at FTC-RAD-001-0171362; Ex. 87 at FTC-RAD-001-0089955; DE 284-8, <i>Theisman Decl. at Page ID 7485, 7579-85 ¶¶ 4.t & 4.u.</i></i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence Exs. 86 or 87 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party’s statement. Finding documents on a receivership computer from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5,</i></p>	<p>it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>120. Sales scripts instruct sales people to say: "These lawyers have filed multiple mass joinder cases against Bank of America (Countrywide) and Wells Fargo and additional litigation against (there bank if applicable) These Banks have admitted defrauding hundreds of thousands of Homeowners. (Now 3 sentences below it says) This case is now going national. Recently Bank of America was forced to admit that it had been defrauding the government in foreclosing on mortgages nationwide." <i>Ex. 86 at FTC-RAD-001-0171364; DE 284-8, Theisman Decl. at Page ID 7485, 7592-7608 ¶ 4.t.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence Ex. 86 was used in any presentations to consumers. In addition, the documents speak for themselves. No</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5,</i></p>	<p>receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>121. Brookstone never maintained more than one office with actual employees. DE 284-13, <i>Theisman Decl. at Page ID 8054 ¶ 15, Att. 12, Foti Depo. at 41:21-42:1</i>, (“<i>Q. So talking generally about Brookstone law, was Brookstone Law a national law firm? A. I don’t believe so. Q. How many offices did it have? A. I’ve only seen one at a time. That’s what I knew.</i>”); DE 284-14, <i>Madden July 2017 Decl. at Page ID 8126, 8285 ¶ 2.h, Att. 8, Marshall Depo. at 73:13-18</i> (“<i>Q. How many offices did Advantis have? A. That I was familiar with? I was familiar with one office at a time. There was an office in Irvine for some time, and then there was an office in Santa Ana.</i>”)</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: Admit</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<i>Those are the only offices I visited, and those are the only offices I'm familiar with.</i>)		
<p>122. Brookstone received ethics advice that it should not claim to be a national law firm. DE 284-8, at Page ID 7487, DE 284-11, at Page ID 7823-27 <i>Theisman Decl.</i> ¶ 4.iii, (attaching and authenticating FTC-RAD-001-0164311 to 0164315, and stating on FTC-RAD-001-0164313 “we believe that Brookstone holding itself out as a ‘national law firm’ could be misleading under Rule 1-400”).</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers. In addition, advice related to</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay to the extent not offered for the truth of the matter asserted. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See Madden 8-14-17 Decl. ¶ 5. Foti’s cited evidence does not controvert the fact at</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims relating to this action.) <i>Thurman Decl., Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576)</i>	issue.
123. The Corporate Defendants' sales scripts instructed sales people to tell consumers: "[Brookstone Law/Advantis Law] has teamed up with some of the top trial lawyers in the country. These attorneys have filed multi-plaintiff litigation cases against some of the country's largest banks. The banks were charged with committing the biggest corporate fraud in United States history and for trying to foreclose on homes they do not own. The Department of Justice and the State Attorney Generals have reached a historic settlement with some of these same banks	Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>and if you are a homeowner that is struggling to pay your mortgage, facing foreclosure, or if you have already lost your home to foreclosure, it is possible that this settlement could help you.”</p> <p>DE 41-2 at Page IDs 2517 & 2523; DE 284-4, Chang Decl. at Page ID 7248 ¶ 4.e & 4.f; See also Ex. 86 at FTC-RAD-001-0171362 & FTC-RAD-001-0171370 (“Brookstone Law has teamed up with some of the top trial lawyers in the country; these lawyers have filed a mass joinder case (which is a form of a Class Action) against some of the largest banks in the country. Recently in the news, all fifty state Attorney Generals have announced actions against the lenders for their wrongdoing. We feel you might be a part of these potential claims against the banks.”); Ex. 87 at FTC-RAD-001-</p>	<p><i>No evidence DE-41-2 at Page IDS 2517 and 2523 or Exhs. 86 to 88 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3 Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page</i></p>	<p>receivership computer from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes it more likely it was used. Foti’s cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>0089955 (“<i>Brookstone Law Firm has teamed up with some of the top trial lawyers in the country; these lawyers have filed a mass joinder case (which is a form of a Class Action) against some of the largest banks in the country. Recently in the news, all fifty state Attorney Generals have announced actions against the lenders for their wrongdoing. We feel you might be part of these potential claims against the banks.</i>”); <i>Ex. 88 at FTC-RAD-002-0133014</i> (“<i>Brookstone Law has teamed up with some of the top trial lawyers in the country. These lawyers have filed multi-plaintiff litigation against the largest banks in the nation, for committing the biggest corporate fraud in United States history. The five major banking institutions have admitted to wrongdoing and have reached a settlement with</i></p>	<p><i>ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>all fifty state Attorney Generals. These actions have placed increased pressure on the lenders to improve and remedy the harms, misrepresentations and fraud committed within their illegal loan practices.”); DE 284-8, <i>Theisman Decl. at Page ID 7485-86, 7592-7652</i> ¶¶ 4.t, 4.u & 4.v.</i></p>		
<p>124. The Corporate Defendants’ sales scripts instructed sales people to tell consumers: As you look at our “website you will see a list of some important case results that we have achieved as of today. [Brookstone/Advantis] is a Pioneer in Mass Tort litigation and all of our landmark cases are still going through the court system. We have had some phenomenal results in our individual cases and have been able to save hundreds of homes and have achieved many confidential settlements.” DE 41-2 at Page IDs</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party’s</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>2519 & 2525; DE 284-4, <i>Chang Decl. at Page ID 7248 ¶¶ 4.e & 4.f. See also Ex. 88 at FTC-RAD-002-0133016 (“Our cases are now proceeding into trial court, and the numbers of plaintiffs from around the country are expanding. It may be that the banks are unable to show they own any of their promissory notes, or that the banks have made errors that will cause other penalties to be levied against them. In the case below, the attorneys have racked up consecutive wins in each round against the Banks.”); Ex. 86 at FTC-RAD-001-0171364 (same); DE 284-8, <i>Theisman Decl. at Page ID 7485-86, 7592-7608, 7615-52 ¶¶ 4.t & 4.v.</i></i></p>	<p>any presentations to consumers.) <i>No evidence DE-41-2 at Page IDS 2519 and 2523 or Exhs. 86 to 88 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido</i></p>	<p>statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>125. The Corporate Defendants' sales scripts instructed sales people to tell consumers: "[Brookstone Law/Advantis Law] is comprised of legal professionals and attorneys who specialize in Real Estate and financial transactions. Already, these lawyers have filed multiple mass tort actions against Bank of America, JP Morgan Chase, Citibank, GMAC, Aurora, Wells Fargo, and numerous individual complaints" <u>DE 41-2</u> at Page IDs</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>2519 & 2525; DE 284-4, <i>Chang Decl. at Page ID 7248 ¶¶ 4.e & 4.f.</i></p>	<p>them and whether any of them were ever used in any presentations to consumers.) <i>No evidence DE-41-2 at Page IDS 2519 and 2523 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4,</i></p>	<p>not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24). Foti Decl. 42, 44, 70.</i></p>	
<p>126. At least one script instructed sales people to tell consumers: “You will see that the judge has stated in court, that the whole matter is of intense interest of the U.S. congress, as well as the central bank. Now (Name) if some of the claims pressed are proven and successful and a request to be tried in a jury court is achieved, the judge states that the punitive damages or reasonable outcome of the</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>case would be a judgment and or settlement would be in the billions. So as you can see this case is starting to get a lot of attention and we are achieving very serious results.” <i>Ex. 86 at FTC-RAD-001-0171364; DE 284-8, Theisman Decl. at Page ID 7485, 7592-7608 ¶ 4.t.</i></p>	<p>them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence Ex. 86 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID</i></p>	<p>evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</p>	
<p>127. The Corporate Defendants' sales scripts instructed sales people to tell consumers: "The five major banking institutions have admitted to wrongdoing and have reached a settlement with all fifty state Attorney Generals. These actions have placed increased pressure on the lenders to improve and remedy the harms, misrepresentations and fraud committed within their illegal loan practices."</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Ex. 88 at FTC-RAD-002-0133014; DE 284-8, <i>Theisman Decl. at Page ID 7486, 7615-7652 ¶ 4.v.</i></i></p>	<p>them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence Ex. 88 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID</i></p>	<p>evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24). Thurman Decl., Attachment 65 (state settlements)</p>	
<p>128. The Corporate Defendants' sales scripts instructed sales people to tell consumers: "Our cases are now proceeding into trial court, and the numbers of plaintiffs from around the country are expanding. It may be that the banks are unable to show they own any of their promissory notes, or that the banks have made errors that will cause</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>other penalties to be levied against them. In the case below, the attorneys have racked up consecutive wins in each round against the Banks.” <i>Ex. 88 at FTC-RAD-002-0133016; DE 284-8, Theisman Decl. at Page ID 7486, 7615-7652 ¶ 4.v.</i></p>	<p>authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence Ex. 88 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-</i></p>	<p>document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>129. Over the phone, Advantis sales people would claim <i>Wright</i> as Advantis', pointing the caller to the Advantis website and saying: "As you scroll down [the website] you will see one of our prominent cases called <i>Wright v. Bank of America</i>. Do you see it? [YES] Great, the <i>Wright</i> case is probably one of the most controversial</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>existing Mass Torts against a major lender in the nation, . . . If you scroll down you will be able to find the many amendments that we have collectively filed with our associate counsel Brookstone Law.” DE 41-2 at Page ID 2525; DE 284-4, Chang Decl. at Page ID 7248 ¶ 4.f.</p>	<p>authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence DE 41-2 at Page ID 2525 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl.</i></p>	<p>document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>130. Over the phone, Advantis sales people would say “we have teamed up with Brookstone Law on this very High profile case and have associated on many other cases.” DE 41-2 at Page ID 2525; DE 284-4, Chang Decl. at Page ID 7248 ¶ 4.f.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objections</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>(irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p><i>No evidence DE 41-2 at Page ID 2525 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151;</i></p>	<p>The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>131. Another document, titled "Objection Techniques," instructed sales people, when challenged on how much the mass joinder was going to cost, to say: "So what your saying is that you want to [sic] the most cost effective program available, the fact is that Brookstone law has been</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>assisting homeowners like you for many years, what this means to you is that we have helped thousands of homeowners save their homes either through litigation, bankruptcy, or some other form of legal aide [sic], and you do want to you're your home don't you?" The Objection Techniques document also instructed sales people to tell a customer who didn't want to pay anything because they were tired of losing money on their property: "Sir, I know exactly how you feel and the bottom line is, if we can't custom tailor a program that benefits you and your family we won't get to write and you won't sign it correct?"</p> <p>DE 41-2 at Page ID 2529; DE 284-4, Chang Decl. at Page ID 7248 ¶ 4.g.</p>	<p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p><i>No evidence DE 41-2 at Page ID 2525 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>132. In another document, sales people are directed to address questions about whether the mass joinder is better or different than a loan modification by stating: “Over the past few years we have taken the steps to build solid relationships with the major banking</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>institutions to provide our clients with the relief they seek. By Having the backing of a REPUTABLE law Firm that has formed a strong relationship with the lenders as we have, you can rest assured that we will be able to get you and your family a permanent solution.”</p> <p><i>Ex. 88 at FTC-RAD-002-0133025; DE 284-8, Theisman Decl. at Page ID 7486, 7615-7652 ¶ 4.v.</i></p>	<p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p><i>No evidence Ex. 88 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
	<p><i>Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>133. The scripts and email correspondence with the sales people emphasize that the sales people were supposed to ask about consumers’ “harms”—why consumers were falling behind on their mortgage or feel they were harmed by their banks—and then to</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>“repeat the harms” and state that because of the “strength of your case” the consumer should come in for an in person meeting to further discuss the mass joinder litigation. <i>DE 41-2 at Page IDs 2518 & 2524 (directing sales people to ask “Do you feel that you have been harmed, misrepresented or defrauded by your lender,” and directing them to say, “IF HAVE HARMS REPEAT (LH1, LH2, LH3) back to them. ‘Due to the fact you have LH1, LH2, and LH3 we believe you can be a possible candidate for our program’.”); Ex. 87 at FTC-RAD-001-0089958 (“The legal department has informed me that due to the strength of your case they would like to schedule a time to have you come down to our office to meet with the attorney at no charge to go over your potential</i></p>	<p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>No evidence DE 41-2 at Page IDs 2518 & 2524, Exhs. 87 and 88 or FTC-RAD-002-0411571 were used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22</p> <p><i>case as soon as possible.”); Ex. 88 at FTC-RAD-002-0133018 (“Legal has informed that due to the strength of your case you are able to proceed further with the litigation process. . . .”); DE 284-8, Theisman Decl. at Page ID 7486, 7609-7652 ¶¶ 4.u & 4.v; <i>id.</i> DE 284-8, Page ID 7489, DE 284-12, Page ID 7972 at ¶ 4.uuuu (authenticating and attaching FTC-RAD-002-0411571, an email from Todd Siedel to Banking Specialists, cc’ing Foti, stating: “Going forward it is imperative you do your job correctly, REPEAT THE HARMS! DUE TO THE STRENGTH OF YOUR CASE!”).</i></p>	<p><i>Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>23 24 25 26 27 28</p> <p>134. Brookstone’s ethics counsel warned that Brookstone may have been improperly playing on potential clients’ emotions: “For instance, in the document entitled ‘CLR</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Work Flow – Resource Management Temp’, Brookstone directs client litigation representatives to listen for ‘emotions and clients pains brought on by bank and [to] notate them on intake form. LISTEN! LISTEN! LISTEN!’ This could be taken to suggest Brookstone is evaluating and directing its efforts at those who are in a suffering emotional state. There is a risk that communications by Brookstone personnel could come under Standard 3 of CRPC 1-400. Standard 3 presumes a violation if a communication is ‘delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.’ We have not looked into</p>	<p>Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims relating to this action.) <i>Thurman Decl., Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576)</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay to the extent not offered for the truth of the matter asserted. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See Madden 8-14-17 Decl. ¶ 5. Foti’s cited evidence does not controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>whether any behavior could violate other laws, such as elder abuse laws. The language above highlights the care that must be taken when creating and reviewing scripts.” DE 284-8, <i>Theisman Decl. at Page ID 7487 ¶ 4.hhh.</i></p>		
<p>135. CLR Work Flow document states: “CLR listens for emotions and clients pains brought on by bank and will notate them on intake form. <u>LISTEN! LISTEN! LISTEN!</u>” <i>Ex. 86 at FTC-RAD-001-0171366; DE 284-8, Theisman Decl. at Page ID 7485, 7592-7608 ¶ 4.t.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party’s statement. Finding</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>consumers.) <i>No evidence Exh. 86 was used in any presentations to consumers. In addition, the documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan</i></p>	<p>documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
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	<p><i>Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
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a. The Corporate Defendants Convinced Consumers to Pay Advance Fees.

<p>136. Consumers were told they were likely to prevail in their mass joinder litigation. DE 186-4, <i>Torchia Decl. at Page ID 5373-75, ¶¶ 9-14, and Page ID 5384-88 (legal analysis would tell clients they had claims); DE 17-2</i>, <i>Kolodziej Decl. at Page ID 1999-2000, ¶ 8, and Page ID 2005-10; DE 17-6</i>, <i>Rios Decl. at Page ID 2132, ¶ 7, and Page ID 2142-47; DE 17-1</i>, <i>Irannejad Decl. at Page ID 1977, ¶¶ 9-12; DE 17</i>, <i>C. Durrett Decl. at Page ID 1968, ¶ 11; DE 17</i>, <i>Chapman Decl. at Page ID 1945, ¶¶ 4-5;</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objections (irrelevant; hearsay; lack of personal knowledge based on witness' testimony ("My understanding is that ...") No basis stated for declarant's "understanding."</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement. Torchia's statements include proper</p>
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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>DE 17-4, Leonido Decl. at Page ID 2077, ¶¶ 8-9; DE 17-7, Lujan Decl. at Page ID 2170, ¶¶ 7-8; DE 17-4, Nava Decl. at Page ID 2095, ¶¶ 6-7; DE 17-5, Navarro Decl. at Page ID 2108, ¶ 5; DE 284-6, Expert Report Submitted by Dr. Bruce Isaacson Measuring the Experiences of Consumers Who Retained Brookstone Law Firm ("Isaacson Expert Report") at Page ID 7303 ¶ 2.i.</p>	<p>Acknowledges he did not "complete," "produce or review" any of the the legal analysis reports; no evidence of Mr. Foti 's knowledge or involvement; Expert Report: Fails to comply with FRE 702 and the Daubert standard; double hearsay.) <i>The documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1,</i></p>	<p>foundation, as one of the control people of the business and its activities. Dr. Isaacson's report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay. Foti's cited evidence does not address or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24).</i></p>	
<p>137. Consumers were told they were likely to obtain monetary relief, including \$75,000 or more. DE 17-1, <i>Irannejad Decl. at Page ID 1978-79, ¶¶ 12 & 14</i>; DE 17, C. <i>Durrett Decl. at Page ID 1968, ¶ 11</i>; DE 17-6, <i>Rios Decl. at Page ID 2132, ¶ 6</i>; DE 17-7, <i>Lujan Decl. at Page ID 2170, ¶ 8</i>; DE 17-4, <i>Nava Decl. at Page ID 2095, ¶¶ 6-7</i>; DE 17-2, <i>Kolodziej Decl. at Page</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (failure to authenticate; hearsay; irrelevant - no evidence of Mr. Foti's</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>ID 2000, ¶ 9; DE 17-5, Navarro Decl. at Page ID 2108, ¶ 6; DE 284-8, Page ID 7488, DE 284-12, Page ID 7926-28, Theisman Decl. at ¶ 4.pppp (authenticating and attaching FTC-RAD-002-0256242 to 0256244, an email in which a Brookstone associated lawyer writes: “Bottom line—prospective clients are being given the numbers of \$75,000 in general damages and \$750,000 in punitive damages. No mental gymnastics related to ‘guarantee’, ‘promise’, ‘no guarantee’, ‘estimate’, ‘likely’, ‘unlikely’, etc. can change that fact. The prospective client hears numbers only. That’s how any reasonable outside person wil look at that. But, hey, that’s just one person’s opinion.”); DE 284-14, Madden July 2017 Decl. at Page ID 8126, 8420 ¶ 3, Att. 15, Marshall’s First RFAs, RFA 75</i></p>	<p>knowledge or involvement; Hearsay; Expert Report: Hearsay, other grounds stated in motion to exclude; <i>The documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3 Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page</i></p>	<p>established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party’s statement. Finding documents on a receivership computer or the receivership premises in fact makes it more likely it was used. Dr. Isaacson’s report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay.</p> <p>Foti’s cited evidence does not address or controvert the fact at issue.</p>

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<p><i>admitted pursuant to FRCP 36(a)(3); DE 284-6, Isaacson Expert Report at Page ID 7303, 7333, 7334 ¶¶ 2, 91 & 95.</i></p>	<p><i>ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24). DE 17, C. Durrett Decl. at Page ID 1968, ¶ 11: Not supported by statement made in declaration ("When questioned about particular potential claims he explained in detail why he thought we had a case. He said our case looked pretty good. He said we shouldn't run out and buy a new car because it wasn't guaranteed, but that we had a good case."); She knew Mr. Watanabe was not a lawyer (Para. 8); Kolodzieg: testified before Judge Carter he had participated in litigation before retaining Brookstone and knew</i></p>	

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>there were "no guarantees" in litigation ("The judge could rule against you?); Thurman Decl., Attachment 66 (Kolodziej Carter 8/3/16)</i></p>	
<p>138. Consumers were told they were likely to obtain a loan modification. DE 17-4, Nava Decl. at Page ID 2095, ¶¶ 6-7; DE 17-2, Kolodziej Decl. at Page ID 1999-2000, ¶ 9; DE 17, Chapman Decl. at Page ID 1946, ¶ 7</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>
	<p>Foti: DENY - Objections (failure to authenticate; hearsay; irrelevant - no evidence of Mr. Foti's knowledge or involvement; Hearsay; Expert Report: Hearsay, other grounds stated in motion to exclude; <i>The documents speak for themselves. No promises are made. All clients signed agreements confirming that no guarantees were made to them (Receiver's</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement. This fact is supported by declarations from consumers testifying to their interactions with</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3 Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24). DE</i></p>	<p>the Corporate Defendants. Dr. Isaacson's report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay.</p> <p>Foti's cited evidence does not address or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>17, C. Durrett Decl. at Page ID 1968, ¶ 11: Not supported by statement made in declaration ("When questioned about particular potential claims he explained in detail why he thought we had a case. He said our case looked pretty good. He said we shouldn't run out and buy a new car because it wasn't guaranteed, but that we had a good case."); She knew Mr. Watanabe was not a lawyer (Para. 8); Kolodzieg: testified before Judge Carter he had participated in litigation before retaining Brookstone and knew there were "no guarantees" in litigation ("The judge could rule against you?); Thurman Decl., Attachment 66</i></p>	
<p>139. Consumers were told they were likely to have their mortgage notes voided or obtain their homes free and clear. DE 17-6, <i>Rios Decl. at Page ID 2132, ¶ 6</i>; DE</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>17-7, Lujan Decl. at Page ID 2170, ¶ 8; DE 284-14, Isaacson Expert Report at Page ID 7430 ¶ 110; Madden July 2017 Decl. at Page ID 8126, 8420 ¶ 3, Att. 15, Marshall's First RFAs, RFA 78 admitted pursuant to FRCP 36(a)(3).</i></p>	<p>with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objections (failure to authenticate; hearsay; irrelevant - no evidence of Mr. Foti's knowledge or involvement; Hearsay; Expert Report: Fails to comply with FRE 702 and the Daubert standard; double hearsay.</p> <p><i>The documents speak for themselves. No promises are made. All clients signed "no guarantee" agreements; Receiver's Preliminary Report (DE-41-4), Exh. 19 pg. 2; Exh. 20, p. 2; DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3 Kolodziej Decl. at Page ID 2029 and 2039-2040; DE 17-3 Kolodziej Decl. at Page ID 2046; DE-6, Rios at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151; DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement. Finding documents on a receivership computer or the receivership premises in fact makes it more likely it was used. Dr. Isaacson's report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay.</p> <p>Foti's cited evidence does not address or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad at Page ID 1994-95; DE 17-4, Leonido Decl. at Page 2085; DE 17-4, Leonido Decl. at Page 2091; DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page 2185; DE 17-7, Lujan Decl. at Page ID 2191; DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104; DE-17-5, Navarro Decl. at Page ID 2114; DE 17-5 Navarro Decl. at Page ID 2118; DE 17-5 Navarro Decl. at Page ID 2123-24;</i></p>	
<p>140. In an email exchange in May 2012, an attorney associated with Brookstone wrote: “Bottom line—prospective clients are being given the numbers of \$75,000 in general damages and \$750,000 in punitive damages. No mental gymnastics related to ‘guarantee’, ‘promise’, ‘no guarantee’, ‘estimate’, ‘likely’, ‘unlikely’, etc.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>can change that fact. The prospective client hears numbers only. That's how any reasonable outside person will look at that. But, hey, that's just one person's opinion." DE 284-8, at Page ID 7488, DE 284-12, at Page ID 7926-28, <i>Theisman Decl.</i> ¶ 4.pppp.</p>	<p>(irrelevant - no evidence email was directed to, received by or reviewed by Mr. Foti; failure to authenticate; hearsay. No foundation the email is genuine, who prepared it, whether Mr. Foti ever received, reviewed, knew about or had anything to do with it.)</p>	<p>The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>141. During in person meetings, Banking Specialists show consumers a "Legal Analysis" that would invariably state that consumers had multiple valid causes of action against their lenders with no discussion of any defenses the lenders may have or discussions of the relative weakness of the various claims. DE 186-4, <i>Torchia Decl.</i> at Page ID 5373-75, ¶¶ 9-</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - DE 186-4, Torchia Decl: lack of foundation ("My understanding is that ..."</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. Torchia's statements include proper</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>14, and Page ID 5384-88, Att. A ("My understanding is that the vast majority of the Legal Analysis reports told clients they that they [sic] had a valid legal claim (e.g., fraudulent concealment, intentional misrepresentations, negligent misrepresentation, breach of contract) against their lender and/or other third party;" "Signing clients up for a Legal Analysis report was Damian Kutzner's idea and its main purpose was to get people in the door as clients. . . . Specifically, the Legal Analysis would tell the client the causes of action the client had against their lender and/or other third party. Contrary to the statements in the Legal Analysis, these documents were not thorough legal analyses of the clients' possible claims. For instance, although the Legal Analysis would</i></p>	<p>No personal knowledge or other basis stated for his understanding. Acknowledges he did not "complete," "produce or review" the reports); irrelevant (no evidence of Foti involvement); <i>DE 186-4, Torchia Decl. ("My understanding is that ..." No basis stated for his understanding. Acknowledges he did not "complete," "produce or review" the reports); Thurman Decl., Attachments 43 (Mr. Torchia's description of the "thorough analysis" of the client's chain of title in the preliminary legal analysis reports prepared by the law firm for some but not all clients)</i></p>	<p>foundation, as one of the control people of the business and its activities. Foti's cited evidence does not address or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>state consumers had valid causes of action against their lenders, it would not discuss or identify any defenses to these claims or weaknesses of these claims. Furthermore, although the Legal Analysis purported to be an examination of the client's specific circumstances, the discussion of the client's particular facts and analysis of those facts was cursory.”); DE 17-2, Kolodziej Decl. at Page ID 2005-10 (a “Legal Analysis” for Ronald Kolodziej, identifying several causes of action against his lender without any discussion of any defenses the lender may have); DE 17-6, Rios Decl. at Page ID 2142-47 (a “Legal Analysis” for Mario Rios, identifying several causes of action against his lender without any discussion of any defenses the lender may have).</i></p>		
142. The “Legal	Marshall: <i>This Defendant</i>	Undisputed as to

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Analysis" would state: "A thorough and comprehensive analysis was completed on all loan documents supplied;" and "The purpose of this report is to flush out some of those claims and to insure that you have a valid claim against your lender." <u>DE 186-4, Torchia Decl. at Page ID 5373, ¶ 10;</u> <u>DE 17-2, Kolodziej Decl. at Page ID 2005; DE 17-6, Rios Decl. at Page ID 2142.</u></p>	<p>lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - DE 186-4, Torchia Decl: lack of foundation ("My understanding is that ..." No personal knowledge or other basis stated for his understanding. Acknowledges he did not "complete," "produce or review" the reports); irrelevant (no evidence of Foti involvement); <i>DE 186-4, Torchia Decl. ("My understanding is that ..." No basis stated for his understanding. Acknowledges he did not "complete," "produce or review" the reports);</i> <i>Thurman Decl., Attachments 43 (Mr. Torchia's description of the "thorough analysis" of</i></p>	<p>Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. Torchia's statements include proper foundation, as one of the control people of the business and its activities. Foti's cited evidence does not address or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>the client's chain of title in the preliminary legal analysis reports prepared by the law firm for some but not all clients)</i>	
<p>143. The “Legal Analysis” provided to clients was not completed by a lawyer or reviewed by a lawyer prior to being shown or explained to a client.</p> <p>DE 284-13, <i>Theisman Decl. at Page ID 8085 ¶ 15, Att. 12, Foti Depo. at 262:7-10, (“Q. Is the legal analysis completed by a lawyer? A. A legal analysis was actually, I believe, completed by an expert who was familiar with title documents.”);</i> DE 186-4, <i>Torchia Decl. at Page ID 5373-74, ¶ 11 (“Although identified as Legal Analysis reports, lawyers did not complete the reports for the clients. . . . Brookstone lawyers did not produce or review these documents before they were shared with clients.”).</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - DE 186-4, Torchia Decl: lack of foundation (“My understanding is that ...” No personal knowledge or other basis stated for his understanding. Acknowledges he did not “complete,” “produce or review” the reports); irrelevant (no evidence of Foti involvement); <i>DE 186-4, Torchia Decl. (“My understanding is that ...” No basis stated for his understanding. Acknowledges he did not</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. Torchia’s statements include proper foundation, as one of the control people of the business and its activities. Foti’s cited evidence does not address or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>"complete," "produce or review" the reports);</i> <i>Thurman Decl.,</i> <i>Attachments 43 (Mr. Torchia's description of the "thorough analysis" of the client's chain of title in the preliminary legal analysis reports prepared by the law firm for some but not all clients)</i></p>	
<p>144. Banking Specialists would present the “Legal Analysis” to potential mass joinder clients. <i>DE 186-4</i>, <i>Torchia Decl. at Page ID 5374-75, ¶ 13</i> (“Typically, the Banking Specialist would meet with the client after the Legal Analysis report was prepared and were principally responsible for reviewing and explaining the Legal Analysis report to Brookstone clients. The protocol I established was to have an attorney present at some point during the meeting with the client about the Legal Analysis report and to answer client questions. I</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - <i>DE 186-4</i>, <i>Torchia Decl</i>: lack of foundation (“My understanding is that ...” No personal knowledge or other basis stated for his understanding. Acknowledges he did not “complete,” “produce or review” the reports); irrelevant (no evidence of</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. Torchia’s statements include proper foundation, as one of the control people of the business and its activities. Foti’s cited evidence does not address or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>now understand that this protocol was not regularly followed by the Banking Specialists.”); DE 17, C. Durrett Decl. at Page ID 1967-68, ¶¶ 10-11; DE 17-2, Kolodziej Decl. at Page ID 1999-2000, ¶¶ 7-9; DE 17-7, Lujan Decl. at Page ID 2169-70, ¶¶ 5-6.</i></p>	<p>Foti involvement); <i>DE 186-4, Torchia Decl. (“My understanding is that ...” No basis stated for his understanding. Acknowledges he did not “complete,” “produce or review” the reports); Thurman Decl., Attachments 43 (Mr. Torchia's description of the “thorough analysis” of the client's chain of title in the preliminary legal analysis reports prepared by the law firm for some but not all clients). Declaration reflects that legal analyses were presented to only three of the nine consumers who submitted declarations.</i></p>	
<p>145. Teresa Irannejad testifies that she met with a Brookstone representative, Salvador Auciello, who told her she would need to pay an additional \$605 in cash for the “Legal Analysis.” DE 17-1, Irannejad Decl. at Page 1977, ¶ 7.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction)</p> <p><i>Ms. Irannejad testified she signed several agreements stating there were no guarantees or promises made to her. DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad Decl. at Page 1994-95;</i></p>	<p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement.</p> <p>Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>146. Teresa Irannejad testifies that a Brookstone representative, Salvador Auciello, told her: "I did not have to make my mortgage payments to BoA while I was paying Brookstone. I did not have enough money to pay both Brookstone and BoA. I stopped paying my BoA mortgage at that point."</p> <p><u>DE 17-1</u>, <i>Irannejad Decl. at Page 1977, ¶ 8.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	transaction) <i>Ms. Irannejad testified she signed several agreements stating there were no guarantees or promises made to her. DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad Decl. at Page 1994-95;</i>	personal knowledge or an opposing party's statement. Foti's cited evidence does not address or controvert the fact at issue.
147. Teresa Irannejad testifies that after paying for her "Legal Analysis," she received a phone call from a Brookstone representative, Salvador Auciello, who "told me he had received the legal analysis and the lawyer said it was a good case and Brookstone could help me if they got involved. He told me I would need to come into the Brookstone office again to get signed up with Brookstone." <i>DE 17-1, Irannejad Decl. at Page ID 1977, ¶ 9.</i>	Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Ms. Irannejad testified she signed several agreements stating there were no guarantees or</i>	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement. Foti's cited evidence does not address

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>promises made to her. DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad Decl. at Page 1994-95;</i>	or controvert the fact at issue.
<p>148. Teresa Irannejad testifies: "When I went to Brookstone, I met with Anthony Stout. Anthony Stout showed me the legal analysis report and we went through it page by page. Anthony Stout told me that Countrywide had done things they shouldn't have on my mortgage. He said they charged me a half-point for a 'stated income' loan even though I had provided them with pay stubs. He said Countrywide had changed the mortgage to a balloon payment even though I had said I didn't want a balloon payment." DE 17-1, Irannejad Decl. at Page ID 1978, ¶ 10.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Ms. Irannejad testified she signed several agreements stating there were no guarantees or promises made to her. DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1,</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement.</p> <p>Foti's cited evidence does not address or controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>Irannejad Decl. at Page 1994-95;</i>	
<p>149. Teresa Irannejad testifies: “Anthony Stout told me Brookstone could represent me and that I had a good case. He said there was no risk of losing because Countrywide had already been sued and lost. Anthony Stout told me that the minimum amount I would get was \$75,000 and it could be as much as \$160,000 because Countrywide had made my mortgage a ‘stated income’ loan with a balloon payment. He told me the lawyers said I was guaranteed \$75,000. He also said I would get the money back that I paid to Brookstone in fees.”</p> <p>DE 17-1, <i>Irannejad Decl. at Page ID 1978, ¶ 12.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY- Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction)</p> <p><i>Ms. Irannejad testified she signed several agreements stating there were no guarantees or promises made to her. DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad Decl. at Page 1994-95;</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party’s statement.</p> <p>Foti’s cited evidence does not address or controvert the fact at issue.</p>
<p>150. Teresa Irannejad testifies: “Before signing</p>	<p>Marshall: <i>This Defendant lacks the knowledge or</i></p>	<p>Undisputed as to Marshall. He does not</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 the retainer agreement, I 2 asked Anthony Stout 3 about the disclaimer in the 4 agreement saying that 5 there was no guarantee, 6 but that he had told me I 7 was guaranteed at least 8 \$75,000. He said that it 9 was just legal words in 10 the retainer and they had 11 to use them in the 12 agreement, but there was 13 no risk of losing. He said 14 I shouldn't pay attention 15 to the disclaimer because 16 the case against 17 Countrywide had already 18 been proven. Anthony 19 Stout said trust me, I can 20 assure you that you will 21 get \$75,000 and the 22 money you paid to 23 Brookstone back.” 24 DE 17-1, <i>Irannejad Decl.</i> 25 <i>at Page ID 1979, ¶ 14.</i></p>	<p>information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: ADMIT - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Ms. Irannejad testified she signed several agreements stating there were no guarantees or promises made to her. DE 17-1, Irannejad Decl. at Page ID 1984; DE 17-1, Irannejad Decl. at Page ID 1988; DE 17-1, Irannejad Decl. at Page 1994-95;</i></p>	<p>offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>
<p>151. Corina Durrett testifies being told by a Banking Specialist: “He said our case looked pretty good. He said we shouldn't run out and buy</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>a new car because it wasn't guaranteed, but that we had a good case. He said that we could win over \$1.0 million, counting punitive damages.”</p> <p>DE 17, <i>C. Durrett Decl. at Page ID 1968</i>, ¶ 11.</p>	<p>Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction)</p> <p><i>"When questioned about particular potential claims he explained in detail why he thought we had a case. He said our case looked pretty good. He said we shouldn't run out and buy a new car because it wasn't guaranteed, but that we had a good case." Ms. Durrett also testified she knew Mr. Watanabe was not a lawyer (DE-17, C. Durrett Decl. at Page ID 1968, ¶ 8).</i></p>	<p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement.</p> <p>Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>152. Mario Rios testifies: “The Brookstone Law representatives told me that they would file a</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>lawsuit on my behalf against my lender, Bank of America, and that the lawsuit would get me at least \$75,000 off the principal of my house, and that it might remove the entire mortgage from my house.” DE 17-6, <i>Rios Decl. at Page ID 2132</i>, ¶ 6.</p>	<p>fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Mr. Rios signed multiple agreements confirming there were no guarantees. DE 17-6, Rios Decl. at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151;</i></p>	<p>issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement. Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>153. Mario Rios testifies: “The Brookstone Law representatives told me that Brookstone Law had a great chance of succeeding in the lawsuit. They said that although it may take some time, Brookstone Law would succeed eventually.” DE 17-6, <i>Rios Decl. at Page ID 2132</i>, ¶ 7.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Mr. Rios signed multiple agreements confirming there were no promises or guarantees. DE 17-6, Rios Decl. at Page ID 2139; DE 17-6, Rios Decl. at Page ID 2151.</i></p>	<p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement. Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>154. Jesse Chapman testifies that Banking Specialists told him: "Stout and Watanabe told us that we would have a very good case against our lender because the lender failed to disclose to us that our mortgage was an interest only loan." DE 17, Chapman Decl. at Page ID 1945, ¶ 4.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction)</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Mr. Chapman signed multiple agreements confirming there were no promises or guarantees. DE-17, Chapman Decl. at Page ID 1951 ¶ 7; 1957, ¶ 1(e).</i></p>	<p>opposing party's statement. Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>155. Jesse Chapman testifies that Banking Specialists told him: "Stout and Watanabe further stated that we were very good candidates and were entitled to a refund as a result of litigation between the Department of Justice and Bank of America." DE 17, <i>Chapman Decl. at Page ID 1945, ¶ 5.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Mr. Chapman signed multiple agreements confirming there were no promises or guarantees. DE-17, Chapman Decl. at Page ID 1951 ¶ 7; 1957, ¶ 1(e).</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement. Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>156. Richard Leonido</p>	<p>Marshall: <i>This Defendant</i></p>	<p>Undisputed as to</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 testifies: "I also spoke 2 with some other 3 Brookstone Law P.C. 4 employees who assured 5 me that I had a good case 6 against my lender. . . . At 7 the time that I signed up, I 8 was told that the litigation 9 would, at the very least, 10 put me in a better position 11 on my mortgage." 12 <u>DE 17-4, Leonido Decl. at</u> 13 <u>Page ID 2077, ¶¶ 8-9.</u></p>	<p>lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Mr. Leonido signed multiple agreements confirming there were no promises or guarantees.</i> <i>DE 17-4, Leonido Decl. at</i> <i>Page ID 2085; DE 17-4,</i> <i>Leonido Decl at Page ID</i> <i>2091.</i></p>	<p>Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement. Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>157. Malu Lujan testifies "Senior Banking Specialist" Richard Taylor, "told me that he had been a loan underwriter at the time I re-financed my mortgage with JP Morgan and based on my documents it was</p>	<p>Marshall: <i>This Defendant</i> lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>likely JP Morgan and the mortgage broker had likely committed fraud. He said they must have falsified the loan documentation in originating my loan because it would have been otherwise impossible to get a stated income loan with those terms at that time.” DE 17-7, Lujan Decl. at Page ID 2170, ¶ 7.</p>	<p>individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Mr. Lujan signed multiple agreements confirming there were no promises or guarantees. DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page ID 2185; DE 17-7, Lujan Decl. at Page 2191.</i></p>	<p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement.</p> <p>Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>158. Malu Lujan testifies “Senior Banking Specialist” Richard Taylor, “told me that Brookstone would probably be able to get me ‘free and clear’ on my loan, that I would owe nothing on my mortgage due to my lender’s fraud. He also said Brookstone would seek compensatory damages up to \$75,000 and punitive damages of \$675,000 per plaintiff.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (hearsay; irrelevant as to</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Richard Taylor told me that Brookstone had already been offered substantial settlements by JP Morgan. He estimated settlement would take up to one year to complete.” DE 17-7, <i>Lujan Decl. at Page ID 2170</i>, ¶ 8.</p>	<p>Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Mr. Lujan signed multiple agreements confirming there were no promises or guarantees. DE 17-7, Lujan Decl. at Page ID 2180; DE 17-7, Lujan Decl. at Page ID 2185; DE 17-7, Lujan Decl. at Page 2191.</i></p>	<p>evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement. Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>159. Michael Nava testifies: “I spoke to Anthony Stout from Brookstone who told me I had a number of different counts on which to sue Chase Bank and Brookstone would sue Chase Bank for me. Anthony Stout told me that the counts against Chase Bank were fraudulent concealment, intentional misrepresentation, and negligence. I asked for a copy of the preliminary report at least twice. Brookstone never provided the preliminary report to me.”</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --. Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Mr. Nava signed multiple agreements confirming</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><u>DE 17-4</u>, Nava Decl. at Page ID 2094-95, ¶ 5.</p>	<p><i>there were no promises or guarantees. DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104.</i></p>	<p>Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>160. Michael Nava testifies: "Brookstone offered to file a lawsuit on my behalf as part of the <i>Potter v. Chase</i> case. Anthony Stout told me that I could get \$75,000 for my participation in the joint lawsuit. He also said I could get an additional \$750,000 due to my individual circumstances." <u>DE 17-4</u>, Nava Decl. at Page ID 2095, ¶ 6.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Mr. Nava signed multiple agreements confirming there were no promises or guarantees. DE 17-4, Nava Decl. at Page ID 2099; DE 17-4, Nava Decl. at Page ID 2104.</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement.</p> <p>Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>161. Michael Nava testifies: "Anthony Stout</p>	<p>Marshall: <i>This Defendant lacks the knowledge or</i></p>	<p>Undisputed as to Marshall. He does not</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 told me that I definitely</p> <p>2 had a very strong case, it</p> <p>3 was basically a done deal,</p> <p>4 and filing the lawsuit</p> <p>5 would get me those</p> <p>6 results. He said I could</p> <p>7 get the \$75,000, and the</p> <p>8 bank would try to</p> <p>9 negotiate the \$750,000</p> <p>10 claim by lowering my</p> <p>11 loan amount.”</p> <p>12 DE 17-4, <i>Nava Decl. at</i></p> <p>13 <i>Page ID 2095</i>, ¶ 7.</p>	<p>information and belief to</p> <p>dispute or declare this fact</p> <p>undisputed, as this alleged</p> <p>fact occurred prior to this</p> <p>Defendant's involvement</p> <p>with Advantis Law</p> <p>Group, P.C. or the other</p> <p>individual defendants in</p> <p>this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection</p> <p>(hearsay; irrelevant as to</p> <p>Mr. Foti since no</p> <p>evidence he was aware of</p> <p>or involved in the</p> <p>transaction)</p> <p><i>Mr. Nava signed multiple</i></p> <p><i>agreements confirming</i></p> <p><i>there were no promises or</i></p> <p><i>guarantees. DE 17-4,</i></p> <p><i>Nava Decl. at Page ID</i></p> <p><i>2099; DE 17-4, Nava</i></p> <p><i>Decl. at Page ID 2104.</i></p>	<p>offer any admissible</p> <p>evidence capable of</p> <p>controverting the fact at</p> <p>issue.</p> <p>Undisputed as to Foti.</p> <p>The fact is relevant. The</p> <p>evidence is not hearsay</p> <p>because it is either</p> <p>statements based on</p> <p>personal knowledge or an</p> <p>opposing party's</p> <p>statement.</p> <p>Foti's cited</p> <p>evidence does not address</p> <p>or controvert the fact at</p> <p>issue.</p>
<p>162. Ronald Kolodziej</p> <p>testifies being told by a</p> <p>Banking Specialist: “[I]t</p> <p>was not a question of</p> <p>whether I would win my</p> <p>cases, but how much</p> <p>money I would get. He</p> <p>never identified not</p> <p>winning as a</p>	<p>Marshall: <i>This</i> Defendant</p> <p>lacks the knowledge or</p> <p>information and belief to</p> <p>dispute or declare this fact</p> <p>undisputed, as this alleged</p> <p>fact occurred prior to this</p> <p>Defendant's involvement</p> <p>with Advantis Law</p> <p>Group, P.C. or the other</p>	<p>Undisputed as to</p> <p>Marshall. He does not</p> <p>offer any admissible</p> <p>evidence capable of</p> <p>controverting the fact at</p> <p>issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>consideration.” DE 17-2, <i>Kolodziej Decl.</i> at Page ID 1999-2000, ¶ 8.</p>	<p>individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Mr. Kolodziej signed multiple agreements confirming there were no promises or guarantees. DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-40; DE 17-3, Kolodziej Decl. at Page ID 2046.</i></p>	<p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement.</p> <p>Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>163. Ronald Kolodziej testifies being told by a Banking Specialist: “Brookstone told me that I would win at least some loan forgiveness through the lawsuit. They said that my potential recovery was two to three hundred thousand dollars, and a drastically reduced interest rate. Brookstone told me that based on the</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>value of my properties, I could expect to recover a couple hundred thousand dollars.” DE 17-2, <i>Kolodziej Decl. at Page ID 2000</i>, ¶ 9.</p>	<p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Mr. Kolodziej signed multiple agreements confirming there were no promises or guarantees. DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-40; DE 17-3, Kolodziej Decl. at Page ID 2046.</i></p>	<p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement. Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>164. Ronald Kolodziej testifies being told by a Banking Specialist: “I would be added to a lawsuit against Bank of America (“BOA”), who now owned Countrywide, very shortly. He said BOA would probably not want to go to court and would want to settle the case. I was told that it would take three to six months to get the loan forgiveness and reduced interest rate.” DE 17-2, <i>Kolodziej Decl.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> <i>Marshall Decl., at ¶ --.</i></p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>at Page ID 2000, ¶ 10.</i></p>	<p>or involved in the transaction) <i>Mr. Kolodziej signed multiple agreements confirming there were no promises or guarantees. DE 17-3, Kolodziej Decl. at Page ID 2022 and 2033; DE 17-3, Kolodziej Decl. at Page ID 2029 and 2039-40; DE 17-3, Kolodziej Decl. at Page ID 2046.</i></p>	<p>statements based on personal knowledge or an opposing party's statement. Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>165. Raymond Navarro testifies to a conversation "with a Brookstone Law P.C. employee who told me that based on what I owed on my house, and the practices of my lender, Wells Fargo, I was a good candidate for litigation." <i>DE 17-5, Navarro Decl. at Page ID 2108, ¶ 5.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</i></p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Mr. Navarro signed multiple agreements</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>confirming there were no promises or guarantees. DE 17-5, Navarro Decl. at Page ID 2114; DE 17-5, Navarro Decl. at Page ID 2118; DE 17-5, Navarro Decl. at Page ID 2123-24.</i></p>	<p>Foti's cited evidence does not address or controvert the fact at issue.</p>
<p>166. Raymond Navarro testifies: "On September 8, 2011, I went to the Brookstone Law P.C. offices and met with a Brookstone Law P.C. employee. At this meeting, I was told I should expect to recover \$75,000 for both the original loan and the loan modification and that my girlfriend, who was also on the loans, should also expect to recover \$75,000 for both the original loan and the loan modification. In total, we were told we should expect to recover \$300,000 from Wells Fargo, less Brookstone Law P.C.'s fee." DE 17-5, <i>Navarro Decl. at Page ID 2108, ¶ 6.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Mr. Navarro signed multiple agreements confirming there were no promises or guarantees. DE 17-5, Navarro Decl. at Page ID 2114; DE 17-5, Navarro Decl. at Page</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement. Foti's cited evidence does not address or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
	<i>ID 2118; DE 17-5, Navarro Decl. at Page ID 2123-24.</i>	
<p>167. Many if not most of the meetings with Banking Specialists were not attended by attorneys. DE 186-4, <i>Torchia Decl. at Page ID 5375, ¶ 13</i> (“<i>The protocol I established was to have an attorney present at some point during the meeting with the client about the Legal Analysis report and to answer client questions. I now understand that this protocol was not regularly followed by the Banking Specialists.</i>”); DE 284-13, <i>Theisman Decl. at Page ID 8078 ¶ 15, Att. 12, Foti Depo. at 181:17-182:6</i> (“<i>Q. Is it your understanding that everybody met with an attorney? A. No. I know that there was times that that didn’t happen because of the attorneys being busy or whatnot, but I’m not sure how often or the – when that</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</i></p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Thurman Decl., Attachment 53 (Torchia testimony re: attorneys at meetings)</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party’s statement.</p> <p>Foti’s cited evidence does not address or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>happened. Q. Do you think it would be more likely that somebody would not meet with an attorney than that that they would? A. Well, I guess it would depend on staffing at that point. I don't know. There was times that, you know, there was more attorneys than clients, and then there was times that there was more clients than attorneys. So I don't – I don't – I don't know the averages. Q. But at the very least there are people who met with just the banking specialist and not an attorney; right? A. I would say that's accurate.”); DE 17-5, Navarro Decl. at Page ID 2108, 2110, ¶¶ 7, 12 (stating that at the end of his sales meeting he was introduced to man who claimed to be Torchia, but then when Navarro took Brookstone to small claims court to recover the fees he paid to Brookstone, the</i></p>		

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Brookstone lawyer that entered an appearance in small claims court as Torchia was not the man he had been introduced to at the end of the sales meeting); DE 17, Chapman Decl. at Page ID 1945-64 (reporting that he met with “representatives” and that after he signed up could never get an appointment or phone call with an attorney); DE 17, C. Durrett Decl. at 1966, ¶ 8 (an attorney only took part for 10 minutes of the sales process); DE 17-7, Lujan Decl. at 2169-70, ¶¶ 6-8 (talked only with non-attorneys).</i></p>		
<p>168. Consumers paid for the “Legal Analysis,” in amounts ranging from \$895-\$1500. DE 186-4, <i>Torchia Decl. at Page ID 5373, ¶ 10 (“Clients typically paid \$895 for a ‘Legal Analysis’ report.”); DE 284-13, <i>Theisman Decl. at Page ID 8085 ¶ 15, Att. 12, Foti Depo. at 263:4-8;</i></i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>DE 17, Chapman Decl. at Page ID 1950; DE 17, C. Durrett Decl. at Page ID 1966-67, ¶ 8 (“We agreed to pay Brookstone \$895 to prepare an analysis report to check our mortgage records for issues and evaluate whether we had claims against Chase Bank.”); DE 17-1, Irannejad Decl. at Page ID 1976-77, ¶ 7 (“He said the cost of the legal analysis was \$895. I gave him a check for that amount, but he said Brookstone would not cash the check before I received the legal analysis. I signed an agreement with Brookstone to have them do the legal analysis. (Attachment A.) Approximately two days later, he called me and said the cost had changed and that I would need to pay \$1500 for the legal analysis. I paid Salvador Auiello the difference in cash that day.”); DE 17-2, Kolodziej Decl. at Page</i></p>	<p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Thurman Decl., Attachment 43 (Torchia testimony - not all clients purchased, "Some do, some don't.")</i></p>	<p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party's statement. Foti's cited evidence does not address or controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>ID 1998-99, ¶ 5 (“The fee for each legal analysis was \$895. For the three legal analyses, I paid Brookstone a total of \$2685.”); DE 17-4, Leonido Decl. at Page ID 2076-77, ¶ 5 (“The paralegal told me that it looked like I had a case against my lender but that I would need to spend \$1,250 on a further legal analysis to determine what laws had been broken. The paralegal told me that Brookstone Law P.C. would reimburse me this money if I did not have a case. I agreed to this and paid the \$1,250.”); DE 17-7, Lujan Decl. at Page ID 2169, ¶ 5 (“He told me Brookstone would offer me a special deal and do the initial legal research for \$895 and \$1000 a month for three months to participate in the case.”); DE 17-4, Nava Decl. at Page ID 2094, ¶ 4 (“I paid Brookstone \$1300 to do a preliminary report</i></p>		

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>about whether I had a case against Chase Bank.”); DE 17-5, Navarro Decl. at Page 2108, ¶ 7 (“I signed two agreements. The first one was for a legal analysis, and I paid \$895 under that agreement.”); DE 17-6, Rios Decl. at Page ID 2132, ¶ 9 (“First, on May 30, 2013, I paid \$895 for a review of my mortgage documents.”).</i></p>		
<p>169. Consumers paid an initial fee for the mass joinder litigations, always exceeding \$1,000. DE 17, Chapman Decl. at Page ID 1946, ¶ 7 (“Under this agreement, we agreed to pay an initial fee of \$3,000, spread over five payments, as well as a monthly fee of \$250.”); DE 17, C. Durrett Decl. at Page ID 1968, ¶ 12 (“[I]nitial payment of \$3000, paid in installments of \$1000, and monthly payments of \$250 for 12 months, followed by monthly payments of</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) <i>Foti Decl. ¶ 75 and 76</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party’s</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>\$59.99.”); DE 17-1, Irannejad Decl. at Page ID 1991 (\$4,500 over five payments); DE 17-2, Kolodziej Decl. at Page ID 2001, ¶ 12 (referring to his Attachment B, paying \$6,250); DE 17-4, Leonido Decl. at Page ID 2077, ¶ 8 (\$1,500); DE 17-7, Lujan Decl. at Page ID 2170-71, ¶ 9 (“In April 2013, I signed the Contingency Fee Agreement and agreed to pay Brookstone \$3,000 in \$1,000 installment payments. . . .”); DE 17-4, Nava Decl. at Page ID 2095, ¶ 8 (“I paid Brookstone \$3,000 in three \$1,000 monthly payments from July-September 2013 to file a case against Chase Bank for me.”); DE 17-5, Navarro Decl. at Page ID 2108, ¶ 7 (“The second agreement was for the mass joinder litigation, and I agreed to pay \$3,000 plus \$250 per month during the course of the litigation.”); DE</i></p>	<p><i>(some paid nothing)</i></p>	<p>statement. Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>17-6, Rios Decl. at Page ID 2132-33, ¶ 12 (“[O]n June 10, 2013, I signed a retainer agreement with Brookstone Law, paying \$1,500 upfront and agreeing to pay an additional \$250 per month.”); DE 284-14, Madden July 2017 Decl. at Page ID 8126, 8419 ¶ 3, Att. 15, Marshall’s First RFAs, RFAs 70 admitted pursuant to FRCP 36(a)(3); DE 284-14, Madden July 2017 Decl. at Page ID 8126-27, 8423-26 ¶¶ 4-5, Att. 16 (excerpts of Marshall First Int. Resp., Int. Nos. 7-8 identifying no defenses and identifying no individuals or entities suggesting any Defendant is not liable), Att. 17, (excerpts of Marshall First RFP Resp., RFP No. 23 identifying no documents tending to disprove or call into question that Corporate Defendants would receive advance fees.).</i></p>		
170. Consumers paid	Marshall: <i>This Defendant</i>	Undisputed as to

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>monthly fees, in many instances \$250 per month. DE 17, Chapman Decl. at Page ID 1946, ¶ 7 (“Under this agreement, we agreed to pay an initial fee of \$3,000, spread over five payments, as well as a monthly fee of \$250.”); DE 17, C. Durrett Decl. at Page ID 1968, ¶ 12 (“[I]nitial payment of \$3000, paid in installments of \$1000, and monthly payments of \$250 for 12 months, followed by monthly payments of \$59.99.”); DE 17-1, Irannejad Decl. at Page 1991 (“A monthly legal fee of \$250.00.”); DE 17-3, Kolodziej Decl. at Page ID 2025 (\$250 monthly fee); DE 17-4, Leonido Decl. at Page ID 2077, ¶ 8 (“250 per month thereafter for 12 months and then a \$59.99 monthly fee for the duration of the litigation.”); DE 17-7, Lujan Decl. at Page ID 2170-71, ¶ 9 (“The</p>	<p>lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (hearsay; irrelevant as to Mr. Foti since no evidence he was aware of or involved in the transaction) Only nine declarations obtained in context of legal services provided on behalf of 2,468 plaintiffs.</p>	<p>Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The evidence is not hearsay because it is either statements based on personal knowledge or an opposing party’s statement. The evidence he cites does not address or controvert the fact at issue.</p> <p>He cites no evidence to controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Contingency Fee Agreement also required a \$250 monthly payment for 12 months.”); DE 17-4, Nava Decl. at Page ID 2095, ¶ 9 (“Pursuant to the agreement, I paid Brookstone a \$250 monthly fee from October 2013-November 2014.”); DE 17-5, Navarro Decl. at Page ID 2108, ¶ 7 (“The second agreement was for the mass joinder litigation, and I agreed to pay \$3,000 plus \$250 per month during the course of the litigation.”); DE 17-6, Rios Decl. at Page ID 2132-33, ¶ 12 (“[O]n June 10, 2013, I signed a retainer agreement with Brookstone Law, paying \$1,500 upfront and agreeing to pay an additional \$250 per month.”).</i></p>		
<p>171. The Corporate Defendants did not deposit the fees it collected into client trust accounts or an IOLTA account. DE 284-5, <i>Second</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 2 3 4 5 6 7 8 9 10 11 12 13</p> <p><i>Declaration of Emil T. George dated July 6, 2017 ("George July 6, 2017 Decl.") at Page ID 7265-66 ¶ 5; DE 284-14, Madden July 2017 Decl. at Page ID 8126, 8419 ¶ 3, Att. 15, Marshall's First RFAs, RFA 71 admitted pursuant to FRCP 36(a)(3) .</i></p>	<p>with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - irrelevant (no evidence Mr. Foti had any signing authority on any banking or merchant processing accounts or had any involvement with depositing any funds on behalf of Corporate Defendants)</p>	<p>Undisputed as to Foti. The fact is relevant. He cites no evidence to controvert the fact at issue.</p>
<p>14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p> <p>172. Brookstone received ethics advice that its "non-refundable" flat fees were not true retainer fees: "The retainer agreements should be amended to remove the language that the retainer fees are non-refundable unless the payment is used to insure availability and not to any extent to compensate Brookstone for providing legal services. Given that Brookstone's attorneys do not currently keep track of the time spent on each client, it would be</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>difficult for Brookstone to track the time spent in case a client terminates Brookstone's representation before the matter is resolved or adjudicated. We recommend that Brookstone's lawyers begin keeping track of their time to provide a basis to show that fees have been earned.”</p> <p>DE 284-8, at Page ID 7487, DE 284-10, DE 284-11, at Page ID 7803-7822, <i>Theisman Decl.</i> ¶ 4.hhh</p>	<p>previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims relating to this action.)</p> <p><i>Thurman Decl., Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576)</i></p>	<p>submitted in support of the fact. The evidence is not hearsay to the extent not offered for the truth of the matter asserted. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See Madden 8-14-17 Decl. ¶ 5. Foti's cited evidence does not controvert the fact at issue.</p>
<p>173. Brookstone received ethics advice noting that Brookstone did not perform conflicts checks when retaining clients and stating that this was problematic.</p> <p>DE 284-8, at Page ID 7487, DE 284-10, DE 284-11, at Page ID 7803-7822, <i>Theisman Decl.</i> at ¶ 4.hhh.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims relating to this action.) <i>Thurman Decl., Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576)</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay to the extent not offered for the truth of the matter asserted. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See Madden 8-14-17 Decl. ¶ 5. Foti's cited evidence does not controvert the fact at issue.</p>
<p>174. FTC's requests for production of documents 8-15 issued to Foti sought all documents supporting or tending to disprove that</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>consumers would win their mass joinder lawsuits, obtain a financial benefit, be added to mass joinder lawsuits, or that the Corporate Defendants had the experience and capability to litigate the mass joinders as promised. In response, Foti produced no documents controverting the FTC's evidence that these claims were made and that they were false.</p> <p>DE 284-8, <i>Theisman Decl. at Page ID 7490 ¶ 12.</i></p>	<p>fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (assertion contitutes [sic] argument). <i>The fact that Foti has no documents in his possession, in light of the fact that all of his documents relating to this action were either seized at the Brookstone premises on June 2, 2016, or seized from his home on October 22, 2016, does not establish any of Plaintiff's claims. More importantly, as a non-attorney who relied on the attorneys who researched, filed and prosecuted the lawsuits on behalf of the Law Firms' clients, Mr. Foti had no knowledge regarding the facts and legal arguments supporting the claims, the benefits to consumers</i></p>	<p>issue.</p> <p>Undisputed as to Foti. He makes no cognizable objection and cites no evidence to controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>and/or the capability of the Brookstone attorneys. However, Mr. Foti's genuine belief that such was the case is shown by the fact that he and his wife retained Brookstone to represent them in the Potter action and paid the firm \$20,000 for its services. In addition, in December 2014, the California Court of Appeals held that by the third amended complaint, the Brookstone attorneys' claims "had crystallized into four causes of action: intentional misrepresentation, negligent misrepresentation, unfair competition, and wrongful foreclosure. The first three apply to all plaintiffs, the foreclosure claim to only 90 of them. The wrongful foreclosure claim, interestingly enough, presents as pristine a common issue of law as it is possible to imagine: Its theory is that the various individual</i></p>	

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
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	<p><i>foreclosures were all unlawful because the eventual trustees who foreclosed on the loan were not the original agents designated in the loan papers. The claim thus presents a tidy, discrete question of law common to all 90 foreclosure plaintiffs.”</i> <i>Peterson v. Bank of America Corp., 232 Cal. App. 4th 238, 246 (Cal.App. 2014), DE-12, pg. 174; Thurman Decl., Attachment 46; Foti Decl, 42, 44, 70.</i></p>	
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a. A Consumer Survey Confirms The Misrepresentations Were Made.

<p>175. Dr. Bruce Isaacson of MMR Strategy Group conducted a survey of the Corporate Defendants' clients in accordance with standard procedures. DE 284-6, Isaacson Expert Report at Page ID 7306, 7310, 7318-20 ¶ 12, 27, 50-52.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed.</i></p> <p>Foti: DENY - Objections (expert report fails to comply with FRE 702 and the Daubert standard; irrelevant; double hearsay.) <i>See objections to Isaacsen Report</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. Dr. Isaacson's report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay.</p>
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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>176. Dr. Isaacson found that “80.4% of all respondents answered that Brookstone’s representatives said or suggested that hiring Brookstone would definitely or probably achieve at least one of the following five outcomes: respondents would (1) win a lawsuit against the company that holds their mortgage; (2) have the terms of their mortgage changed; (3) receive money; (4) have their mortgage voided; and/or (5) get their property free and clear of their mortgage.”</p> <p>DE 284-6, Isaacson Expert Report at Page ID 7303 ¶ 2.</p>	<p>Marshall:</p> <p>Foti: DENY - Objections (expert report fails to comply with FRE 702 and the Daubert standard; irrelevant; double hearsay.)</p> <p><i>See objections to Isaacsen Report</i></p>	<p>Undisputed as to Foti. The fact is relevant. Dr. Isaacson’s report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay.</p>
<p>177. Dr. Isaacson found that 64.5% of the survey respondents “indicated that Brookstone’s representatives said or suggested they would definitely or probably win their lawsuit.”</p> <p>DE 284-6, Isaacson Expert Report at Page ID</p>	<p>Marshall: No response</p> <p>Foti: DENY - Objections (expert report fails to comply with FRE 702 and the Daubert standard; irrelevant; double hearsay.)</p> <p><i>See objections to Isaacsen</i></p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. Dr. Isaacson’s report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
7303 ¶ 2.i.	<i>Report</i>	hearsay.
178. Dr. Isaacson asked the survey respondents an open-ended question at the beginning of the survey about what Brookstone representatives said or suggested they would achieve by hiring Brookstone, more than 70% provided an answer in their own words referencing one of the following three themes: (1) obtaining money or a settlement, getting their loan reduced or modified, or eliminating their loan; (2) joining a lawsuit, suing lender or banks, or class action; or (3) saving their house from foreclosure or keeping or saving their home. DE 284-6 , <i>Isaacson Expert Report at Page ID 7322, 7323 ¶¶ 59 (Table A), 63.</i>	Marshall: No response Foti: DENY - Objections (expert report fails to comply with FRE 702 and the Daubert standard; irrelevant; double hearsay.) <i>See objections to Isaacsen Report</i>	Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. Dr. Isaacson's report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay.
179. Dr. Isaacson asked the survey respondents an open-ended question at the beginning of the survey about what they	Marshall: No response Foti: DENY - Objections (expert report fails to	Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. Dr.

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 thought hiring Brookstone would achieve, and more than 20% answered by complaining about Brookstone, including the following statements: "They stole my money and lied to me." "We gave them about \$15,000 and they packed and left town like a bunch of thieves." "A lot of lies and promises. They took money from me and nothing happened." DE 284-6 , Isaacson Expert Report at Page ID 7324-25 ¶¶ 66-67.	comply with FRE 702 and the Daubert standard; irrelevant; double hearsay.) <i>See objections to Isaacsen Report</i>	Isaacson's report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay.
17 18 19 20 21 22 23 24 25 26 27 28 180. Dr. Isaacson found that if a consumer recalled a certain claim being made, more than 79% would state they were told that result was definite or probable. DE 284-6 , Isaacson Expert Report at Page ID 7326-29, 7332-33, 7335-38 ¶¶ 73-74 (Table D), 80-81 (Table G), 90-91 (Table K), 99-100 (Table O), 104-05 (Table Q).	Marshall: No response Foti: DENY - Objections (expert report fails to comply with FRE 702 and the Daubert standard; irrelevant; double hearsay.) <i>See objections to Isaacsen Report</i>	Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. Dr. Isaacson's report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay.
181. Dr. Isaacson found	Marshall: No response	Undisputed as to

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 that 54.3% of the survey 2 respondents "indicated 3 that Brookstone's 4 representatives said or 5 suggested that they would 6 definitely or probably 7 receive money." 8 DE 284-6, Isaacson 9 <i>Expert Report at Page ID</i> 10 <i>7303 ¶ 2.</i></p>	<p>Foti: DENY - Objections (expert report fails to comply with FRE 702 and the Daubert standard; irrelevant; double hearsay.) <i>See objections to Isaacsen</i> <i>Report</i></p>	<p>Marshall. Undisputed as to Foti. The fact is relevant. Dr. Isaacson's report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay.</p>
<p>11 182. Dr. Isaacson found 12 that of those who reported 13 being told they would 14 definitely or probably 15 obtain money as a result 16 of hiring Brookstone, 17 "80.4% answered \$75,000 18 or more, including 51.7% 19 who answered \$300,000 20 or more." 21 DE 284-6, Isaacson 22 <i>Expert Report at Page ID</i> 23 <i>7334 ¶ 95.</i></p>	<p>Marshall: No response Foti: DENY - Objections (expert report fails to comply with FRE 702 and the Daubert standard; irrelevant; double hearsay.) <i>See objections to Isaacsen</i> <i>Report</i></p>	<p>Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. Dr. Isaacson's report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay.</p>
<p>24 183. Dr. Isaacson 25 concluded: 26 "Based on the findings 27 from my survey of 28 customers who had retained Brookstone, I conclude that a substantial percentage of respondents hired Brookstone to obtain a settlement or a modification relating to</p>	<p>Marshall: No response Foti: DENY - Objections (expert report fails to comply with FRE 702 and the Daubert standard; irrelevant; double hearsay.) <i>See objections to Isaacsen</i> <i>Report</i></p>	<p>Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. Dr. Isaacson's report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
their mortgage, to join a lawsuit, or to save a home from foreclosure.” DE 284-6, Isaacson Expert Report at Page ID 7339 ¶ 109.		
184. Dr. Isaacson concluded: “Based on the findings from my survey, I also conclude that a substantial percentage of respondents believe that Brookstone’s representatives said or suggested that the respondents will definitely or probably: (a) win their lawsuit against the company that holds their mortgage, and/or (b) achieve outcomes such as changing the terms of their mortgage, receiving money, having their mortgage voided, or getting their property free and clear of their mortgage.” DE 284-6, Isaacson Expert Report at Page ID 7340 ¶ 110.	Marshall: No Response Foti: DENY - Objections (expert report fails to comply with FRE 702 and the Daubert standard; irrelevant; double hearsay.) <i>See objections to Isaacsen Report</i>	Undisputed as to Marshall. Undisputed as to Foti. The fact is relevant. Dr. Isaacson’s report is appropriate expert testimony under Rule 702 and so is both admissible and does not constitute hearsay.
a. The MARS Rule Requires Certain Disclosures, None of Which Were Made.		
185. The Corporate	Marshall: <i>This Defendant</i>	Undisputed as to

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Defendants' mailers, websites, and retainer agreements did not include the disclosures identified in 12 C.F.R. § 1015.4.</p> <p>DE 17, Chapman Decl. at Page ID 1948 (mailer); <i>id.</i> at Page ID 1949-63 (agreements); DE 17, C. Durrett Decl. a Page ID 1971-72 (mailer); DE 17-1, Irannejad Decl. at Page ID 1982-92 (agreements); DE 17-1, Irannejad Decl. at Page ID at 1993-97 (second half of agreement); DE 17-3, Kolodziej Decl. at Page ID 2021-50 (agreements); DE 17-4, Leonido Decl. at Page ID 2084-93 (agreement); DE 17-7, Lujan Decl. at Page ID 2175-76 (mailer); <i>id.</i> at Page ID 2178-87 (agreements); DE 17-8, Lujan Decl. at Page ID 2188-93 (second half of agreement); <i>id.</i> at Page ID 2194 (mailer); DE 17-4, Nava Decl. at Page ID 2098-99 (first two pages of agreement); DE 17-5,</p>	<p>lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. This Defendant did not have knowledge of or any involvement with marketing or advertising. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant where no evidence of Mr. Foti's involvement in or knowledge of any mailer, website or retainer agreement requirements and where no showing that Corporate Defendants activities were "mortgage assistance services.") <i>Foti Decl.</i> ¶ 16.d., 18, 19, 20, 24, 26, 29, 31.</p>	<p>Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant.</p> <p>Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Nava Decl. at Page ID 2100-06 (remainder of agreement); DE 17-5, Navarro Decl. at Page ID 2112-25 (agreements); id. at Page ID 2128-29 (one mailer and first page of second mailer); DE 17-6, Navarro Decl. at Page ID 2130 (second page of mailer); DE 17-6, Rios Decl. at Page ID 2135-36 (mailer); DE 17-6, Rios Decl. at Page ID 2137-41, 2148-53 (agreements); DE 41-2 at Page ID 2508-11, 2515 (mailers); DE 284-4, Chang Decl. at Page ID 7248 ¶¶ 4.a, 4.b, 4.d; DE 41-3 at Page ID 2578-84 (agreement); DE 284-4, Chang Decl. at Page ID 7248 ¶ 4.o; DE 41-4 at Page ID 2586-2618 (agreements); DE 284-4, Chang Decl. at Page ID 7248-49 ¶¶ 4.p, 4.q, 4.r; DE 14-4, Gales Decl. at Page ID 1268-1366 (Brookstone Law website); DE 14-4, Gales Decl. at Page ID 1367-76 (Advantis Law website); Ex. 73 at FTC-RAD-002-</i></p>		

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>0284832 (mailer); Ex. 75 at FTC-RAD-001-0221284-85; Ex. 76 at FTC-RAD-002-0373032-33 (mailer); Ex. 77 at FTC-RAD-002-0373017 (mailer); Ex. 79 at FTC-RAD-001-0088986-87 (mailer); Ex. 80 (Ex. 79 mailer was sent); DE 284-8, Theisman Decl. at Page ID 7485, 7571-7574, 7576-7591 ¶¶ 4.l, 4.n, 4.o, 4.p, 4.q, 4.r, & 4.s; id. DE 284-8, Page ID 7487, 7486, DE 284-11, Page ID 7843-46, DE 284-10, Page ID 7754-58 at 4.ooo, 4.ss & 4.rr; DE 284-14, Madden July 2017 Decl. at Page ID 8126, 8420, ¶ 3, Att. 15, Marshall's First RFAs, RFAs 82-83 admitted pursuant to FRCP 36(a)(3).</p>		

a. Consumers Do Not Receive the Promised Benefits.

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<p>186. Torchia declared: "Neither Brookstone nor Advantis has ever won a mass joinder case. Because there is always risk in litigation, I knew there was a possibility</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>
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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 that we could in fact lose 2 all of the lawsuits and that 3 payment to Brookstone 4 and Advantis would 5 increase those consumers' 6 losses." 7 DE 186-4, <i>Torchia Decl.</i> 8 at Page ID 5375, ¶ 14.</p>	<p>with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: ADMIT</p>	<p>Undisputed as to Foti.</p>
<p>9 187. Of all of the mass 10 joinder cases filed prior to 11 2016, all but <i>Wright</i> had 12 been dismissed and none 13 had resulted in a judgment 14 for plaintiffs. 15 DE 12, <i>Madden May 2016</i> 16 <i>Decl. at Page ID 353, Att.</i> 17 <i>1, Page ID 361, Att. 2;</i> 18 <i>Page ID 377, Att. 4; Page</i> 19 <i>ID 414, 418, Att. 6; Page</i> 20 <i>ID 420, 434, Atts. 7-8;</i> 21 <i>Page ID 439, 442-43,</i> 22 <i>455-56, Atts. 9-11; Page</i> 23 <i>ID 457, Att. 12; Page ID</i> 24 <i>463, 480, 482, Atts. 14 &</i> 25 <i>16; Page ID 489, 491 Att.</i> 26 <i>17; Page ID 498, 502 Att.</i> 27 <i>19; Page ID 512, 515, Att.</i> 28 <i>21; Page ID 600, 603, Att.</i> 26; DE 13, <i>Madden May</i> 2016 <i>Decl. at Page ID</i> 726, 732, Att. 29; See DE 17, <i>Chapman Decl. at</i> Page ID 1947, ¶¶ 11-12; DE 17, <i>C. Durrett Decl. a</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY <i>Thurman Decl.,</i> <i>Attachment 49, 50, 51,</i> <i>and 52 (Cases still</i> <i>pending after January 1,</i> <i>2016: Abdullah Aslami vs.</i> <i>National Default</i> <i>Servicing Corporation</i> <i>(30-2016-00844390-CU-</i> <i>OR-CJC); Lawley vs.</i> <i>Bank of America NA (37-</i> <i>2016)-00011715-CU-OR-</i> <i>CTL); Karie Wasinack</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. He cites only evidence of additional cases filed after January 1, 2016, which does not controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Page ID 1968-70, ¶¶ 15-22; DE 17-1, Irannejad Decl. at Page ID 1979-81, ¶¶ 16-22; DE 17-2, Kolodziej Decl. at Page ID 2002-04, ¶¶ 16-22; DE 17-4, Leonido Decl. at Page ID 2077-79, ¶¶ 10-14; DE 17-7, Lujan Decl. at Page ID 2171-72, ¶¶ 10-14; DE 17-4, Nava Decl. at Page ID 2095-96, ¶¶ 10-12; DE 17-5, Navarro Decl. at Page ID 2109-10, ¶¶ 8-13; DE 17-6, Rios Decl. at Page ID 2133, ¶¶ 13-16.</p>	<p>vs. <i>Quality Loan Service Corp.</i> (RIC 1601230); <i>John P. Wright vs. Bank of America, N.A.</i> (30-2011-00449059-CU-MT-CXC); 80 additional Wright plaintiffs added in May 2016.)</p>	
<p>188. Although Wright is still active, it has not progressed beyond the filing of a complaint. DE 284-14, Madden July 2017 Decl. at Page ID 8124, 8129-73 ¶ 2.a, Att. 1.</p>	<p>Marshall: Disputed. <i>Petersen v. Bank of America</i>, 232 Cal. App. 4th 238, 254 (2014).</p> <p>Foti: ADMIT <i>As the appellate court stated in the Wright case, "In this case it will</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>obviously be a while before this complaint is ready for the prime time of a trial." Peterson v. Bnak of America Corp., 232 Cal.App.4th 238, 254 n.19 (Cal.App. 2014)</i></p>	
<p>189. On appeal in <i>Wright</i>, the California Court of Appeal stated that Brookstone's complaint, as filed, was not viable and criticized it as "scattered and desultory allegations." <i>Petersen v. Bank of America</i>, 232 Cal. App. 4th 238, 254 (2014).</p>	<p>Marshall: Disputed. Marshall Decl., at ¶ --.</p> <p>Foti: ADMIT <i>However, the California Court of Appeals also stated that by the time of the third amended complaint, the Brookstone attorneys' claims "had crystallized into four causes of action: intentional misrepresentation, negligent misrepresentation, unfair competition, and wrongful foreclosure. The first</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>three apply to all plaintiffs, the foreclosure claim to only 90 of them. The wrongful foreclosure claim, interestingly enough, presents as pristine a common issue of law as it is possible to imagine: Its theory is that the various individual foreclosures were all unlawful because the eventual trustees who foreclosed on the loan were not the original agents designated in the loan papers. The claim thus presents a tidy, discrete question of law common to all 90 foreclosure plaintiffs.”</i> <i>Peterson v. Bank of America Corp., 232 Cal. App. 4th 238, 246 (Cal.App. 2014).</i></p>	
<p>190. Currently in <i>Wright</i>, a demurrer is pending and many of the plaintiffs have stipulated to a dismissal with prejudice in exchange for Bank of America agreeing not to seek costs. DE 284-14, <i>Madden July</i></p>	<p>Marshall: Disputed.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>2017 Decl. at Page ID 8124, 8129-8258 ¶¶ 2.a-e, Att. 1-5.</p>	<p>Foti: DENY - Objection (irrelevant where FTC injunction has denied plaintiffs their counsel in the Wright action; irrelevant as to Mr. Foti where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions) <i>Foti Decl.</i> ¶ 57, 58, 75, 76, 7, 78, 79, 80</p>	<p>material fact on summary judgment.</p> <p>Undisputed as to Foti. The fact is relevant. Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.</p>
<p>191. Brookstone lost a number of mass joinder cases on the merits. DE 12, <i>Madden May 2016 Decl.</i>, at Page ID 414, 418, Att. 6; 463, 480, 482, Atts. 14 & 16; <i>Page ID 512, 515, Att. 21</i>; DE 13 at Page ID 727, 732, Att. 29.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (misstates the evidence - none of the outcomes were the result of trials on the merits or even</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant and supported by the cited evidence. Foti cites no</p>

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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
	summary judgment determinations against the plaintiffs; irrelevant as to Mr. Foti where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions) <i>DE 12, Madden May 2016 Decl., at Page ID 414, 418, Att. 6; 463, 480, 482, Atts. 14 & 16; Page ID 512, 515, Att. 21; DE 13 at Page ID 727, 732, Att. 29. Tarkowski deposition (Thurman Decl., Att. 73, pgs. 98:4-99:16, 117-119:10)</i>	evidence to controvert the fact at issue.
192. In <i>Wells Fargo Bank Mortgage Cases</i> , JCCP No. 4711, Coordinated Actions <i>Mireles, et al. v. Wells Fargo Bank N.A., et al.</i> No. BC467652 and <i>Roberts, et al. v. Wells Fargo Bank N.A., et al.</i> No. 34-2011-00110146, a September 12, 2013 decision sustained Wells Fargo’s demurrer without leave to amend, finding: the complaint “is recycled	Marshall: Foti: DENY - Objection (irrelevant as to Mr. Foti where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions) <i>Foti Decl. ¶ 57, 58, 75,</i>	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 from other cases, by other 2 plaintiffs, represented by 3 other lawyers, against 4 other defendants.” at p. 1; 5 the complaint “matches 6 the invalid complaint 7 described in the Bank of 8 America case. 9 Comparing the two 10 documents establishes 11 that the pleading by Luis 12 Mireles in this case is 13 unoriginal. As the Bank 14 of America complaint 15 lacked merit, so too does 16 this complaint lack 17 merit.” at p. 2; 18 “Copycat allegations 19 warrant the same legal 20 fate as earlier and more 21 original pleadings that 22 themselves – at the 23 pleading stage – 24 completely and 25 conclusively failed.” at 26 pp. 8-9; 27 “Mireles has not shown a 28 reasonable probability he could cure the pleading defects. At oral argument, the court inquired on this topic. Mireles’s reply illustrated the gulf between his</p>	<p>76, 7, 78, 79, 80</p>	<p>the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
concept of a curative amendment and the requirements of the law.” at p. 16. DE 284-14 , <i>Madden July 2017 Decl. at Page ID 8125, 8263-64, 8270-71, 8278 ¶ 2.g, Att. 7.</i>		
193. In <i>Potter v. JP Morgan Chase Bank, N.A. et al.</i> , BC 459627, California Superior Court for Los Angeles County, judgment was entered in favor of JP Morgan Chase. DE 12 , <i>Madden May 2016 Decl. at Page ID 512, 515, Att. 21.</i>	Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --. Foti: ADMIT <i>Foti Decl. 78; Tarkowski deposition (Thurman Decl., Att. 73, pgs. 98:4-99:16, 117-119:10)</i>	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti.
194. In <i>Norberto Flores Zenteno et al. v. Aurora Loan Services, LLC et al.</i> , BC460262, California Superior Court for Los Angeles County, judgment was entered in favor of defendants.	Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant’s involvement with Advantis Law	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>DE 13, <i>Madden May 2016 Decl. at Page ID 727, 732, Att. 29.</i></p>	<p>Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (irrelevant as to Mr. Foti where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions) <i>Foti Decl</i> ¶ 57, 58, 75, 76, 7, 78, 79, 80</p>	<p>Undisputed as to Foti. The fact is relevant.</p> <p>Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.</p>
<p>195. In <i>James Hughes et al. v. Ocwen Financial Corp. et al.</i>, BC559747, California Superior Court for Los Angeles County, the mass joinder was dismissed for want of prosecution. DE 12, <i>Madden May 2016 Decl. at Page ID 457, Att. 12.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (irrelevant as to Mr. Foti where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions)</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant.</p> <p>Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>Foti Decl</i> ¶ 57, 58, 75, 76, 7, 78, 79, 80	reference does not address the fact at issue.
196. In many instances, Brookstone voluntarily dismissed mass joinder actions it had filed. DE 12 , <i>Madden May 2016 Decl. at Page ID 353, 360 Att. 1, Page ID 361, 371 Att. 2, Page ID 377, 384, Att. 4, Page ID 439, 442, 455-56, Atts. 10-11, Page ID 489, 491 Att. 17, Page ID 498, 502 Att. 19.</i>	Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --. Foti: DENY - Objection (irrelevant as to Mr. Foti where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions) <i>Foti Decl</i> ¶ 57, 58, 75, 76, 7, 78, 79, 80	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.
197. The Corporate Defendants did not seek to void consumers' mortgage notes through mass joinder litigation arguing "the debt isn't void, just the sale. The property is still subject to the same	Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare part of this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group,	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>encumbrances as existed prior to the wrongful foreclosure sale.” (emphasis in original). DE 13-3, <i>Madden May 2016 Decl. at Page ID 919, 942-43, Att. 50, Potter v. JP Morgan Chase Bank N.A., No. 11-10255 (C.D. Cal.) (Pltf. Reply in Support of Motion to Remand, at 15-16, (DE 24))</i>.</p>	<p>P.C. or the other individual defendants in this action. Disputed. To the extent “Advantis” refers to Advantis Law Group, P.C. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (irrelevant as to Mr. Foti where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions) <i>Foti Decl ¶ 57, 58, 75, 76, 7, 78, 79, 80</i></p>	<p>Undisputed as to Foti. The fact is relevant.</p> <p>Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.</p>
<p>198. Neither Brookstone nor Advantis ever succeeded in a mass joinder case it filed. DE 186-4, <i>Torchia Decl. at Page ID 5375, ¶ 14; DE 284-14</i>, <i>Madden July 2017 Decl. at Page ID 8126, 8419-20 ¶ 3, Att. 15, Marshall's First RFAs, RFAs 69, 76-77, 79 admitted pursuant to FRCP 36(a)(3)</i>.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (irrelevant as to Mr. Foti where no evidence he had any knowledge or</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant.</p> <p>Foti cites only his self-serving declaration,</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	involvement regarding the handling or status of any of the legal actions) <i>Foti Decl</i> ¶ 57, 58, 75, 76, 7, 78, 79, 80	which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.
<p>199. Some consumers who paid to be mass joinder clients were never added to a mass joinder case.</p> <p>DE 16, <i>Kennedy Decl. at Page ID 1562, 1580, 1589, Att. 1.C (Decision, In the Matter of: Vito Torchia, Jr., Member No. 244687, Case Nos. 12-O-11847-RAP (12-O-13469); 12-O-14081; 12-O-14522; 12-O-16003; 12-O-17260; 12-O-17119; 12-O-18135 (State Bar Court of California (Aug. 6, 2014))</i>); <i>id. at Page ID 1641, 1642, Att. 1.K (Decision and Order of Involuntary Inactive Enrollment, In the Matter of: Vito Torchia, Jr., Case Nos. 13-O-14835 (13-O-15422); 14-O-01008 (14-O-02316); 14-O-02698-YDR, (State Bar Court of California (Nov. 12, 2015))</i>); DE 284-14,</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (irrelevant as to Mr. Foti where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions)</p> <p><i>Foti Decl</i> ¶ 57, 58, 75, 76, 7, 78, 79, 80; <i>Thurman Decl., Attachment 70.</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue. The other evidence cited does not controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Madden July 2017 Decl. at Page ID 8126, 8420 ¶ 3, Att. 15, Marshall's First RFAs, RFA 81 admitted pursuant to FRCP 36(a)(3).</i></p>		
<p>200. The California Bar found Torchia “lacked and continues to lack the law-office-management skills and basic knowledge of mortgage lending law and bankruptcy law necessary to adequately and properly represent some 4,000 mortgage loan clients and to adequately supervise a law office staff of 30 to 40 employees.” DE 16, <i>Kennedy Decl. at Page ID 1565, Att. 1.C (Decision, In the Matter of: Vito Torchia, Jr., Member No. 244687, Case Nos. 12-O-11847-RAP (12-O-13469); 12-O-14081; 12-O-14522; 12-O-16003; 12-O-17260; 12-O-17119; 12-O-18135 (State Bar Court of California (Aug. 6, 2014)))</i>.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> <i>Marshall Decl., at ¶ --.</i></p> <p>Foti: DENY - Objection (irrelevant as to Mr. Foti where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions) <i>Foti Decl ¶ 57, 58</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>201. Tarkowski was first admitted to the California Bar in 2014. DE 16-1, <i>Kennedy Decl.</i> at Page ID 1647.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (irrelevant as to Mr. Foti where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions) <i>Foti Decl.</i> ¶ 75, 76, 77, 78, 79, 80</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.</p>
<p>202. Tarkowski had little mortgage lender litigation experience prior to working for the Corporate Defendants. DE 186-3, <i>Tarkowski Decl.</i> at Page ID 5356-57, ¶¶ 2-3, 6.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	Foti: DENY - Objection (irrelevant as to Mr. Foti where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions) <i>Foti Decl.</i> ¶ 75, 76, 77, 78, 79, 80	Undisputed as to Foti. The fact is relevant. Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.
203. Marshall had no prior mass joinder litigation experience. DE 284-14 , <i>Madden July 2017 Decl. at Page ID 8125, Page ID 8283 ¶ 2.h, Att. 8, Marshall Depo. at 19:11-20.</i>	Marshall: Undisputed. That is one of the big reasons Marshall sought to coordinate with the individual co-defendants— they had foreclosure joinder lawsuit experience and Marshall had the deeper foreclosure law experience overall. It was never a secret that Marshall sought to make their cases more successful. In turn, if and when Marshall filed joinder cases, which never happened, Marshall would benefit and his new Adavantis Law Group clients would benefit. Foti: DENY - Objection (irrelevant as to Mr. Foti	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant.

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions) <i>Foti Decl.</i> ¶ 75, 76, 77, 78, 79, 80	Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.
204. Many of the complaints Marshall has filed on behalf of his clients are dismissed without leave to amend for failure to allege cognizable claims. DE 284-14 , <i>Madden July 2017 Decl. at Page ID 8125-26, 8316-8365, ¶¶ 2.j-m, Atts. 10-13.</i>	Marshall: Disputed. A significant number of foreclosure cases Marshall has settled and “won.” Marshall Decl., at ¶ --. Foti: DENY - Objection (irrelevant as to Mr. Foti where no evidence he had any knowledge or involvement regarding the handling or status of any of the legal actions) <i>Foti Decl.</i> ¶ 75, 76, 77, 78, 79, 80	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.
a. In May 2016, the Corporate Defendants Sent Out “Account Due” Letters Demanding an Additional \$5,000.		
205. On May 5, 2016, Brookstone mass mailed an “ACCOUNT DUE” letter to clients claiming each owed Brookstone \$5,000 for past work done on the <i>Wright</i> appeal. DE 41-2 at Page ID 2543-45; DE 41-3 at	Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group,	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Page ID 2547-74; DE 284-4, Chang Decl. at Page ID 7248 ¶¶ 4.l, 4.m.</i></p>	<p>P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant - no evidence regarding when mailed, to whom mailed, how many mailed or who mailed; no evidence that any clients made any payments based on any letters; no evidence Jeremy approved or directly participated in preparation or mailing of letters or that he was aware of the amounts billed and how they were calculated; hearsay).</p> <p><i>Not a single one of the FTC's declarants claims they paid any money to the Corporate Defendants in response to the "Account Due" letters. (DE 17, Chapman Decl. at Page ID 1945-47; DE 17, C. Durrett Decl.) at Page ID 1965-70; DE 17-1, Irannejad Decl. at Page ID 1976-81; DE 17-2, Kolodziej Decl. at Page</i></p>	<p>Undisputed as to Foti. The fact is relevant. The FTC's evidence shows that the letters were in fact sent to consumers.</p> <p>Foti cites no evidence to controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>1998-2004; DE 17-4, Leonido Decl. at Page 2076-79; DE 17-4, Nava Decl. at Page ID 2094-2096; DE 17-5, Navarro Decl. at Page ID 2107-11; DE 17-6, Rios Decl. at Page ID 2131-34; DE 17- 7, Lujan Decl. at Page ID 2168-74). No other evidence submitted reflecting any payments received in response to the "Account Due" letters.</p>	
<p>206. The "Account Due" letter claimed: "Your file needs your immediate attention as we show there is an outstanding balance. We need this to be cleared up with accounting so we can continue to represent you as a plaintiff on this case." DE 41-2 at Page ID 2543; DE 284-4, Chang Decl. at Page ID 7248 ¶ 4.l.</p>	<p>Marshall: This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant - no evidence regarding when mailed, to whom mailed, how many mailed or who mailed; no evidence that any clients</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The FTC's evidence shows that the letters were in fact sent to consumers. Foti cites no</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>made any payments based on any letters; no evidence Jeremy approved or directly participated in preparation or mailing of letters or that he was aware of the amounts billed and how they were calculated; hearsay).</p> <p><i>Not a single one of the FTC's declarants claims they paid any money to the Corporate Defendants in response to the "Account Due" letters. (DE 17, Chapman Decl. at Page ID 1945-47; DE 17, C. Durrett Decl.) at Page ID 1965-70; DE 17-1, Irannejad Decl. at Page ID 1976-81; DE 17-2, Kolodziej Decl. at Page 1998-2004; DE 17-4, Leonido Decl. at Page 2076-79; DE 17-4, Nava Decl. at Page ID 2094-2096; DE 17-5, Navarro Decl. at Page ID 2107-11; DE 17-6, Rios Decl. at Page ID 2131-34; DE 17-7, Lujan Decl. at Page ID 2168-74). No other evidence submitted</i></p>	<p>evidence to controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>reflecting any payments received in response to the "Account Due" letters.</i>	
<p>207. The "Account Due" letter claimed: "We do have several options for you in order to make it financially feasible for you to continue to have our firm represent you in this case. Attached please find an invoice for services provided and an amount that is currently due." (bold in original). DE 41-2 at Page ID 2543; DE 284-4, Chang Decl. at Page ID 7248 ¶ 4.l.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant - no evidence regarding when mailed, to whom mailed, how many mailed or who mailed; no evidence that any clients made any payments based on any letters; no evidence Jeremy approved or directly participated in preparation or mailing of letters or that he was aware of the amounts billed and how they were calculated; hearsay). <i>Not a single one of the</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The FTC's evidence shows that the letters were in fact sent to consumers. Foti cites no evidence to controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>FTC's declarants claims they paid any money to the Corporate Defendants in response to the "Account Due" letters. (DE 17, Chapman Decl. at Page ID 1945-47; DE 17, C. Durrett Decl.) at Page ID 1965-70; DE 17-1, Irannejad Decl. at Page ID 1976-81; DE 17-2, Kolodziej Decl. at Page 1998-2004; DE 17-4, Leonido Decl. at Page 2076-79; DE 17-4, Nava Decl. at Page ID 2094-2096; DE 17-5, Navarro Decl. at Page ID 2107-11; DE 17-6, Rios Decl. at Page ID 2131-34; DE 17-7, Lujan Decl. at Page ID 2168-74). No other evidence submitted reflecting any payments received in response to the "Account Due" letters.</i></p>	
<p>208. The "Account Due" letter claimed: "Call today to get your account off 'Accounting Hold.'" DE 41-2 at Page ID 2543; DE 284-4, Chang Decl. at Page ID 7248 ¶ 4.1.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant - no evidence regarding when mailed, to whom mailed, how many mailed or who mailed; no evidence that any clients made any payments based on any letters; no evidence Jeremy approved or directly participated in preparation or mailing of letters or that he was aware of the amounts billed and how they were calculated; hearsay). <i>Not a single one of the FTC's declarants claims they paid any money to the Corporate Defendants in response to the "Account Due" letters. (DE 17, Chapman Decl. at Page ID 1945-47; DE 17, C. Durrett Decl.) at Page ID 1965-70; DE 17-1, Irannejad Decl. at Page ID 1976-81; DE 17-</i></p>	<p>Undisputed as to Foti. The fact is relevant. The FTC's evidence shows that the letters were in fact sent to consumers.</p> <p>Foti cites no evidence to controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>2, <i>Kolodziej Decl. at Page 1998-2004; DE 17-4, Leonido Decl. at Page 2076-79; DE 17-4, Nava Decl. at Page ID 2094-2096; DE 17-5, Navarro Decl. at Page ID 2107-11; DE 17-6, Rios Decl. at Page ID 2131-34; DE 17- 7, Lujan Decl. at Page ID 2168-74). No other evidence submitted reflecting any payments received in response to the "Account Due" letters.</i></p>	
<p>209. The "Account Due" letter attached an invoice, claiming \$5,000 was due for over 1,800 hours purportedly spent working on the <i>Wright</i> appeal. DE 41-2 at Page ID 2543-44; DE 284-4, <i>Chang Decl. at Page ID 7248 ¶ 4.1.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> <i>Marshall Decl., at ¶ --.</i></p> <p>Foti: DENY - Objections (irrelevant - no evidence regarding when mailed, to whom mailed, how many mailed or who mailed; no</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The FTC's evidence shows that the letters were in fact sent to consumers.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>evidence that any clients made any payments based on any letters; no evidence Jeremy approved or directly participated in preparation or mailing of letters or that he was aware of the amounts billed and how they were calculated; hearsay).</p> <p><i>Not a single one of the FTC's declarants claims they paid any money to the Corporate Defendants in response to the "Account Due" letters. (DE 17, Chapman Decl. at Page ID 1945-47; DE 17, C. Durrett Decl.) at Page ID 1965-70; DE 17-1, Irannejad Decl. at Page ID 1976-81; DE 17-2, Kolodziej Decl. at Page 1998-2004; DE 17-4, Leonido Decl. at Page 2076-79; DE 17-4, Nava Decl. at Page ID 2094-2096; DE 17-5, Navarro Decl. at Page ID 2107-11; DE 17-6, Rios Decl. at Page ID 2131-34; DE 17-7, Lujan Decl. at Page ID 2168-74). No</i></p>	<p>Foti cites no evidence to controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>other evidence submitted reflecting any payments received in response to the "Account Due" letters.</i>	
<p>210. The "Account Due" letter attached an invoice, claiming 1,237 hours had been worked on the opening appeal brief for the <i>Wright v. Bank of America</i> appeal. DE 41-2 at Page ID 2543-44; DE 284-4, <i>Chang Decl.</i> at Page ID 7248 ¶ 4.1</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> <i>Marshall Decl., at ¶ --.</i></p> <p>Foti: DENY - Objections (irrelevant - no evidence regarding when mailed, to whom mailed, how many mailed or who mailed; no evidence that any clients made any payments based on any letters; no evidence Jeremy approved or directly participated in preparation or mailing of letters or that he was aware of the amounts billed and how they were calculated; hearsay).</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The FTC's evidence shows that the letters were in fact sent to consumers. Foti cites no evidence to controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Not a single one of the FTC's declarants claims they paid any money to the Corporate Defendants in response to the "Account Due" letters. (DE 17, Chapman Decl. at Page ID 1945-47; DE 17, C. Durrett Decl.) at Page ID 1965-70; DE 17-1, Irannejad Decl. at Page ID 1976-81; DE 17-2, Kolodziej Decl. at Page 1998-2004; DE 17-4, Leonido Decl. at Page 2076-79; DE 17-4, Nava Decl. at Page ID 2094-2096; DE 17-5, Navarro Decl. at Page ID 2107-11; DE 17-6, Rios Decl. at Page ID 2131-34; DE 17-7, Lujan Decl. at Page ID 2168-74). No other evidence submitted reflecting any payments received in response to the "Account Due" letters.</i></p>	
<p>211. The Corporate Defendants did not track the hours worked by attorneys on matters or projects related to the mass joinder litigation. DE 186-3, <i>Tarkowski</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Decl., at Page ID 5363-64, ¶ 22; DE 186-4, Torchia Decl., at Page ID 5381-82, ¶¶ 28-30; DE 284-14, Madden July 2017 Decl. at Page ID 8126, 8419 ¶ 3, Att. 15, Marshall's First RFAs, RFA 73 admitted pursuant to FRCP 36(a)(3).</i></p>	<p>involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY <i>Foti Decl. 43, 44; MT MSJ Decl. Attachment 17 (Vito State Bar testimony: "there is a protocol that I established in which the assisting managing attorney at the time would be responsible for looking into the allegations, gathering documents, time sheets, whatever, depending on what they were asking for ... if they wanted refunds of money, then I would review it."); Thurman Decl., Attachment 55, 56;</i></p>	<p>Undisputed as to Foti. In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment. The other evidence he cites does not indicate that the Corporate Defendants in fact tracked the hours that they worked.</p>
<p>212. The "Account Due" letter went to clients who had not agreed to additional billings, clients who had regularly made their monthly payments, and even some clients who had long since terminated Brookstone.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group,</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>DE 41-3 at Page ID 2547-74; Chang Decl. at ¶ 4.m.</i></p>	<p>P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant - no evidence regarding when mailed, to whom mailed, how many mailed or who mailed; no evidence that any clients made any payments based on any letters; no evidence Jeremy approved or directly participated in preparation or mailing of letters or that he was aware of the amounts billed and how they were calculated; hearsay) <i>Not a single one of the FTC's declarants claims they paid any money to the Corporate Defendants in response to the "Account Due" letters. (DE 17, Chapman Decl. at Page ID 1945-47; DE 17, C. Durrett Decl.) at Page ID 1965-70; DE 17-1, Irannejad Decl. at Page ID 1976-81; DE 17-2, Kolodziej Decl. at Page</i></p>	<p>Undisputed as to Foti. The fact is relevant. The FTC's evidence shows that the letters were in fact sent to consumers. The evidence is not hearsay because it is an opposing party's statement.</p> <p>Foti cites no evidence to controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>1998-2004; DE 17-4, Leonido Decl. at Page 2076-79; DE 17-4, Nava Decl. at Page ID 2094-2096; DE 17-5, Navarro Decl. at Page ID 2107-11; DE 17-6, Rios Decl. at Page ID 2131-34; DE 17- 7, Lujan Decl. at Page ID 2168-74). No other evidence submitted reflecting any payments received in response to the "Account Due" letters.</p>	
<p>Consumers paid more than \$18 Million.</p>		
<p>213. From January 1, 2011 through June 2, 2016, the Corporate Defendants had revenues of \$18,146,866.34 taking into account refunds, chargebacks, and transfers among the Corporate Defendants' bank accounts. DE 284-5, George July 6, 2017 Decl. at Page ID 7271 ¶ 9, Att. B.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY <i>Thurman Decl., Attachment 39; FTC's Updated Response to Interrogatory No. 1 (FTC-</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The document Foti cites to in response is not accompanied by any testimony explaining that</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>RFP-0152760)</i>	the spreadsheet included all revenues and so does not controvert Mr. George's testimony of the revenue figure based on his review of the Corporate Defendants' bank statements.
<p>214. From February 27, 2015 through June 2016, the Corporate Defendants had revenues of \$1,784,022.61 taking into account refunds, chargebacks, and transfers among the Corporate Defendants' bank accounts. DE 284-5, <i>George July 6, 2017 Decl. at Page ID 7272 ¶ 10, Att. C.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY <i>Thurman Decl., Attachment 39; FTC's Updated Response to Interrogatory No. 1 (FTC-RFP-0152760)</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The document Foti cites to in response is not accompanied by any testimony explaining that the spreadsheet included all revenues and so does not controvert Mr. George's testimony of the revenue figure based on his review of the Corporate Defendants'</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
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		bank statements.
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Foti and Marshall Were Directly Involved in the Wrongful Conduct.

a. From the Beginning, Foti Was a Manager.

<p>215. Foti began working with Brookstone in late 2010. DE 78-1, Declaration of Jeremy Foti in Support of Opposition to Preliminary Injunction (“Foti July 2016 Decl.”) at Page ID 3538, ¶¶ 9-10; <i>id.</i> at Page ID 3544-50; DE 152-1, Declaration of Jeremy Foti in Support of Defendant’s Response to Plaintiff’s Objections to Proposed Findings of Fact and Receiver’s Supplemental Report (“Foti Nov. 2016 Decl.”) at Page ID 4757-59; Ex. 91 (email from Foti to Kutzner regarding Brookstone sales script dated November 18, 2010); Ex. 97 (email from Foti to Kutzner and other Brookstone employees re sales dated December 10, 2010); DE 284-8, Theisman Decl. at Page ID 7486, 7653-56, 7685</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: ADMIT - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) Foti Decl., ¶ 16.d. and 18</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>
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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>¶¶ 4.w & 4.cc; <i>id.</i> at DE 284-8, Page ID 7489, DE 284-12, Page ID 7973-74 ¶ 4.vvvv (authenticating and attaching FTC-RAD-002-0457531 to 0457532, email from Foti to Kutzner regarding bringing on Brookstone employees dated November 30, 2010); <i>id.</i> at DE 284-8, Page ID 7487, DE 284-10, Page ID 7790-93 ¶ 4.ddd (authenticating and attaching FTC-RAD-001-0131338 to 0131341, email dated November 16, 2010 from Kutzner to Foti attaching Brookstone script); <i>id.</i> at DE 284-8, Page ID 7487, DE 284-11, 78547 ¶ 4.ttt (authenticating and attaching FTC-RAD-001-0201437, email dated November 17, 2010 from Foti to Kutzner replying to email from Kutzner attaching a Brookstone sales script, stating: “Send me the rest of your scripts. I am putting an ad in to hire people and</p>		

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
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have leads starting on Thursday. We are set to have our screeners answer calls as soon as tomorrow. If calls dump into screens they will get all the mortgage info then transfer the call over to your QC person. I think the flow can be a little smoother that is why I want to look at the scripts. I will work on a little bit shorter process, but will still have the same effect with the client. Let me know what you think.”); *id.* at [DE 284-8](#), Page ID 7487, [DE 284-11](#), 7855 ¶ 4.rrr (authenticating and attaching FTC-RAD-001-0195945, email exchange dated December 2, 2010, with Foti regarding a shared calendar for Brookstone); *id.* at [DE 284-8](#), Page ID 7487, [DE 284-11](#), 7854 ¶ 4.qqq (authenticating and attaching FTC-RAD-001-0191412, email from Foti to Kutzner regarding “our deal,” and stating, among other things,

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>“[p]rofits to be split 50/50”); <i>id.</i> at DE 284-8, Page ID 7487, DE 284-11, 7858 ¶ 4.uuu (authenticating and attaching FTC-RAD-001-0204736, an email exchange dated December 6, 2010, with Foti asking what to do about Brookstone’s phone provider being down); <i>id.</i> at DE 284-8, Page ID 7487, DE 284-11, 7856, ¶ 4.sss (authenticating and attaching FTC-RAD-001-0196601, email dated December 7, 2010, with Foti asking for a “company employee list” to be sent to jeremyf@brookstone-law.com”); <i>id.</i> at DE 284-8, Page ID 7487, DE 284-11, 7847-53 ¶ 4.ppp (authenticating and attaching FTC-RAD-001-0191405 to 0191411, email dated December 16, 2010 with Foti requesting an estimate for business cards and attaching proofs of the cards including one listing his</p>		

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>title as "Managing Team"); DE 284-7, Lobo Decl. at Page ID 7472 ¶ 4, Att. 1 at 4.</i></p>		
<p>216. In an email dated November 17, 2010, in response to an email from Kutzner attaching a Brookstone script, Foti writes to Kutzner: "Send me the rest of your scripts. I am putting an ad in to hire people and have leads starting on Thursday. We are set to have our screeners answer calls as soon as tomorrow. If calls dump into screens they will get all the mortgage info then transfer the call over to your QC person. I think the flow can be a little smoother that is why I want to look at the scripts. I will work on a little bit shorter process, but will still have the same effect with the client. Let me know what you think." <i>Theisman Decl. at DE 284-8, Page ID 7487, DE 284-11, 7857 ¶ 4.ttt; id. at DE 284-8, Page ID 7487,</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> <i>Marshall Decl., at ¶ --.</i></p> <p>Foti: ADMIT - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>Foti Decl., ¶ 16.d. and 18</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>DE 284-10, Page ID 7790-93 ¶ 4.ddd (authenticating and attaching FTC-RAD-001-0131338 to 0131341, email dated November 16, 2010 from Kutzner to Foti attaching Brookstone script).</p>		
<p>217. In an email dated November 30, 2010, Foti tells Kutzner he is bringing in numerous employees, several of whom are sales people and are former employees of Plan Right Group, and further states: "It is go time let's hit it full throttle." <i>Theisman Decl.</i> at DE 284-8, Page ID 7489, DE 284-12, Page ID 7973-74 ¶ 4.vvvv.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl.</i>, ¶ 32, (<i>Plan Right</i>); <i>DE-284-7, Lobo</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Decl., Att. 1. Page ID 7475-76.</i></p>	<p>statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue. The other evidence cited does not controvert the fact at issue.</p>
<p>218. In an email from Foti to Kutzner dated December 3, 2010, Foti writes: "Here is the way I see our deal being structured so look it over and make any changes or suggestions you might have.</p> <p>1) Investment to be split 50/50</p> <p>2) Investment to be paid back by applying 80% of the net profit</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>per month until everyone's investment has been paid back.</p> <p>3) Profits to be split 50/50</p> <p>4) All decisions to be agreed on and discussed.</p> <p>5) Salaries for all ACTIVE working employee's</p> <p>6) Start date income and expenses to be effective 11-29-10 this past Monday</p> <p>7) Shared employee's must be agreed on by all parties before such share shall take place</p> <p>8) Any past expenses for either party to be paid by that party in full</p> <p>9) All expenses to be agreed upon</p> <p>10) Agreement can only be broken if BOTH parties agree</p> <p>11) All parts of</p>	<p>(irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p> <p><i>Foti Decl., ¶ 86, (December 2010 email)</i></p>	<p>The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>litigation business to be split 50/50 regardless of who brings it in</p> <p>12) Any NEW outside ventures should be 50/50 as well</p> <p>That all I can think of as of now but I am sure you will come up with some things.”</p> <p><i>Theisman Decl. at DE 284-8, Page ID 7487, DE 284-11, 7854 ¶ 4. qqq.</i></p>		
<p>219. Foti had authority to issue refunds to Brookstone clients.</p> <p><i>Theisman Decl. at DE 284-8, Page ID 7487, DE 284-10, Page ID 7776 ¶ 4.aaa; DE 284-7, Lobo Decl. at Page ID 7467 ¶ 7.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>or had anything to do with them.) <i>Foti, 39, 67 (no authority to authorize refunds); MT MSJ Decl., Attachments 11 (Torchia testimony: "I would have had to [approve a refund]"), 16 (Torchia testimony: His assistant attorney "had certain authority to handle certain matters on his own," "as long as it didn't have to do with money. If it had to do with money, we would sit down" and "if he felt that there might be some refund due, ... I would go over it with him"), 17 ("there is a protocol that I established in which the assisting managing attorney at the time would be responsible for looking into the allegations, gathering documents, time sheets, whatever, depending on what they were asking for ... if they wanted refunds of money, then I would review it."); Damian Kutzner's Executive Employment</i></p>	<p>the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue. The other evidence cited does not controvert the fact at issue. Although he cites to "protocol," the evidence he cites acknowledges the protocol was not followed.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Agreement; Lobo email (FTC-RAD- 001-0080085) states: "Per Vito the two of you have the authority to issue refunds. So whenever there is a refund request I need an email from either of you confirming it is ok to issue the refund & the amount of the refund." Although it has produced hundreds of thousands of documents and had access to thousands of emails, the FTC has failed to identify a single email or other document where Mr. Foti approved a refund.</i></p>	
<p>220. One of the Corporate Defendants' phone directories identified Foti as "management." DE 41-5 at Page ID 2640; DE 284-4, Chang Decl. at Page ID 7249 ¶ 4.u.</p>	<p>Marshall: This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
	<p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl. 33, 34, 36 (not an Executive); Thurman Decl., Attachment 48 (Kutzner employment agreement)</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party’s statement. Finding documents on a receivership computer from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue. The other evidence cited does not controvert the fact at issue.</p>
<p>221. One of the Corporate Defendants’ phone directories identified Foti as “VP of</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Marketing.” <i>DE 41-5 at Page ID 2641; DE 284-4, Chang Decl. at Page ID 7249 ¶ 4.u; Theisman Decl. at DE 284-8, Page ID 7487, DE 284-10, Page ID 7769-71 ¶ 4.yy (authenticating and attaching FTC-RAD-001-0079758 to 0079759, an email dated July 12, 2012, to “Brookstone All,” recovered from one of Foti’s computers, attaching phone directory identifying Foti as VP of Marketing).</i></p>	<p>undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl. (not an Executive); Thurman Decl., Attachment 48 (Kutzner employment agreement)</i></p>	<p>controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party’s statement. Finding documents on a receivership computer from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
		summary judgment, and the cited reference does not address the fact at issue. The other evidence cited does not controvert the fact at issue.
<p>222. Foti was copied on an email from a Brookstone employee to Brookstone's landlord attaching a "Tenant Contact Information" document listing Foti as the person with signature authority and identifying him as an "Executive." <i>Theisman Decl. at DE 284-8, Page ID 7486, DE 284-10, 7752-53 ¶ 4.qq.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl. 33, 34, 36 (not an Executive); Thurman Decl., Attachment 48 (Kutzner employment agreement)</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
		<p>from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue. The other evidence cited does not controvert the fact at issue.</p>
<p>223. When Foti applied for health insurance, he claimed to be Brookstone's CFO. DE 69-2, <i>Chang July 2016 Decl.</i>, at Page ID 3273-77, Att. 2, at Page ID 3273 (<i>Foti health care application</i>); , DE 284-8, <i>Theisman Decl.</i> at Page ID 7489 ¶ 7 (<i>attaching excerpt of Foti RFA answer admitting he signed this health care application, response to RFAs 8 & 9</i>).</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; no foundation the email or</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>the written "CFO" is genuine, that Mr. Foti sent or received a copy of it, knew about it or had anything to do with it in the form presented here. Although Mr Foti has admitted he signed the healthcare application, he denies he wrote or saw the "CFO" on the document.) <i>Foti Decl. 36, 37 (re: "CFO"); DE 69-2, Chang July 2016 Decl. at Page ID 3267-3268, 3273, 3277, Att. 2.</i></p>	<p>established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue. The other evidence cited does not controvert the fact at issue. In fact, as the FTC cited, Foti admitted the application, with the designation of CFO and employee of Brookstone, is genuine and authentic.</p>
224. Brookstone's bookkeeper created a	Marshall: <i>This</i> Defendant lacks the knowledge or	Undisputed as to Marshall. He does not

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>chart showing the payments to Brookstone employees, and Foti, along with Kutzner, is identified as an "executive." DE 41-5 at Page ID 2669; DE 284-4, Chang Decl. at Page ID 7249 ¶ 4.z.</p>	<p>information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>225. In the chart created by Brookstone's bookkeeper, Foti received</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to</p>	<p>Undisputed as to Marshall. He does not offer any admissible</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>the same amount of income from Brookstone as Torchia and Kutzner. DE 41-5 at Page ID 2668-72; DE 284-4, <i>Chang Decl. at Page ID 7249 ¶ 4.z</i>; DE 284-7, <i>Lobo Decl. at Page ID 7467 ¶ 6</i>.</p>	<p>dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) No authentication of who created chart - Lobo declaration fails to state the time period when she claims Foti received the same amounts; acknowledges that she did very little or no work from August 2014 to September 2015 and worked from home from October 2013 to August 2014 and September 2015 to June 2016; Irrelevant (the fact that Foti received</p>	<p>evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	the same amount of income from Brookstone as Torchia and Kutzner during the referenced time period does not establish either that Foti had any ownership interest or any ability to control Brookstone). <i>DE-284-7, Lobo Decl., ¶ 2. ("From October 2013 until August 2014, I worked part-time for Brookstone Law from my home for approximately 15 hours a week. From August 2014 until mid-October 2014, I did very little work for Brookstone Law. From November 2014 until September 2015, I did no work for Brookstone. I worked for Brookstone Law part time from September 2015 to June 2016.")</i>	
226. Brookstone's bookkeeper created and distributed "daily cash position" reports to Foti, Kutzner, and Torchia. DE 284-7, Lobo Decl. at Page ID 7467 ¶ 7.	Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with</i>	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. Not unusual Mr. Foti would receive these in light of his budgeting and forecasting responsibilities - do not establish any ability to control). <i>Foti Decl. 15, 16 (re: his responsibilities)</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>227. Foti, Kutzner, and Torchia all signed their initials to a document titled "Deal Memo." DE 41-5 at Page ID 2681; Ex. 68; DE 284-8, <i>Theisman Decl.</i> at Page ID 7485, 7540 ¶ 4.j; DE 284-13, <i>Theisman Decl.</i> at Page ID 8059 ¶ 15, Att. 12, <i>Foti Depo.</i> at 74:12-18 ("It's not my signature. It's my initials."); DE 284-8, <i>Theisman Decl.</i> at Page ID 7489 ¶ 7 (attaching excerpts of Foti's response to RFA 38 admitting the Deal Memo is authentic, response to RFA 38).</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: ADMIT <i>Foti Decl. 33, 34 (explaining Deal Memo); MAT MSJ Decl., Attachments 1 (Brookstone Law, P.C. Statement of Information" dated December 11, 2013), 2 (Brookstone accountant's testimony that 2012 K-1 shows Vito Torchia was "100% owner " of Brookstone), 3 (Resolution of the Shareholders of Brookstone Law, P.C., Stock Certificate Transfer dated July 8, 2015), 4 (Memorandum of Understanding between</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Law Offices of Jonathan Tarkowski and Brookstone Law, P.C. dated June 30, 2014), 5 (Attachment C-1 Standard Law Corporation Guarantee), 6 (Torchia State Bar Testimony that he was the CEO, president and managing attorney of Brookstone), 7 (Memorandum of Understanding between Law Offices of Vito Torchia, Jr., Esq. and Advantis Law, P.C. dated July 8, 2015); Thurman Decl., Attachment 68 (Certified copy of Attachment C-1 Standard Law Corporation Guarantee produced by California State Bar); Thurman Decl., Attachment 48 (Kutzner's Executive Employment Agreement); DE-78-1, Pages 3544-50 (Independent consulting and business services agreement).</i></p>	
<p>228. The "Deal Memo," in a provision related to the day-to-day</p>	<p>Marshall: This Defendant lacks the knowledge or information and belief to</p>	<p>Undisputed as to Marshall. He does not offer any admissible</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>management of Brookstone, states: "[T]here will be a majority rule in the voting decision amongst the shareholders of the firm and non-attorneys (Employees) Jeremy Foti and Damian Kutzner." DE 41-5 at Page ID 2681; Ex. 68; DE 284-8, <i>Theisman Decl.</i> at Page ID 7485, 7540 ¶ 4.j; DE 284-8, <i>Theisman Decl.</i> at Page ID 7489 ¶ 7 (attaching excerpts of Foti's response to RFAs admitting the Deal Memo is authentic, response to RFA 38).</p>	<p>dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: ADMIT <i>Foti Decl. 33, 34 (Deal Memo); MAT MSJ Decl., Attachments 1 (Brookstone Law, P.C. Statement of Information" dated December 11, 2013), 2 (Brookstone accountant's testimony that 2012 K-1 shows Vito Torchia was "100% owner " of Brookstone), 3 (Resolution of the Shareholders of Brookstone Law, P.C., Stock Certificate Transfer dated July 8, 2015), 4 (Memorandum of Understanding between Law Offices of Jonathan Tarkowski and Brookstone Law, P.C. dated June 30, 2014), 5</i></p>	<p>evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>(Attachment C-1 Standard Law Corporation Guarantee), 6 (Torchia State Bar Testimony that he was the CEO, president and managing attorney of Brookstone), 7 (Memorandum of Understanding between Law Offices of Vito Torchia, Jr., Esq. and Advantis Law, P.C. dated July 8, 2015); Thurman Decl., Attachment 68 (Certified copy of Attachment C-1 Standard Law Corporation Guarantee produced by California State Bar); Thurman Decl., Attachment 48 (Kutzner's Executive Employment Agreement); DE-78-1, Pages 3544-50 (Independent consulting and business services agreement).</i></p>	
<p>229. Foti later provided loan funding to Brookstone in accordance with the "Deal Memo" agreement. DE 284-13, <i>Theisman Decl. at Page ID 8059 ¶</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>15, Att. 12, Foti Depo. at 76:6-12 (“Q. Did you ever provide loan funding to Brookstone? A. I did. I provided Vito [Torchia] personally with funds. I’m not sure of the exact amounts, but it was always, you know, approached by Vito [Torchia] about, ‘Hey, I need to be able to pay this or pay that,’ and so I would consider it from time to time.”).</p>	<p>involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY <i>Foti Decl. 33</i></p>	<p>Undisputed as to Foti. Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment</p>
<p>230. In 2015, Kutzner sent the “Deal Memo” to a third party, explaining that he and Foti were “partners” of Brookstone. <i>Ex. 69 (email from Kutzner to Pepe Abad, copying Foti, attaching the Deal Memo, and stating “Psss. . . Look at the Deal memo we all signed. . . . I am sending this to you as we are partners NOW and you should understand all sides! Not just one!”); DE 284-8, Theisman Decl. at Page ID 7485, 7541-7640 ¶ 4.k.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl. 33, 34 (Deal Memo); MAT MSJ Decl., Attachments 1 (Brookstone Law, P.C. Statement of Information" dated December 11, 2013), 2 (Brookstone accountant's testimony that 2012 K-1 shows Vito Torchia was "100% owner " of Brookstone), 3 (Resolution of the Shareholders of Brookstone Law, P.C., Stock Certificate Transfer dated July 8, 2015), 4 (Memorandum of Understanding between Law Offices of Jonathan Tarkowski and Brookstone Law, P.C. dated June 30, 2014), 5 (Attachment C-1 Standard Law Corporation Guarantee), 6 (Torchia State Bar Testimony that he was the CEO, president and managing attorney of Brookstone), 7 (Memorandum of</i></p>	<p>evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue. The other evidence cited does not controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Understanding between Law Offices of Vito Torchia, Jr., Esq. and Advantis Law, P.C. dated July 8, 2015); Thurman Decl., Attachment 68 (Certified copy of Attachment C-1 Standard Law Corporation Guarantee produced by California State Bar); Thurman Decl. Attachment 48 (Kutzner's Executive Employment Agreement); DE-78-1, Pages 3544-50 (Independent consulting and business services agreement).</i></p>	
<p>231. Foti has declared that his role with the Corporate Defendants included: (1) “. . . [M]anagement services related to referral services, hiring/recruiting, vendor relations, IT relations, and data sources”; (2) “Obtain[ing] estimates and costs for expenses associated with day to day operations”; (3) “Obtain[ing] or arrang[ing] for the</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: ADMIT</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>preparation of law firm supplied creative content, advertising, campaign management and other related services”; and (4) “Audit[ing] all invoices and expenses provided by third-parties to ensure accuracy, including but not limited to payroll bonuses and employee compensation.”</p> <p>DE 78-1, <i>Foti July Decl.</i> at Page ID 3538-39, ¶ 10.</p>	<p><i>Foti Decl.</i> ¶ 15, 16, 17 (re: duties)</p>	
<p>232. Foti declares he was promised an “turnkey private office space free of charge” in whatever offices Brookstone maintained.</p> <p>DE 78-1, <i>Foti July Decl.</i> at Page ID 3546; DE 152-1, <i>Declaration of Jeremy Foti in Support of Defendant’s Response to Plaintiff’s Objections to Proposed Findings of Fact and Receiver’s Supplemental Report (“Foti Nov. Decl.”)</i> at Page ID 4757.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (irrelevant - negotiations for office space are not evidence of knowledge, ownership or ability to control)</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant.</p> <p>Foti cites only his self-serving declaration, which cannot controvert a fact on summary</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>Foti Decl. ¶ 81 (re: office negotiations)</i>	judgment, and the cited reference does not address the fact at issue.
<p>233. Foti admits that he occupied a “VP Office” at 6 Hutton Centre, Suite 1000, Santa Ana, CA, which, according to the Receiver’s diagram, was larger than all offices occupied by any other Brookstone employee but Kutzner. DE 41 at Page ID 2479 (“He operates from a large, and upon our arrival locked, office next to Mr. Kutzner’s office.”); DE 41-2 at 2498-99 (identifying Foti’s office as the “VP Office” designated as “I” or “111”); DE 284-8, <i>Theisman Decl.</i> at Page ID 7489 ¶ 7 (attaching excerpts of Foti’s answers to RFAs in which he admits he occupied the office identified as number 111 and admitting the office locations of Kutzner and Broderick, responses to RFAs 111-13).</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> <i>Marshall Decl., at ¶ --.</i></p> <p>Foti: DENY - Objection (irrelevant - negotiations for office space are not evidence of knowledge, ownership or ability to control) <i>Foti Decl. ¶ 81 (re: office negotiations)</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>234. Foti agreed to hold Brookstone "harmless from any and all claims brought by a third party. . ."</p> <p><i>DE 152-1, Foti Nov. Decl., at Page ID 4758.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (misstates the evidence as a result of incomplete citation; irrelevant - no evidence unsigned sublease agreement between GAMC Services and Brookstone was ever executed</p> <p><i>Foti Decl. ¶ 14 (re: indemnification); DE 152-1, Foti Nov. Decl., at Page ID 4758 (unsigned lease reflects that the parties reciprocally proposed "to indemnity and hold each other harmless from any and all claims brought by a third party relating to one</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant and supported by the cited evidence.</p> <p>Foti cites no evidence to controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>235. Brookstone's ethics counsel stated, in a memo addressed to Torchia: "You are the sole shareholder of Brookstone. You supervise the attorneys' work, and the attorneys seem to understand that you are the supervisory lawyer at Brookstone. It is less clear to us whether the non-lawyer personnel at Brookstone understand that you are in charge of supervising their work." DE 284-8, <i>Theisman Decl. at Page ID 7487</i>, DE 284-10, DE 284-11, <i>Page ID 7803-7822 ¶ 4.hhh.</i></p>	<p><i>another's businesses."</i></p> <p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay to the extent not offered for the truth of the matter asserted. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See Madden 8-14-17 Decl. ¶ 5. Foti's cited evidence does not controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	relating to this action.) <i>Thurman Decl., Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576)</i>	
<p>236. Foti was responsible for determining the bonuses for the Corporate Defendants' sales personnel.</p> <p>DE 284-13, <i>Theisman Decl. at Page ID 8081-82 ¶ 15, Att. 12, Foti Depo. at 216:21-217:6, 219:7-13 (indicating he would "verify" "units" sold to determine bonus amounts); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 7 (attaching excerpts of Foti's answers to RFAs, including where he admits he was "responsible for calculating bonuses for non-lawyer staff that worked as employees for Corporate Defendants, or as contractors for Corporate Defendants", response to RFA 90).</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (misstates the testimony stating that Mr. Foti "verified" and "calculated" bonuses, but failing to include that all bonus payments were required to be approved by Torchia or other managing attorneys) <i>DE-186-4, Torchia Decl., ¶16 ("Bonus calculations were done primarily by Jeremy Foti. Damian Kutzner would approve</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant and supported by the cited evidence.</p> <p>Foti cites no evidence to controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>the bonuses. I would sign off on the bonuses based on what Jeremy Foti and Damian Kutzner provided to me."); MAT MSJ Decl., Attachments 16 and 17 (Mr. Torchia's State Bar testimony regarding his control over financial decisions at Brookstone). Foti Decl. ¶ 16.c., 39, 59 (re: bonuses);</i></p>	
<p>237. In determining bonuses, Foti would determine the payment status of a client and bonuses could be changed, including taking into account chargebacks or if a client cancelled or obtained a refund. DE 284-13, <i>Theisman Decl. at Page ID 8082 ¶ 15, Att. 12, Foti Depo. at 217:17-218:13; DE 284-8, at Page ID 7488, DE 284-11, at Page ID 7866, <i>Theisman Decl. ¶ 4. www (authenticating and attaching FTC-RAD-001-0218348, email to Foti claiming right to bonuses, including taking into account chargebacks);</i></i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; misstates the testimony. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>DE 69-2, Chang July 2016 Decl. at Page ID 3259-61 (email correspondence with Brookstone sales person about bonus amount, including deductions where consumers signed up for less lucrative deals and where there were chargebacks).</p>	<p>received, knew about or had anything to do with them. Mr. Foti testified he "calculated" and "verified" bonuses, but all bonus payments were required to be approved by Torchia or other managing attorneys. Torchia Decl., ¶16 ("Bonus calculations were done primarily by Jeremy Foti. Damian Kutzner would approve the bonuses. I would sign off on the bonuses based on what Jeremy Foti and Damian Kutzner provided to me."); MAT MSJ Decl., Attachments 16 and 17 (Mr. Torchia's State Bar testimony regarding his control over financial decisions at Brookstone). Foti Decl. ¶ 15.c. and 39 re: bonuses;</p>	<p>The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue. The other evidence cited does not controvert the fact at issue.</p>
<p>238. Bonuses were based on the number of sales made by a sales person.</p> <p>DE 284-13, Theisman Decl. at Page ID 8081-82 ¶ 15, Att. 12, Foti Depo. at 217:7-13 ("Q. Right.</p>	<p>Marshall: This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>So the methodology would be that they would submit information to you indicating the number of units sold, 'units' meaning the number of clients who were retained; and then depending on the number of units that were sold, they would receive an incentive payment; is that accurate? A. That sounds accurate.”); DE 284-8, Page ID 7487, DE 284-10, DE 284-11, Page ID 7798-7822, <i>Theisman Decl.</i> at ¶¶ 4.hhh & 4.ggg (authenticating and attaching FTC-RAD-001-0164070 to 0164089, at FTC-RAD-001-0164082, and authenticating and attaching FTC-RAD-001-0163703 to 0163707, at FTC-RAD-001-0163706) (ethics opinions discussing Brookstone’s practice of bonuses based on the number of sales); DE 284-8, Page ID 7488, DE 284-11, Page ID 7866, <i>Theisman Decl.</i> at ¶ 4.www (authenticating</i></p>	<p>Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims relating to this action.) <i>Torchia Decl.</i>, ¶16 ("Bonus calculations were done primarily by Jeremy Foti. Damian Kutzner would approve the bonuses. I would sign off on the bonuses based on what Jeremy Foti and</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party’s statement. Finding documents on a receivership computer from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes it more likely it was used. As noted elsewhere, any privilege associated with the ethics opinions has been waived.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>and attaching FTC-RAD-001-0218348, email to Foti claiming right to bonuses, including taking into account chargebacks); DE 69-2, Chang July 2016 Decl. at Page ID 3259-61 (email correspondence with Brookstone sales person about bonus amount, including deductions where consumers signed up for less lucrative deals and where there were chargebacks).</i></p>	<p><i>Damian Kutzner provided to me."); MAT MSJ Decl., Attachments 16 and 17 (Mr. Torchia's State Bar testimony regarding his control over financial decisions at Brookstone). Foti Decl. ¶ 16.c., 39, 59 (re: bonuses); Thurman Decl., Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576)</i></p>	<p>summary judgment, and the cited reference does not address the fact at issue. The other evidence cited does not controvert the fact at issue.</p>
<p>239. Broderick, the purported "Managing Attorney," sought approval from Foti for payment of bonuses for collections activities. DE 41-6 at Page ID 2714; DE 284-4, Chang Decl. at Page ID 7249 ¶ 4.gg.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; misstates the evidence;</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims relating to this action. No indication from the content of the email that Mr. Broderick was requesting approval as opposed to instructing Mr. Foti to make the payments directed.)</p> <p><i>Torchia Decl., ¶16 ("Bonus calculations were done primarily by Jeremy Foti. Damian Kutzner would approve the bonuses. I would sign off on the bonuses based on what Jeremy Foti and Damian Kutzner provided to me."); MAT MSJ Decl.,</i></p>	<p>established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. The other objections do not appear to apply to this fact or the evidence cited.</p> <p>Foti's cited evidence does not controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Attachments 16 and 17 (Mr. Torchia's State Bar testimony regarding his control over financial decisions at Brookstone). Foti Decl. ¶ 16.c., 39, 59 (re: bonuses); Thurman Decl., Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576)</i></p>	
<p>240. Brookstone obtained ethics advice that paying sales people a bonus based on the number of clients retained likely violated Brookstone's ethical duties. DE 284-8, Page ID 7487, DE 284-10, DE 284-11, Page ID 7803-7822, <i>Theisman Decl. at ¶ 4.hhh (authenticating and attaching FTC-RAD-001-0164070 to 0164089, at FTC-RAD-001-0164082, stating: "Brookstone's payments to CSRs of bonuses based on a percentage of the clients' initial fees clearly violate this rule. It is possible the bonuses to other non-</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</i></p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay to the extent</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>attorney personnel violate this rule too, but we don't have information about how those bonuses are calculated. This is not to say that a bonus cannot be paid to the CSRs. For instance, the CSRs could be paid a bonus based on compliance with the guidelines for their performance. It is crucial that any bonus or amount paid to a non-attorney could not be characterized as fee-sharing or as a referral fee.”); DE 284-8, Page ID 7487, DE 284-10, Page ID 7798-82, <i>Theisman Decl.</i> at ¶ 4.ggg (authenticating and attaching FTC-RAD-001-0163703 to 0163707, at FTC-RAD-001-0163706 stating: “[I]t seems more likely than not that the proposed bonus arrangement would be found to violate CRPC 1-320.”).</i></p>	<p>genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims relating to this action.) <i>Thurman Decl.</i>, Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576)</p>	<p>not offered for the truth of the matter asserted. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See Madden 8-14-17 Decl. ¶ 5. Foti's cited evidence does not controvert the fact at issue.</p>
<p>241. At times, Foti would send emails to the Corporate Defendants'</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 sales personnel regarding</p> <p>2 sales process and</p> <p>3 guidelines.</p> <p>4 DE 284-8, Page ID 7486,</p> <p>5 DE 284-10, Page ID</p> <p>6 7759, <i>Theisman Decl.</i> at ¶</p> <p>7 4.tt; <i>id.</i> at DE 284-8,</p> <p>8 Page ID 7487, DE 284-</p> <p>9 10, Page ID 7764 ¶ 4.ww</p> <p>10 (<i>authenticating and</i></p> <p>11 <i>attaching FTC-RAD-001-</i></p> <p>12 <i>0072682, stating, among</i></p> <p>13 <i>other things: "I the [sic]</i></p> <p>14 <i>company is very</i></p> <p>15 <i>concerned with your</i></p> <p>16 <i>numbers! In Aug you sold</i></p> <p>17 <i>37 reports vs. only 10</i></p> <p>18 <i>Litigations. These</i></p> <p>19 <i>numbers are unacceptable</i></p> <p>20 <i>and the company cannot</i></p> <p>21 <i>afford to pay a large</i></p> <p>22 <i>bonus for such a low</i></p> <p>23 <i>conversion ratio? I hope</i></p> <p>24 <i>you would agree that</i></p> <p>25 <i>these numbers are not</i></p> <p>26 <i>what we were trying to</i></p> <p>27 <i>accomplish with the new</i></p> <p>28 <i>bonus system. If you can</i></p> <p><i>please email me back an</i></p> <p><i>explanation on this so we</i></p> <p><i>can understand what</i></p> <p><i>happened that would be</i></p> <p><i>great."); id. At DE 284-8,</i></p> <p><i>Page ID 7488, DE 284-</i></p>	<p>dispute or declare this fact</p> <p>undisputed, as this alleged</p> <p>fact occurred prior to or</p> <p>without this Defendant's</p> <p>involvement with</p> <p>Advantis Law Group,</p> <p>P.C. or the other</p> <p>individual defendants in</p> <p>this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections</p> <p>(irrelevant; failure to</p> <p>authenticate; hearsay. No</p> <p>foundation the documents</p> <p>are genuine, who prepared</p> <p>them, whether Mr. Foti</p> <p>ever received, knew about</p> <p>or had anything to do with</p> <p>them.)</p> <p><i>Foti Decl. 21, 31 (re:</i></p> <p><i>forwarding</i></p> <p><i>documents/messages</i></p> <p><i>within Brookstone);</i></p> <p><i>Thurman Decl.,</i></p> <p><i>Attachment 59 (Rodriguez</i></p> <p><i>Decl.)</i></p>	<p>evidence capable of</p> <p>controverting the fact at</p> <p>issue.</p> <p>Undisputed as to Foti.</p> <p>The fact is relevant. The</p> <p>document(s) are genuine</p> <p>and authentic, as</p> <p>established by the</p> <p>evidence the FTC</p> <p>submitted in support of</p> <p>the fact for this paragraph.</p> <p>The evidence is not</p> <p>hearsay because it is an</p> <p>opposing party's</p> <p>statement. Finding</p> <p>documents on a</p> <p>receivership computer</p> <p>from the defendant's</p> <p>office or from the</p> <p>defendants' premises</p> <p>taken over by the</p> <p>receivership in fact makes</p> <p>it more likely it was used.</p> <p>In response, Foti</p> <p>cites his self-serving</p> <p>declaration, which cannot</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 <u>11</u>, Page ID 7889-91 ¶ 2 4.bbbb; <i>id.</i> at <u>DE 284-8</u>, 3 Page ID 7487, <u>DE 284-</u> 4 <u>10</u>, Page ID 7762-63 ¶ 5 4.vv.</p>		<p>controversy a fact on summary judgment. He also cites to a single declaration from a former sales person who does not testify to a fact controverting the fact at issue.</p>
<p>6 7 8 9 242. At times, Foti 10 monitored the use of 11 "leads" by sales people, 12 even instructing those 13 sales people to create 14 Excel spreadsheets and 15 then report to Foti on the 16 status of a sales lead. 17 <u>DE 41-6</u> at Page ID 18 2736; <u>DE 284-4</u>, <i>Chang</i> 19 <i>Decl.</i> at Page ID 7249 ¶ 20 4.jj.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl 31 (re: following up on leads); Thurman Decl.,</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding</p>

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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
	<i>Attachment 59 (Rodriguez Decl.)</i>	documents on a receivership computer from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes it more likely it was used. In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment. He also cites to a single declaration from a former sales person who does not testify to a fact controverting the fact at issue.
243. Foti received and then provided to sales people messages from potential clients, passing them on as “leads.” DE 284-8 , Page ID 7487, DE 284-10 , Page ID 7797, <i>Theisman Decl.</i> at ¶ 4.fff (authenticating and attaching FTC-RAD-001-0156323, email from a sales person to other Brookstone sales people stating: “Good afternoon,	Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --. Foti: DENY - Objections	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti.

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Jeremy has been sending NEW Chase Bank leads/messages from our answering service. I understand we're all busy however, it is absolutely critical YOU Call back all leads SAME DAY Put client info in ILS EVERY TIME Schedule QUALITY appointments for Banking Specialists Please remember. . . . These clients are calling us, leaving a message and NEED a call back ASAP!!!!!! Also... work closest to the MONEY! Things can ONLY get better!").</i></p>	<p>(irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl. ¶ 21, 22, 31 (re: forwarding documents within Brookstone/discuss when phone system was down, following up on leads); Thurman Decl., Attachment 59 (Rodriguez Decl.)</i></p>	<p>The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment. He also cites to a single declaration from a former sales person who does not testify to a fact controverting the fact at issue.</p>
<p>244. On March 21, 2016, Foti sent an email to sales people stating: "Attached is a daily sales</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>sheet that we can use as a tracking tool for all of your calls and appointments. Please take a look at it and then go back and plug in the numbers from this month. To start please email this to me at the end of each day so we can keep our eye on the target.”</p> <p>DE 284-8, Page ID 7488, DE 284-12, Page ID 7905-07, <i>Theisman Decl.</i> at ¶ 4.hhhh.</p>	<p>undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p> <p><i>Foti Decl. ¶ 21 (re: forwarding documents/messages within Brookstone); Thurman Decl., Attachment 59 (Rodriguez Decl.)</i></p>	<p>controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
		summary judgment. He also cites to a single declaration from a former sales person who does not testify to a fact controverting the fact at issue.
<p>245. On January 21, 2011, Foti sent an email to other Brookstone personnel on setting up training meetings for sales staff. DE 284-8, Page ID 7488, DE 284-12, Page ID 7929-30, <i>Theisman Decl.</i> at ¶ 4. qqqq.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. <i>Foti Decl.</i> ¶ 21, 31 (re: forwarding documents/messages within Brookstone);</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>Thurman Decl., Attachment 59 (Rodriguez Decl.); Email cited by FTC sought confirmation from managers regarding an upcoming office meeting Mr. Foti was NOT scheduled to lead and reflects that Mr. Kutzner was in charge.</i></p>	<p>receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment. He also cites to a single declaration from a former sales person who does not testify to a fact controverting the fact at issue.</p>
<p>246. Foti took part in meetings to determine the sales process. DE 284-13, <i>Theisman Decl. at Page ID 8065, 8067-68 ¶ 15, Att. 12, Foti Depo. at 114:19-115:8, 124:21-125:11, (meetings regarding content of mailers); DE 284-8, Page ID 7488, DE 284-12, Page ID 7929-30, Theisman Decl. at ¶ 4.qqqq; id. at DE 284-8, Page ID 7489, DE 284-12, 7937-71 ¶ 4.tttt.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.</p> <p><i>Foti Decl.</i> ¶ 16.d., 18, 19, 20, 21, 26, 29, 31, 38 ; <i>Thurman Decl.</i>, <i>Attachment 59 (Rodriguez Decl.)</i></p>	<p>document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment. He also cites to a single declaration from a former sales person who does not testify to a fact controverting the fact at issue.</p>
<p>247. At times, Foti would distribute sales scripts to sales people. <i>Theisman Decl.</i> at DE 284-8, Page ID 7488, DE</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>284-11, Page ID 7874-78 ¶ 4.yyy; <i>id.</i> at DE 284-8, Page ID 7488, DE 284-11, Page ID 7867-7873 ¶ 4.xxx; <i>id.</i> at DE 284-8, Page ID 7488, DE 284-11, Page ID 7879-83 ¶ 4.zzz; <i>id.</i> at DE 284-8, Page ID 7488, DE 284-11, Page ID 7884-88 ¶ 4.aaaa.</p>	<p>fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl.</i> ¶ 21, 31; <i>Thurman Decl.</i>, <i>Attachment 59 (Rodriguez Decl.)</i></p>	<p>issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment. He</p>

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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
		also cites to a single declaration from a former sales person who does not testify to a fact controverting the fact at issue.
<p>248. Torchia, the purported owner of Brookstone, declared: “Although Jeremy Foti was technically a ‘consultant’ for Brookstone, he was, along with Damian Kutzner, responsible for all non-legal aspects of Brookstone’s operation.” DE 186-4, <i>Torchia Decl.</i> at Page ID 5371-72, ¶ 6.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY <i>MT MSJ Decl., Attachment 11 (Torchia testimony: "I would have had to [approve a refund]"), 16 (Torchia State Bar testimony: His assistant attorney "had certain authority to handle certain matters on his own," "as long as it didn't have to do with money. If it had to do with money, we would sit</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. In response, he cites to evidence that others also may have had control, which does not controvert the fact.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>down" and "if he felt that there might be some refund due, ... I would go over it with him"), 17 (Torchia State Bar testimony: "there is a protocol that I established in which the assisting managing attorney at the time would be responsible for looking into the allegations, gathering documents, time sheets, whatever, depending on what they were asking for ... if they wanted refunds of money, then I would review it."); Thurman Decl., Attachment 59 (Peter Rodriguez Decl.); Thurman Decl., Attachment 48 (Kutzner's employment Agreement); Kutzner's Stipulated Order;</i></p>	
<p>249. Former Brookstone and Advantis attorney Jonathan Tarkowski declares: “Damian Kutzner and Jeremy Foti, another non-attorney, were responsible for Brookstone/Advantis financial matters. Damian</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group,</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
<p>Kutzner and Jeremy Foti supervised the individuals primarily responsible for customer contact—the ‘Civil Litigation Representatives’ (CLRs) and ‘Banking Specialists.’” DE 186-3, <i>Tarkowski Decl. at Page ID 5359</i>, ¶ 9.</p>	<p>P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY <i>MT MSJ Decl., Attachment 11 (Torchia testimony: "I would have had to [approve a refund]"), 16 (Torchia State Bar testimony: His assistant attorney "had certain authority to handle certain matters on his own," "as long as it didn't have to do with money. If it had to do with money, we would sit down" and "if he felt that there might be some refund due, ... I would go over it with him"), 17 (Torchia State Bar testimony: "there is a protocol that I established in which the assisting managing attorney at the time would be responsible for looking into the allegations, gathering documents, time sheets, whatever, depending on what they were asking for</i></p>	<p>Undisputed as to Foti.</p> <p>In response, he cites to evidence that others also may have had control, which does not controvert the fact.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>... if they wanted refunds of money, then I would review it."); Thurman Decl., Attachment 59 (Peter Rodriguez Decl.); Thurman Decl., Attachment 48 (Kutzner's employment Agreement); (DE-95-1) Kutzner Stipulated Order.</i></p>	
<p>250. In a deposition taken as a result of ULG's bankruptcy, Brookstone's then bookkeeper, Josephine Lobo, testified that Brookstone's management was "Vito [Torchia], Damian [Kutzner], and Jeremy [Foti]." DE 284-7, <i>Lobo Decl. at Page ID 7477 ¶¶ 4-5, Att. 1 at 9.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY <i>MT MSJ Decl., Attachment 11 (Torchia testimony: "I would have had to [approve a refund]"), 16 (Torchia State Bar testimony: His assistant attorney "had certain authority to handle certain matters on</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. In response, he cites to evidence that others also may have had control, which does not controvert the fact.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>his own," "as long as it didn't have to do with money. If it had to do with money, we would sit down" and "if he felt that there might be some refund due, ... I would go over it with him"), 17 (Torchia State Bar testimony: "there is a protocol that I established in which the assisting managing attorney at the time would be responsible for looking into the allegations, gathering documents, time sheets, whatever, depending on what they were asking for ... if they wanted refunds of money, then I would review it."); Thurman Decl., Attachment 59 (Peter Rodriguez Decl.); Thurman Decl., Attachment 48 (Kutzner's employment Agreement); (DE-95-1) Kutzner's Stipulated Order;</i></p>	
<p>251. In a deposition taken as a result of ULG's bankruptcy, Brookstone's then bookkeeper, Josephine Lobo, testified</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 that Torchia, Kutzner, and</p> <p>2 Foti received the same</p> <p>3 compensation from</p> <p>4 Brookstone.</p> <p>5 DE 284-7, <i>Lobo Decl. at</i></p> <p>6 <i>Page ID 7481 ¶¶ 4 & 6,</i></p> <p>7 <i>Att. 1 at 13.</i></p>	<p>fact occurred prior to or</p> <p>without this Defendant's</p> <p>involvement with</p> <p>Advantis Law Group,</p> <p>P.C. or the other</p> <p>individual defendants in</p> <p>this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: ADMIT, as of date</p> <p>of deposition (8/19/11) -</p> <p>Objection (irrelevant as to</p> <p>whether Corporate</p> <p>Defendants engaged in</p> <p>any violations or whether</p> <p>Mr. Foti had control or</p> <p>knowledge over the</p> <p>Corporate Defendants)</p>	<p>issue.</p> <p>Undisputed as to Foti.</p>
<p>17 252. A Brookstone</p> <p>18 employee wrote an email</p> <p>19 to Torchia, Kutzner, and</p> <p>20 Foti seeking their</p> <p>21 approval to become the</p> <p>22 direct supervisor over the</p> <p>23 sales operation.</p> <p>24 DE 284-8, <i>at Page ID</i></p> <p>25 <i>7487</i>, DE 284-10, <i>at Page</i></p> <p>26 <i>ID 7789</i>, <i>Theisman Decl.</i></p> <p>27 <i>at ¶ 4.ccc.</i></p>	<p>Marshall: <i>This</i> Defendant</p> <p>lacks the knowledge or</p> <p>information and belief to</p> <p>dispute or declare this fact</p> <p>undisputed, as this alleged</p> <p>fact occurred prior to or</p> <p>without this Defendant's</p> <p>involvement with</p> <p>Advantis Law Group,</p> <p>P.C. or the other</p> <p>individual defendants in</p> <p>this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections</p> <p>(irrelevant; failure to</p>	<p>Undisputed as to</p> <p>Marshall. He does not</p> <p>offer any admissible</p> <p>evidence capable of</p> <p>controverting the fact at</p> <p>issue.</p> <p>Undisputed as to Foti.</p> <p>The fact is relevant. The</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. Fact that an employee may have copied Foti on the email does not mean he had authority to approve any promotion.) <i>Foti Decl. ¶ 41 (no power to fire); Thurman Decl., Attachment 59 (Rodriguez Decl); Thurman Decl., Attachment 48 (Kutzner Employment Agreement)</i></p>	<p>document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment. He also cites to a single declaration from a former sales person who does not testify to a fact controverting the fact at issue. He cites to evidence that others also may have had control, which does not controvert the fact.</p>
253. Brookstone	Marshall: <i>This Defendant</i>	Undisputed as to

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>obtained ethics advice, which was shared only with Torchia, Kutzner, and Foti. DE 284-8, Page ID 7487, DE 284-10, Page ID 7798-7802, <i>Theisman Decl.</i> at ¶ 4.ggg (authenticating and attaching FTC-RAD-001-0163703 to 0163707, cover email on memo regarding Brookstone's bonus structure, from Torchia to Kutzner and Foti, stating "Confidential. Do not distribute."); <i>id.</i> at DE 284-8, Page ID 7487, DE 284-10, DE 284-11, Page ID 7803-7822 ¶ 4.hhh (authenticating and attaching FTC-RAD-001-0164070 to 0164089, cover email from Torchia is to just Kutzner and Foti); <i>id.</i> at DE 284-8, Page ID 7487, DE 284-11, Page ID 7823-27 ¶ 4.iii (authenticating and attaching FTC-RAD-001-0164311 to 0164315, cover email on memo regarding Brookstone's</p>	<p>lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims relating to this action.) Thurman Decl.,</p>	<p>Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay to the extent not offered for the truth of the matter asserted. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See Madden 8-14-17 Decl. ¶ 5. Foti's cited evidence does not controvert the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>claim to be a national law firm, from Torchia to Kutzner and Foti, stating "This is Confidential Memo not to be distributed.").</p>	<p>Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576)</p>	
<p>254. In response to the ethics opinion Foti responded: "This looks pretty good overall just need to change a few things," to which Kutzner wrote: "You didn't read it?" DE 284-8, at Page ID 7487, DE 284-11, at Page ID 7828, <i>Theisman Decl.</i> ¶ 4.jjj.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; misstates the evidence; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay for the reason offered. All parties potentially holding a relevant attorney-client privilege have waived that</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>them. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims relating to this action. Email reflects that although it was not his responsibility to implement, since he did not supervise the relevant areas, he expected and believed they would be implemented.) <i>Thurman Decl., Attachment 53 (Vito clawback request - FTC-RFP-0149575-0149576); Although not his responsibility to implement since he did not supervise the relevant areas, but email reflects that Mr. Foti expected and believed the proposed procedures would be implemented. Thurman Decl., Attachment 59 (Rodriguez Decl.); Foti Decl. ¶ 15 and 16 (his responsibilities)</i></p>	<p>privilege. See Madden 8-14-17 Decl. ¶ 5. Foti's cited evidence does not controvert the fact at issue. He cites his self-serving declaration, which cannot controvert a fact on summary judgment. He also cites to a single declaration from a former sales person who does not testify to a fact controverting the fact at issue.</p>
255. In response to one piece of ethics advice,	Marshall: This Defendant lacks the knowledge or	Undisputed as to Marshall. He does not

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Foti wrote: "I think we need to keep in mind he is an ethic's attorney so he is going to always say you shouldn't do this you shouldn't do that." DE 284-8, at Page ID 7486, DE 284-10, at Page ID 7760-6, <i>Theisman Decl.</i> at ¶ 4.uu.</p>	<p>information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; misstates the evidence; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims relating to this action. FTC left out Mr. Foti's</p>	<p>offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay for the reason offered. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See Madden 8-14-17 Decl. ¶ 5. Foti's cited evidence does not controvert the fact at issue. He cites his self-serving declaration, which cannot controvert a fact</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>statement: "We need to power forward and mend the holes in the ship." <i>Thurman Decl., Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576); FTC's statement left out Mr. Foti's statement that, "We need to power forward and mend the holes in the ship." Although it was not his responsibility to implement the proposed changes, since he did not supervise the relevant areas, but Mr. Foti's email reflects that he expected and believed the proposed procedures would be implemented. Thurman Decl., Attachment 59 (Rodriguez Decl.); Foti Decl. ¶ 15 and 16 (his responsibilities)</i></p>	<p>on summary judgment. He also cites to a single declaration from a former sales person who does not testify to a fact controverting the fact at issue.</p>
<p>256. The FTC sought discovery from Foti on his control over the Corporate Defendants and he did not identify or produce any documents controverting the FTC's evidence.</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>DE 284-8, <i>Theisman Decl. at Page ID 7489-90</i> ¶ 9.</p>	<p>involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (irrelevant - Mr. Foti's inability to produce documents, where all of Mr. Foti's documents relevant to this action were previously seized at his home and office, does not constitute an admission of anything other than that he has no documents.</p>	<p>Undisputed as to Foti. The fact is relevant. He cites no evidence to controvert the fact at issue.</p>
a. Foti Helped Draft Mailers and Sales Scripts.		
<p>257. Foti owned and controlled GAMC Services Inc. ("GAMC Services"). DE 284-8, <i>Theisman Decl. at Page ID 7489</i> ¶ 7 (attaching excerpts of <i>Foti's responses to RFAs, response to RFA 89</i>).</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>258. Foti owned and controlled DND Consulting Inc. DE 284-8, <i>Theisman Decl. at Page ID 7489 ¶ 7</i> (attaching excerpts of <i>Foti's responses to RFAs, response to RFA 88</i>).</p>	<p>Foti: ADMIT</p> <p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: ADMIT</p>	<p>Undisputed as to Foti.</p> <p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>
<p>259. Foti owned and controlled Webstar Inc. ("Webstar"). DE 284-8, <i>Theisman Decl. at Page ID 7489 ¶ 7</i> (attaching excerpts of <i>Foti's responses to RFAs, response to RFA 86</i>); DE 284-13, <i>Theisman Decl. at Page ID 8071 ¶ 15, Att. 12, Foti Depo. at 143:17-18 (Q. What was Webstar? A. Webstar was an extension of GAMC Services. . . .)</i> <i>id.</i> DE 284-13, at Page ID 8075, 158:22-159:12 (noting that multiple</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The document(s) are genuine and authentic, as established by the</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>people knew he owned Webstar).</i></p>	<p>are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Theisman Decl. at ¶ 7, MSJ Evid p. 243 (attaching excerpts of Foti's responses to RFAs, response to RFA 86) (Mr. Foti has acknowledged only that he controlled Webstar); Foti Decl. ¶ 73 (re: Webstar)</i></p>	<p>evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. He testified at his deposition that he purchased the company and registered it. His contrary statements in response to RFAs and in his self-serving declaration cannot controvert this fact. Furthermore, he does not deny that he in fact controlled the company.</p>
<p>260. Foti, through GAMC Services and Webstar, arranged for the Corporate Defendants' mailers to be sent to consumers. <i>DE 78-1, Foti July</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Decl. at 3538; DE 284-13, Theisman Decl. at Page ID 8063 ¶ 15, Att. 12, Foti Depo. at 105:1-3 (“Q. Would you say that the direct mail was the most commonly used form of solicitation? A. I would probably say that was correct.”); id. DE 284-13 at Page ID 8064, 109:12-22, (“Q. And your consulting services, did it have anything to do with the mailers? A. As far as? Q. Anything. A. Well, yeah. I would – I would find services for them to get quotes on whatever marketing they were seeking and see, you know, how the pricing would look; and, you know, based off of what Vito wanted to have go out, rather be it mail or whatever type of marketing, he would say, ‘Hey this is what I want to do. Can you find some vendors that will help?’”); id. DE 284-13, at Page ID 8064, 110:19-23 (“Q. What I’m asking</i></p>	<p>involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY <i>Foti Decl. ¶ 16.d., 19, 20, 21, 23, 25, 38); Thurman Decl., Attachment 67 (FTC-RAD-001-0099028) (reflects that Mr. Foti did not send the mailer to the outside vendor but was under the impression it was sent by Mr. Torchia had with the assistance of Kevin and Josh (“This was done by Kevin, Josh and yourself?”). Mr. Kutzner eventually responds, stating, “No i just verified that The printing house for the mailers printed the old one as we have been back and forth on this for months.”)</i></p>	<p>Undisputed as to Foti. Foti’s cited evidence does not controvert the fact at issue. He cites his self-serving declaration, which cannot controvert a fact on summary judgment. Otherwise, he challenges only one piece of evidence related to one mailer, which on its own does not controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>you is: You, as part of your consulting services, would provide the mailing companies with proofs and copies of the mailers that they were instructed to, then, send to consumers? A. It's – it's possible.”); id. DE 284-13, at Page ID 8071, 144:10-13 (“Q. What did Webstar do regarding the marketing? A. It was a facilitator. It would locate the best marketing, the lowest prices, and, you know, who can do the best job and then subcontract them.”); DE 78-1, Foti July 2016 Decl. at page ID 3539, ¶ 10 (declaring his duties included “[o]btain[ing] or arrang[ing] for the preparation of law firm supplied creative content, advertising, campaign management and other related services).</i></p>		
<p>261. At times, Foti circulated the mailers to Torchia. <i>Ex. 75 (email from Foti to Torchia attaching mailers</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>to be sent to consumers);</i> <u>DE 284-8</u>, <i>Theisman Decl. at Page ID 7485, 7576-78 ¶ 4.n; id. at <u>DE 284-8</u>, Page ID 7486, <u>DE 284-10</u>, Page ID 7757-58 ¶ 4.ss (authenticating and attaching FTC-RAD-001-0065189 to 0065190, email from Foti to Torchia attaching a mailer).</i></p>	<p>fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; mischaracterizes the evidence. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl. ¶ 16.d., 19, 20, 21, 23, 25, 38</i></p>	<p>issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
		the cited reference to the Foti Decl. does not address the fact at issue.
<p>262. Not all of the mailers sent to consumers were approved by attorneys. <i>Ex. 79 at FTC-RAD-001-0088985 (email from Torchia to Kutzner and Foti stating: "SEE THE ATTACHED MAILER. THIS WAS NOT AUTHORIZED! WHO SENT THIS AND WHEN WAS IT SENT. THERE ARE SO MANY THINGS WRONG WITH THIS I CANNOT EVEN BEGIN TO LIST THEM.")</i>; DE 284-8, <i>Theisman Decl. at Page ID 7485, 7587-89 ¶ 4.r.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; mischaracterizes the evidence. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. No evidence Mr. Foti forwarded the mailer to the outside vendor.) <i>Thurman Decl., Attachment 67 (FTC-RAD-001-0099028) (reflects that Mr. Foti did</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>not send the mailer to the outside vendor but was under the impression it was sent by Mr. Torchia had with the assistance of Kevin and Josh ("This was done by Kevin, Josh and yourself?"). Mr. Kutzner eventually responds, stating, "No i just verified that The printing house for the mailers printed the old one as we have been back and forth on this for months."</i></p>	<p>receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>
<p>263. In March 2011, Foti sent an email to Kutzner and Torchia stating: "Here is where we should target until we run out of local data. Min loan – 400K NOD and late payments (no current loans) Chase, Aurora, Wells, Citi, Ocwen Add to mailer – Mass joinder lawsuit claiming trial loan modification fraud". <i>Ex. 74; DE 284-8, Theisman Decl. at Page ID 7485, 7579 ¶ 4.m.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; mischaracterizes the</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as</p>

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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
	<p>evidence. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and no evidence whether communication resulted in any consumers receiving any mailers as a result.) <i>Foti Decl ¶ 16.d., 18, 19, 20, 21, 26, 29, 31, 38</i></p>	<p>established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party’s statement. Finding documents on a receivership computer from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes it more likely it was used. In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>264. Foti sent an email to Kutzner, subject line “info for mailer,” stating “This is what I am thinking for inside message for mailer” and then included the following text: “We have been trying to reach you to discuss our</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>landmark victory against Bank of America in California supreme court. Bank of America was not pleased with this decision as it now opens up many different legal channels on your case. Brookstone is preparing to sue the trustee assigned to foreclose on your property for wrongful foreclosure and demand that they immediately cancel your sale date scheduled for _____.</p> <p>If you would like to be included in this case we need to hear from you as soon as possible. This is a very time sensitive matter so please call us at XXX XXX XXXX.”</p> <p><i>Ex. 78; DE 284-8, Theisman Decl. at Page ID 7485, 7586 ¶ 4.q.</i></p>	<p>individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p><i>Foti Decl. ¶ 16.d., 18, 19, 20, 21, 26, 29, 31, 38</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>265. Foti provided text for mailers to</p>	<p>Marshall: <i>This Defendant lacks the knowledge or</i></p>	<p>Undisputed as to Marshall. He does not</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>subordinates at Brookstone, had subordinates create mailer proofs incorporating that text, and then further arranged for those mailers to be distributed. <i>Ex. 76 (email chain showing Foti providing text for a mailer to Josh Cook, who then created a mailer proof that Foti then provided to Kutzner); Ex. 77 (email chain showing Foti taking mailer completed by Cook and identifying it as the final one in an email to bobby@clientprocessingc enter.com); DE 284-8, Theisman Decl. at Page ID 7485, 7579-85 ¶¶ 4.o & 4.p; id. at DE 284-8, Page ID 7486, DE 284-10, 7754-56 ¶ 4.rr (authenticating and attaching FTC-RAD-001-0064644 to 0064646, email from Foti to a mailing vendor providing mailer).</i></p>	<p>information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.) <i>The FTC's email (FTC-RAD-001-0064644 to 0064646) makes clear that the mailer was reviewed and revised by Vito Torchia: "The head attorney made a few changes to this mailer. Make sure the 800 number is the same as we</i></p>	<p>offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>are sending out now and make sure this one goes out on next batch. Thanks." ; Foti Decl re: role on marketing</i></p>	<p>issue.</p>
<p>266. Foti sent and received emails attaching mailers sent to consumers. DE 284-8, <i>Theisman Decl. at Page ID 7487 ¶ 4.000 (authenticating and attaching FTC-RAD-001-0183728 to 0183731, an email from Torchia to Foti attaching an approved mailer); id. at DE 284-8, Page ID 7486, DE 284-10, Page ID 7757-58 ¶ 4.ss (authenticating and attaching FTC-RAD-001-0065189 to 0065190, an email from Foti to Torchia attaching a mailer).</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</i></p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to consumers.)</p> <p><i>The FTC's email (FTC-RAD-001-0183728 to 0183731) confirms that</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>Mr. Torchia reviewed and approved the mailer.</i>	defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.
<p>267. Foti received draft mailers from other sales staff. DE 284-8, at Page ID 7486, DE 284-9, at Page ID 7713-16 <i>Theisman Decl.</i> ¶ 4.kk; <i>Ex. 76</i> (email chain showing Foti providing text for a mailer to Josh Cook, who then created a mailer proof that Foti then provided to Kutzner.); <i>Ex. 77</i> (email chain showing Foti taking mailer completed by Cook and identifying it as the final one in an email to <i>bobby@clientprocessingcenter.com</i>); DE 284-8, <i>Theisman Decl.</i> at Page ID 7485, 7579-85 ¶ 4.o and 4.p; <i>id.</i> DE 284-8, Page ID 7486, DE 284-10, 7754-56 at ¶ 4.rr (authenticating and</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> <i>Marshall Decl.</i>, at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any presentations to</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party's statement. Finding</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>attaching FTC-RAD-001-0064644 to 0064646, email from Foti to a mailing vendor providing mailer).</p>	<p>consumers.) <i>The FTC's email (FTC-RAD-001-0064644 to 0064646) demonstrates that the email was reviewed and revised by Vito Torchia: "The head attorney made a few changes to this mailer. Make sure the 800 number is the same as we are sending out now and make sure this one goes out on next batch. Thanks."; Foti Decl. ¶ 16.d., 18, 19, 20, 21, 26, 29, 31, 38 (re role in marketing)</i></p>	<p>documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>
<p>268. Foti was frequently included on emails to sales staff or emails regarding sales process. <i>Ex. 87 (Foti copied on email to "Brookstone Banking Specialists"); DE 284-8, Theisman Decl. at Page ID 7486, 7609-7614 ¶ 4.u; id. at DE 284-8, Page ID 7486, DE 284-9, Page ID 7717-20 ¶ 4.ll; id. at DE 284-8, Page ID 7487, DE 284-10, Page ID 7765-68 ¶ 4.xx; id. at DE 284-8,</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> <i>Marshall Decl., at ¶ --.</i> <i>Foti: DENY - Objections (irrelevant; failure to</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Page ID 7489, DE 284-12, Page ID 7972 ¶ 4.uuuu (authenticating and attaching FTC-RAD-002-0411571, an email from Todd Siedel to Banking Specialists, cc'ing Foti); id. at DE 284-8, Page ID 7488, DE 284-12, Page ID 7931-32 ¶ 4.rrrr; id. at DE 284-8, Page ID 7488, DE 284-12, Page ID 7937-71 ¶ 4.tttt.</p>	<p>authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any communications with consumers.) <i>Foti Decl.</i> ¶ 16.d., 18, 19, 20, 21, 26, 29, 31, 38 (re: role in marketing)</p>	<p>document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>269. In November 2010, Foti provided a copy of a sales script to Kutzner, stating in the email attaching the script: "Check it out made some minor, but good changes." Ex. 91; DE 284-8,</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Theisman Decl. at Page ID 7486, 7653-56 ¶ 4.w.</i></p>	<p>Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any communications with consumers.)</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>270. In January 2011 Foti wrote an email proposing language for sales people to use to close sales, including lines like "If your case is not strong enough we can't risk the validity of</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 these cases so we would 2 not be able to represent 3 you” and “[t]hese 4 attorneys are so sure that 5 they will win that they 6 will defer 95% of their fee 7 and charge it ONLY IF 8 THEY WIN.” 9 <i>Ex. 96; DE 284-8,</i> 10 <i>Theisman Decl. at Page</i> 11 <i>ID 7486, 7682-84 ¶ 4.bb.</i></p>	<p>Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant. No foundation whether the proposed language was ever used in any communications with consumers.) <i>Foti Deposition (JF</i> <i>testified that he believes</i> <i>he was directed by Vito to</i> <i>provide this language to</i> <i>sales staff) - Exh. 96; Foti</i> <i>Decl. ¶ 16.d., 18, 19, 20,</i> <i>21, 26, 29, 31, 38 (re: role</i> <i>in marketing)</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The stated fact is limited to Foti sending the text at issue.</p> <p>In response, Foti cites only his self-serving declaration to characterize the fact, which does not and cannot controvert the fact at issue.</p>
<p>21 271. In December 2010 22 Foti wrote an email to 23 sales staff directing them 24 to say the following: “As 25 a case specialist it is my 26 job to see if you are ready 27 to join the case. As you 28 are aware the attorneys have approved your case so all we need is the signed retainer and a</p>	<p>Marshall: <i>This Defendant</i> lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>check to get this going. Remember that 99% of the law firms fees are only earned if they win the case so they feel pretty good about your chances of winning.” <i>Ex. 97; DE 284-8, Theisman Decl. at Page ID 7486, 7685 ¶ 4.cc.</i></p>	<p>this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant. No foundation whether the proposed language was ever used in any communications with consumers.) <i>Foti Deposition (JF testified that he believes he was directed by Vito to provide this language to sales staff) - Exh. 97; Foti Decl. ¶ 16.d., 18, 19, 20, 21, 26, 29, 31, 38 (re: role in marketing)</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The stated fact is limited to Foti sending the text at issue.</p> <p style="padding-left: 40px;">In response, Foti cites only his self-serving declaration to characterize the fact, which does not and cannot controvert the fact at issue.</p>
<p>272. In January 2014, Foti sent an email attaching a draft script to Kutzner, among others, and stating: “Please look at this and give any feedback you have.” DE 284-8, at Page ID 7488, DE 284-11, at Page ID 7879-83, <i>Theisman Decl. ¶ 4.zzz.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any communications with consumers.)</p> <p><i>Foti Decl. ¶ 16.d., 18, 19, 20, 21, 26, 29, 31, 38 (re: role in marketing)</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used.</p> <p>In response, Foti cites only his self-serving declaration to characterize the fact, which does not and cannot controvert the fact at issue.</p>
<p>273. Over several years, Foti was included on numerous emails attaching scripts and drafts of scripts. Sometimes, the emails asked for Foti's input on scripts.</p> <p><i>Ex. 92 (email to Foti attaching a draft script and stating: "Please</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>review and approve the script.”); Ex. 93 (email to Foti attaching a draft script and stating: “Check it out and if okay. . . I will finish the rest!”); Ex. 94 (email from Kutzner to Foti attaching script and stating: “Can you look over this.. Seems alittle to much!”); DE 284-8, Theisman Decl. at Page ID 7486, 7657-78 ¶¶ 4.x, 4.y, & 4.z; id. DE 284-8, Page ID 7487, DE 284-10, Page ID 7829-33 at ¶ 4.kkk (authenticating and attaching FTC-RAD-001-0171170 to 0171174, an email cc’ing Foti asking for approval for a “CLR Work Flow”); id. at DE 284-8, Page ID 7487, DE 284-10, Page ID 7790-93 ¶ 4.ddd (authenticating and attaching FTC-RAD-001-0131388 to 0131341, email dated November 16, 2010 from Kutzner to Foti attaching Brookstone script); id. at DE 284-8, Page ID 7487, DE 284-11, 7857 ¶ 4.ttt; id at DE</i></p>	<p>this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any communications with consumers.)</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant’s computer or on-site at the receivership defendant’s premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>

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<p>284-8, Page ID 7486, DE 284-9, Page ID 7721-28 ¶ 4.mm; <i>id.</i> at DE 284-8, Page ID 7486, DE 284-9, Page ID 7729-36 ¶ 4.nn; <i>id.</i> at DE 284-8, Page ID 7486, DE 284-9, Page ID 7737-44 ¶ 4.oo; <i>id.</i> at DE 284-8, Page ID 7486, DE 284-9, Page ID 7745-51 ¶ 4.pp (authenticating and attaching FTC-RAD-001-0049879 to 0049885, email to Kutzner and Foti with a draft script stating: “Thoughts?”); <i>id.</i> at DE 284-8, Page ID 7487, DE 284-10, Page ID 7772-75 ¶ 4.zz; <i>id.</i> at DE 284-8, Page ID 7487, DE 284-10, Page ID 7777-7788 ¶ 4.bbb</p>		
<p>274. In September 2015, Foti sent an email to a sales person, giving him language to include in an email to a Brookstone client. <i>Theisman Decl.</i> at DE 284-8, Page ID 7488, DE 284-12, Page ID 7914 ¶ 4.jjjj.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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	<p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any communications with consumers.)</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>275. In April 2015, Kutzner sent an email to Foti stating: "Another BIG issue we MUST update the SCRIPT!! ME and YOU..... LETS DO THIS!!!" <i>Ex. 95; DE 284-8, Theisman Decl. at Page ID 7486, 7679-81 ¶ 4.aa.</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any communications with consumers.)</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>276. The FTC sought discovery from Foti on his duties in drafting and creating marketing materials for the Corporate Defendants and he did not identify or produce any documents controverting the FTC's evidence. DE 284-8, <i>Theisman Decl. at Page ID 7490</i>, 8000-32 ¶ 10.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>Foti: DENY - Objection (irrelevant - Mr. Foti's inability to produce documents, where all of Mr. Foti's documents relevant to this action were previously seized at his home and office, does not constitute an admission of anything other than that he has no documents. <i>See Updated Interrogatory Responses</i></p>	<p>Undisputed as to Foti. The fact is relevant. In response, Foti cites evidence that is not relevant to the fact at issue.</p>
<p>277. FTC sought discovery regarding any defenses Foti might assert, issuing an interrogatory requiring him to identify any defenses he might assert and further identify all individuals, entities, and documents that might support those defenses. In response, Foti asserted only that the FTC would not be able to prove he had control, participated in the relevant acts, or had the relevant knowledge to hold him monetarily liable. He did not assert that the Corporate</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (irrelevant - Mr. Foti's inability to produce documents, where all of Mr. Foti's documents relevant to this action</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. In response, Foti cites evidence that is not relevant to the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
Defendants did not commit the alleged acts. He also did not identify any affirmative defenses. <i>DE 284-8, Theisman Decl. at Page ID 7490, 8000-13 ¶ 11.</i>	were previously seized at his home and office, does not constitute an admission of anything other than that he has no documents. <i>See Updated Interrogatory Responses</i>	
a. Foti Received and Responded to Consumer Complaints and Otherwise Had Knowledge of Bad Acts.		
278. Foti, at times, would engage in collection efforts for Brookstone, including bragging to Kutzner on one occasion: "I took a small amount of them (50) and closed 36." <i>Ex. 108; DE 284-8, at Page ID 7486, DE 284-9, at Page ID 7704-07, Theisman Decl. ¶ 4.ii.</i>	Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --. Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>that time. The box contained hundreds of envelopes with Merchant Services Chargeback notices.”), Page ID 3287-88, Att. 1, 3307-11, Att. 4; DE 284-13, Theisman Decl. at Page ID 8088 ¶ 15, Att. 12, Foti Depo. at 291:8-292:10 (admitting he responded to consumer chargebacks).</i></p>	<p>authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them, how box came to be in Foti's office, who placed it there or when, whether it had been opened, whether he ever looked at it). <i>Foti Decl. ¶ 66, 67, 68, 69 re: chargebacks</i></p>	<p>document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>280. Foti worked with others to respond to chargebacks. DE 284-7, Lobo Decl. at Page ID 7467-68 ¶ 10; DE 284-8, at Page ID 7488, DE 284-11, at Page ID 7859-65, Theisman</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 2 3 4 5 6 7 8 9 10 11 12</p> <p><i>Decl. ¶ 4.vvv; id. at DE 284-8, Page ID 7489, DE 284-12, Page ID 7978 ¶ 4.xxxx; id. at DE 284-8, Page ID 7489, DE 284-12, Page ID 7979 ¶ 4.yyyy; DE 284-13, <i>Theisman Decl. at Page ID 8088 ¶ 15, Att. 12, Foti Depo. at 291:8-292:10 (admitting he responded to consumer chargebacks).</i></i></p>	<p>Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: ADMIT <i>Foti Decl. ¶ 66, 67, 68, 69</i></p>	<p>Undisputed as to Foti.</p>
<p>13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p> <p>281. Foti received emails from consumers complaining about the Corporate Defendants' services. <i>Ex. 100 (Foti receiving and responding to a consumer complaint); Ex. 107 (Foti directing another employee to address a written consumer complaint); DE 284-8, at Page ID 7486, DE 284-9, at 7686-7695, 7702-03, <i>Theisman Decl. ¶¶ 4.dd, 4.ee, & 4.hh; id. DE 284-8, at Page ID 7489 ¶ 7 (attaching excerpts of Foti's responses to RFAs, request admitting he had</i></i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>access to the accounting@brookstonela.com email address, response to RFA 29); DE 41-3 at Page ID 2547-53 (complaint sent to "accounting"); <i>id.</i> at Page ID 2559-65 (complaints sent to "accounting"); <i>id.</i> at 2576 (email complaint sent to "accounting" to which Foti then directs another employee to respond); DE 284-4, <i>Chang Decl.</i> at Page ID 7248 ¶¶ 4.m & 4.n (authenticating documents in DE 41-3); DE 284-8, at Page ID 7488, DE 284-11, at Page ID 7889-91, <i>Theisman Decl.</i> ¶ 4.bbbb (authenticating and attaching FTC-RAD-001-0232680 to 0232682, email thread with a complaint from a consumer about an individual lawsuit in which nothing had been done as to which Foti instructed sales people to call the client to save the</p>	<p>or had anything to do with them. No evidence that Mr. Foti routinely reviewed emails sent to accounting@brookstonela.com.) <i>Foti Decl.</i> ¶¶ 66, 67, 68, 69 <i>re: chargebacks</i></p>	<p>the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti admits he used the accounting@brookstonela.com email address. DE 284-8 at Page ID 7509-10.</p> <p>In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>deal</i>).</p> <p>282. One “chargeback” document found in Foti’s office relates to a particular client whose signature block for the purported “Credit Card / Debit Card Authorization” is at an angle in comparison to the rest of the document, the margins for the signature block portion of the document are narrower than the remainder of the document, and the date of the signature is for two years prior to the date of the authorized charge. DE 284-8, <i>Theisman Decl. at Page ID 7489 ¶ 6 (authenticating and attaching FTC-RFP-0040099 to 0040112, at FTC-RFP-0040102, marked as “confidential” pursuant to protective order and redacted for use in this filing, DE 158).</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any communications with consumers.) <i>The evidence shows the authorization form on Theisman Decl, Attachment 7, Page ID 7989 was either misdated or prepared AFTER the client retained the law</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party’s statement. Finding documents on a receivership computer from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>firm on 9/4/12 (Pages 7990-99). DE-12, Page ID 214-216 demonstrates that, after client retained the law firm the client was added as a Plaintiff in the Potter Third Amended Complaint on 2/7/13.</i>	it more likely it was used. In response, Foti offers no evidence, just conjecture, which cannot controvert the fact at issue.
<p>283. In November and December 2014, Foti received consumer voice messages directly from Brookstone's answering service, with consumers complaining about unfulfilled promises and not being able to reach Brookstone.</p> <p>DE 284-8, <i>Theisman Decl. at Page ID 7489 ¶ 7 (attaching excerpts of Foti's responses to RFAs, response to RFA 131, admitting: "In November and December 2014 you received consumer messages from Brookstone's answering service.");</i> DE 284-8, <i>Theisman Decl. at Page ID 7491 ¶ 16 (authenticating and attaching emails to Foti attaching voicemails from</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i></p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the messages are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p> <p><i>Foti Decl ¶ 22</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>consumers from November and December 2014).</i></p>		<p>documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites only to his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited references does not address the fact at issue. Furthermore, in another paragraph of his declaration, he admits receiving the messages at issue. DE 304-1 at Page ID 9764 ¶ 21.</p>
<p>284. In November 2015, Tarkowski sent an email to Foti, among others, stating concerns he had with consumers reporting to him that they had been promised they would prevail in the mass joinder litigation or otherwise obtain relief.</p> <p><i>DE 186-3, Tarkowski Decl. at Page ID 5361, ¶ 15, and Page ID 5365,</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<i>Att. I.</i>	Foti: ADMIT Foti Decl. ¶ 60 (Geist fired shortly after); Tarkowski Depo, (Geist fired shortly after)	Undisputed as to Foti.
<p>285. In 2015, Foti helped draft and send emails stating that Brookstone is “very confident we will prevail” in the mass joinder litigation, that the consumer’s accout was “on suspense due to a past due amount,” and then responded to emails sent by consumers receiving these messages.</p> <p>DE 284-8, at Page ID 7488, DE 284-12, at Page ID 7923, <i>Theisman Decl.</i> ¶ 4.nnnn (authenticating and attaching FTC-RAD-002-0231191, email from Foti to Kutzner with draft language to send to consumers); <i>id.</i> at DE 284-8, Page ID 7488, DE 284-12, Page ID 7897-98 ¶ 4.eeee (authenticating and attaching FTC-RAD-002-0078913 to 0078914, email exchange with</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them and whether any of them were ever used in any communications with consumers.)</p> <p><i>Thurman Decl.</i>, Attachment 57 (FTC-</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay because it is an opposing party’s statement. Finding documents on a receivership computer from the defendant’s</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>consumer that received email claiming "very confident we will prevail," with Brookstone employee reporting to Foti); Ex. 100; DE 284-8, Theisman Decl. at Page ID 7486, 7686-87 ¶4.dd; id. at DE 284-8, Page ID 7488, DE 284-12, Page ID 7896 ¶ 4.dddd (authenticating and attaching FTC-RAD-002-0078912, email exchange with consumer receiving "very confident we will prevail" email, and consumer indicating he has been in correspondence with Foti about this); DE 17-6, Rios Decl. at Page ID 2157-58.</p>	<p>RAD-002-0024528) (No evidence Foti was involved in sending emails; evidence shows that Mr. Kutzner re-wrote the communication afterwards and directed Brookstone's Accounting Dept to send it out.) The complaint contains no allegations Defendants' conduct regarding the Account Due letters was deceptive or that any clients made any payments as a result of receiving Account Due letters; The Brookstone client retainer agreement authorized payments for work performed by Brookstone on appeals (Receiver's Preliminary Report (DE-41-4), Exhs. 19 and 20)</p>	<p>office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti's cited evidence does not address and/or controvert the fact at issue.</p>
<p>286. One consumer who received the email from 2015 demanding more money and claiming Brookstone is "very confident we will prevail," responded by stating: "I am unwilling to put more money into</p>	<p>Marshall: This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group,</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>this 'possibility.' Back when this all started I was promised many things that were never delivered." Foti responded: "[W]e think things looks [sic] promising." <i>Ex. 100; DE 284-8, Theisman Decl. at Page ID 7486, 7686-87 ¶ 4.dd.</i></p>	<p>P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; misstates the evidence. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Theisman Decl. at ¶ 15, Att. 12, Foti Depo. at 39:14-40:19, MSJ Evid p. 808 (Mr. Foti testified he was aware Mr. Kutzner had been sued by the FTC but understood that Mr. Kutzner, who shares a nearly identical name as his brother, took responsibility for his brother's actions and that it was the brother who was actually responsible for the conduct involved. Foti Decl. 83, 84, 86</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. For support Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue. The other evidence he cites also does not address the fact at issue.</p>
<p>287. Foti was aware that Kutzner had been pursued</p>	<p>Marshall: <i>This Defendant lacks the knowledge or</i></p>	<p>Undisputed as to Marshall. He does not</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>by the FTC in the past. DE 284-13, <i>Theisman Decl. at Page ID 8054 ¶ 15, Att. 12, Foti Depo. at 39:14-40:11; DE 284-8, at Page ID 7488, DE 284-12, at Page ID 7933-36, Theisman Decl. ¶ 4.ssss (authenticating and attaching FTC-RAD-002-0323522 to 0323525, email including Foti discussing Kutzner's history with the FTC, including a telemarketing ban).</i></p>	<p>information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Theisman Decl. at ¶ 15, Att. 12, Foti Depo. at 39:14-40:19, MSJ Evid p. 808 (Mr. Foti testified he was aware Mr. Kutzner had been sued by the FTC but understood that Mr. Kutzner, who shares a nearly identical name as his brother, took responsibility for his brother's actions and that it was the brother who</i></p>	<p>offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement.</p> <p>In response, Foti cites to his self-serving affidavit, which cannot controvert a fact on summary judgment, and the cited reference does not actually controvert the fact at issue. The other cited evidence also does not controvert the fact at</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<i>was actually responsible for the conduct involved. Foti Decl. ¶ 83, 84, 85, 86</i>	issue.
288. Foti was aware that Kutzner had previously worked with United Law Group (“ULG”) and that ULG had been shut down by criminal law enforcement. <i>Ex. 110 (email correspondence discussing criminal investigation of ULG); DE 284-8, at Page ID 7486, DE 284-9, at Page ID 7708-12, Theisman Decl. ¶ 4.jj; id. at DE 284-8, Page ID 7488, DE 284-12, Page ID 7933-36 ¶ 4.ssss (authenticating and attaching FTC-RAD-002-0323522 to 0323525, email exchange including Foti discussing Kutzner and ULG).</i>	Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action.</i> Marshall Decl., at ¶ --. Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; misstates the evidence. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl. ¶ 84, 85, 86 (re: ULG); Thurman Decl., Attachment 58 (unsealing order)</i>	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent or a sworn declaration. Foti’s cited evidence does not controvert the fact at issue.
289. Torchia and Kutzner had worked for	Marshall: <i>This Defendant lacks the knowledge or</i>	Undisputed as to Marshall. He does not

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>ULG. <i>DE 18, Ex. 2, at Page ID at 2225-40 (Torchia explaining his history with ULG, Kutzner's position with ULG and ULG's demise); id. at 2256-57 (Torchia explaining how he opened Brookstone and took on a number of ULG employees); id. at 2239-40 (Kutzner was ULG's COO); United States v. Kutzner, SACR14-00186-JLS (C.D. Cal.), DE 1 (information), DE 19 (guilty plea).</i></p>	<p>information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: ADMIT - Objection (irrelevant. No evidence Mr. Foti was aware of any criminal wrongdoing associated with ULG). <i>Foti Decl. ¶83, 84, 85, 86 (re: ULG); Thurman Decl., Attachment 58 (unsealing order)</i></p>	<p>offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>
<p>290. Kutzner has been indicted and pled guilty to conspiracy to commit mail fraud and wire fraud related to ULG's loan modification and lender litigation practices. <i>United States v. Kutzner, SACR14-00186-JLS (C.D. Cal.), DE 1 (information), DE 19 (guilty plea).</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>Foti: ADMIT - Objection (irrelevant. No evidence Mr. Foti was aware of any criminal wrongdoing associated with ULG). <i>Foti Decl.</i> ¶ 84, 85 (re: <i>ULG</i>); <i>Thurman Decl.</i>, Attachment 58 (unsealing order)</p>	<p>Undisputed as to Foti.</p>
<p>291. In 2012, Gil Mariscal, one of Brookstone's sales managers, stated the following in an email to Kutzner that Foti also received: "When the crap came down with the U.S. Attorney I gave you information to try to help you out and whether it was helpful or not is irrelevant, I was trying to look out for you. If you don't think that was loyalty then I would have kept my mouth shut and would not have led those investigators in a different direction. Jeremy knows the person leading the investigation and he believes what I say</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl.</i> ¶ 83, 84, 85, 86</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 because the guy has not 2 [sic] reason to doubt me. 3 I told him Brookstone had 4 nothing to do with all the 5 bullshit Kramer/Kaslow 6 and ULG did and they left 7 it alone. You know those 8 people came to my home 9 and I never said shit to 10 them. I instead picked up 11 the phone and called off 12 the dogs and sent them in 13 a different direction. For 14 them to try to pull Jeremy 15 and me into an 16 investigation that we had 17 nothing to do with is 18 beyond me. If you don't 19 think that was loyalty 20 Damian, then I don't 21 know what is." 22 <i>Ex. 110 at FTC-RAD-002-0256068; DE 284-8, at Page ID 7486, DE 284-9, at Page ID 7708-12, Theisman Decl. ¶ 4.jj.</i></p>	<p>(<i>re: ULG</i>); <i>Thurman Decl., Attachment 58 (unsealing order)</i></p>	<p>opposing party's statement. In response, Foti cites to his self-serving affidavit, which cannot controvert a fact on summary judgment, and the cited reference does not actually controvert the fact at issue. The other cited evidence also does not controvert the fact at issue.</p>
<p>23 292. Brookstone's ethics 24 counsel identified and 25 discussed a Brookstone 26 document that made 27 reference to ULG in a 28 memo forwarded to Foti by Torchia: "There is an error in the Guidelines,</p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>which has 'United' as the defined term for Brookstone. This could prove highly detrimental to Brookstone because it could be seen as evidence that Brookstone is a continuation of United.” DE 284-8, at Page ID 7487, DE 284-10, DE 284-11, at Page ID 7803-7822, <i>Theisman Decl.</i> ¶ 4.hhh.</p>	<p>Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay; subject to attorney-client communication and work product privilege asserted previously by Mr. Torchia. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. In addition, advice related to supervision of nonattorneys regarding the dispensation of "legal advice" under state ethics laws, not any claims relating to this action.) <i>Thurman Decl., Attachment 54 (Vito clawback request - FTC-RFP-0149575-0149576)</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay to the extent not offered for the truth of the matter asserted. All parties potentially holding a relevant attorney-client privilege have waived that privilege. See Madden 8-14-17 Decl. ¶ 5. Foti's cited evidence does not controvert the fact at issue.</p>
<p>293. At least at one point, there were staffing guidelines that stated: “This is a list of</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>mandatory guidelines to be followed by any Resource Management employee that has an assignment with Brookstone Law, Inc. ("United"). . . ." <i>Ex. 88 at FTC-RAD-002-0133032; DE 284-8, Theisman Decl. at Page ID 7486, 7615-7652 ¶ 4.v.</i></p>	<p>undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>294. In an email from 2012, Gil Mariscal wrote to Foti, among others, regarding banking specialists' behavior:</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 “Cain brings me a list of 2 clients every day that 3 need repeated calls 4 because they are being 5 ignored and we are losing 6 monthly revenue because 7 of it. Their response is, I 8 don't get paid on residuals 9 so I don't care about 10 dealing with those clients 11 I did my job. They 12 complain our BBB rating 13 is an 'F', they complaint 14 [sic] that they can't close 15 deals unless they stretch 16 the truth. . . .” 17 <i>Ex. 110 at FTC-RAD-002- 18 0256066; DE 284-8, at 19 Page ID 7486, DE 284-9, 20 at Page ID 7708-12, 21 Theisman Decl. at ¶ 4.jj.</i></p>	<p>fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Thurman Decl., Attachment 59 (Rodriguez decl.)</i></p>	<p>issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent or a sworn declaration. Foti's cited evidence does not controvert the fact at issue.</p>
<p>21 295. The FTC sought 22 discovery from Foti on his 23 duties in communicating 24 with clients, and he did 25 not identify or produce 26 any docments 27 controverting the FTC's 28 evidence. <i>DE 284-8, Theisman Decl. at Page ID 7490 ¶ 10.</i></p>	<p>Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
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	<p>this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objection (irrelevant - Mr. Foti's inability to produce documents, where all of Mr. Foti's documents relevant to this action were previously seized at his home and office, does not constitute an admission of anything other than that he has no documents.</p>	<p>Undisputed as to Foti. The fact is relevant. He cites no evidence to controvert the fact at issue.</p>
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a. Foti was Directly Involved in the May 2016 "Account Due" Scheme.

<p>296. Foti was included on numerous emails regarding the April/May 2016 draft "Account Due" letters and draft invoices, including the final draft invoice circulated on May 4, 2016. DE 41-6 at Page ID 2729-32; DE 284-4, Chang Decl. at Page ID 7249 ¶ 4.jj; DE 284-8, at Page ID 7486, 7489, DE 284-9, at Page ID 7969-01, DE 284-12, at Page ID 7975-77, Theisman Decl. ¶¶ 4.ff, 4.gg, &</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine</p>
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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
<p>4. www.</p>	<p>foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. No evidence that any consumer made any payments after receiving any such documents.) <i>Foti Declaration ¶ 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 (re: Account Due letters)</i></p>	<p>and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party’s statement. Finding documents on a receivership computer from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue. The other evidence cited does not controvert the fact at issue.</p>
<p>297. Foti received at least some emails from consumers complaining about the “Account Due” letters. DE 41-3 at Page ID 2576; DE 284-4, Chang</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Decl. at Page ID 7248 ¶ 4.n; Ex. 107, FTC-RAD-007-0000771 to 0000772; DE 284-8, at Page ID 7486, DE 284-9, at Page ID 7702-03, <i>Theisman Decl. ¶ 4.hh.</i></i></p>	<p>involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. No evidence that Mr. Foti routinely reviewed emails sent to accounting@brookstonelaw.com.) <i>Foti Decl. ¶ 66, 67, 68, 69 (re: chargebacks)</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti admits he used the accounting@brookstonelaw.com email address. DE 284-8 at Page ID 7509-10.</p> <p>In response, Foti cites only his self-serving</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
		declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.
<p>298. Foti directed other staff members to respond to consumer complaints regarding the "Account Due" letters. DE 41-3 at 31, <i>Page ID 2576</i>; DE 284-4, <i>Chang Decl. at Page ID 7248 ¶ 4.n</i></p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. No evidence that Mr. Foti routinely reviewed emails sent to accounting@brookstonela.com.) <i>Foti Decl. ¶ 66, 67, 68, 69</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer</p>

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Uncontroverted Fact/ Support	Defendants’ Responses	FTC’s Reply
	<i>(re: chargebacks)</i>	<p>from the defendant’s office or from the defendants’ premises taken over by the receivership in fact makes it more likely it was used. Foti admits he used the accounting@brookstonela w.com email address. DE 284-8 at Page ID 7509-10.</p> <p>In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.</p>
<p>299. In one consumer complaint regarding the “Account Due” letters that Foti received, the consumer expressed concern about the Account Due letter and explained that she had previously been convinced to pay an additional \$1,500 based on claims that the <i>Wright v. Bank of America</i> litigation was close to resolution in the fall of</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant’s involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>2015. <i>Ex. 107, FTC-RAD-007-0000771 to 0000772; DE 284-8, at Page ID 7486, DE 284-9, at Page ID 7702-03, <i>Theisman Decl.</i> ¶ 4.hh.</i></p>	<p>(irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. No evidence that Mr. Foti routinely reviewed emails sent to accounting@brookstonelaw.com.) <i>Foti Decl.</i> ¶ 66, 67, 68, 69 (re: chargebacks)</p>	<p>The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used. Foti admits he used the accounting@brookstonelaw.com email address. DE 284-8 at Page ID 7509-10.</p> <p>In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference does not address the fact at issue.</p>
<p>300. Throughout 2015, there was not an operative</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or</p>	<p>Undisputed as to Marshall. He does not</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23</p> <p>complaint on file in <i>Wright v. Bank of America</i>. <i>Petersen v. Bank of America</i>, 232 Cal. App. 4th 238 (Dec. 11, 2014); DE 12, <i>Madden May 2016 Decl.</i>, at Page ID 657-60, Att. 28.</p>	<p>information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: ADMIT <i>Petersen v. Bank of America</i>, 232 Cal. App. 4th 238, n.19 (Dec. 11, 2014) ("In this case it will obviously be a while before this complaint is ready for the prime time of a trial.") <i>Thurman Decl.</i> (case is still pending and litigation over the amended complaint continues in the more than a year since Brookstone was removed from the case.)</p>	<p>offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti.</p>
<p>24 25 26 27 28</p> <p>301. The Receiver found on Foti's desk copies of the "Accounting Inbound SCRIPT (Inbound)" with handwritten notes about the "accounting hold"</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>referred to in the May 5 letter. <u>DE 69-2</u>, <i>Robertson Decl.</i> at Page ID 3282-84, 3289-90, Ex. 11, ¶ 5, Att. 1.</p>	<p>without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. No evidence that any consumer made any payments after receiving any such documents.) <i>Foti Decl. ¶ 52 (not JF's handwriting)</i></p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
		Foti Decl. does not address the fact at issue.
<p>302. The Receiver found on Foti's desk a printout tallying the results of the collection efforts related to the Account Due letters with the title "Damian and Regina Crushing IT!!!" DE 69-2, <i>Robertson Decl.</i> at Page ID 3282-86, Ex. 11, ¶ 5, Att. 1.</p>	<p>Marshall: <i>This</i> Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed, as this alleged fact occurred prior to or without this Defendant's involvement with Advantis Law Group, P.C. or the other individual defendants in this action. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them or placed them on Mr. Foti's desk or whether they were received or reviewed by Mr. Foti. No evidence any consumers paid anything as a result of any statements on this document.whether Mr. Foti ever received, knew about or had anything to do with them. No evidence that any consumer made any</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
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	payments after receiving any such documents.) <i>Foti Decl.</i> ¶ 53	receivership in fact makes it more likely it was used. In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.
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a. Marshall Took Control of Advantis with Full Knowledge of Torchia's, Kutzner's, Broderick's and Brookstone's Malfeasance.

303. Marshall intended to transfer clients from Brookstone to Advantis, including providing instruction regarding the "Brookstone to Advantis client hand-off," and Brookstone clients "subject to transfer to Advantis." <i>Ex. 46, DE 218-2, Madden April 2017 Decl. at Page ID 5996-6003, Att. 7; Ex. 44, DE 218-2, Madden April 2017 Decl. at Page ID 6004 Att. 8; Ex. 48, DE 218-2, Madden April 2017 Decl. at Page ID 6005, Att. 9; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8299, 8301 ¶ 2.h,</i>	Marshall: Disputed. There were a tiny number of clients—no more than a half dozen—that were considered as possible candidates because the coordination efforts to start filing mass joinder cases in coordination with co-defendants was slow in developing and the idea was to jump-start one small test case in one joinder. There was never any global transfer clients and/or Brookstone cases to Advantis Law Group, P.C. Marshall Decl., at ¶ --. Foti: DENY - Not applicable to Mr. Foti	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment. Undisputed as to Foti.
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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Att. 8, Marshall Depo. (testimony authenticating Exs. 44 & 46 at 178:7-12, 179:1-20, 185:14-19, 186:10-17, 187:3-16); DE 218-2, Madden April 2017 Decl. at Page ID 6069, Marshall Depo. (testimony authenticating Ex. 48 at 194:11-195:1; DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5.</i></p>		
<p>304. Marshall sent letters to Brookstone clients informing them that their cases were being transferred to Marshall and Advantis. <i>Ex. 46, DE 218-2, Madden April 2017 Decl. at Page ID 5996-6003, Att. 7; Marshall Depo. (testimony authenticating Ex. 46 at 185:14-19, 186:10-17, 187:3-16); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5.</i></p>	<p>Marshall: Disputed. There were a tiny number of clients—no more than a half dozen— that were considered as possible candidates because the coordination efforts to start filing mass joinder cases in coordination with co-defendants was slow in developing and the idea was to jump-start one small test case in one joinder. There was never any global transfer clients and/or Brookstone cases to Advantis Law Group, P.C. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Not</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>305. On numerous occasions, Marshall requested that Kutzner and Foti begin fully marketing Advantis' mass joinder services urging them to "fully open marketing," have marketing "full-on," and "open up the marketing." <i>Ex. 54, DE 218-2, Madden April 2017 Decl. at Page ID 6078, Att. 17; Ex. 55, DE 218-2, Madden April 2017 Decl. at Page ID 6006, Att. 10; Ex. 56, DE 218-2, Madden April 2017 Decl. at Page ID 6094, Att. 18; DE 284-14, Madden July 2017 Decl. at Page ID 8304, 8306 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Exs. 54-56 at 215:4-216:7, 222:4-14, and 223:22-224:25); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5.</i></p>	<p>applicable to Mr. Foti</p> <p>Marshall: Disputed. During Marshall's brief tenure with Advantis Law Group, P.C., he issued three to three to six letters, which he never heard the results of nor followed up with as to whether the letters actually went out or if any of those clients actually switched and became either Advantis Law clients (which Marshall never had any information about or control over) nor Advantis Law Group, which he would have known and been informed, if true. In fact, Marshall has no knowledge whether these letters actually went out. Marshall never reviewed or individually vetted the marketing. As his deposition states, multiple times, whenever the issue of marketing came up, Kutzner assured Marshall that a separate attorney had reviewed and fully vetted and signed off on</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p>

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	<p>the marketing and advertising as fully compliant with all California Bar rules, state and federal laws, including FTC requirements. Foti's and Kutzner's initial disclosures identify the reviewing attorney. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>306. Marshall had an Advantis email address of Charles@advantislaw.co</p>	<p>Marshall: Undisputed.</p>	<p>Undisputed as to Marshall. He does not offer any admissible</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>m. Ex. 62, DE 218-2, Madden April 2017 Decl. at Page ID 6009; DE 284-14, Madden July 2017 Decl. at Page ID 1064 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 62 at 253:8-254:9); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5; DE 284-14, Madden July 2017 Decl. at Page ID 8126, 8417 ¶ 3, Att. 15, Marshall's First RFAs, RFA 47.b admitted pursuant to FRCP 36(a)(3).</p>	<p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>evidence capable of controverting the fact at issue. Undisputed as to Foti.</p>
<p>307. Marshall received multiple emails from people associated with the Corporate Defendants from advantislaw.com email addresses and multiple emails from people who claimed Advantis titles in their email signature blocks. Ex. 46, DE 218-2, Madden April 2017 Decl. at Page ID 5996-98, Att. 7; Ex. 57, DE 218-2, Madden April 2017 Decl.</p>	<p>Marshall: Disputed. This fact is vague. Marshall considered this email domain to be associated with Advantis Law Group. He used 'advantislaw' because it was shorter. Prior to his deposition, Marshall had no awareness of Advantis Law as opposed to Advantis Law Group. Marshall rarely used this email—less than a few dozen emails were ever</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self- serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>at Page ID 6007-08; <i>Ex. 37</i>, DE 218-2, <i>Madden April 2017 Decl. at Page ID 6053, Att. 14</i>; DE 284-14, <i>Madden July 2017 Decl. at Page ID 8125, 8295, 8301, 8308 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Exs. 37, 46, and 57 at 129:11-130:10, 185:14-19, 186: 10-17, 187: 3-16, 226:24-227:11</i>; DE 284-8, <i>Theisman Decl. at Page ID 7489 ¶ 5</i>; DE 284-14, <i>Madden July 2017 Decl. at Page ID 8126, 8417-18 ¶ 3, Att. 15, Marshall's First RFAs, RFAs 46, 48-51 admitted pursuant to FRCP 36(a)(3).</i></p>	<p>sent or received over the few months Marshall was involved with Advantis Law Group. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to Foti.</p>
<p>308. Marshall expected Kutzner and Foti to be in charge of the marketing and, although asking that the marketing be “full on,” never reviewed any of the Advantis marketing materials. <i>Ex. 55</i>, DE 218-2, <i>Madden April 2017 Decl. at Page ID 6006, Att. 10</i>; DE 218-2, <i>Madden April 2017 Decl. at Page ID</i></p>	<p>Marshall: Undisputed. Marshall relied on the attorney who had vetted all this for compliance based on Kutzner’s representations. Also, the “full on” comments were few, and spaced weeks or sometimes months apart, and never came to anything—mere suggestions that never transpired.</p>	<p>Undisputed as to Marshall.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>6072, <i>Marshall Depo. at 218:8-20, Att. 16</i>; DE 284-14, <i>Madden July 2017 Decl. at Page ID 8125, 8137 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 55 at 222:4-14)</i>; DE 284-8, <i>Theisman Decl. at Page ID 7489 ¶ 5</i>.</p>	<p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them. Mr. Marshall's "expectation" regarding Mr. Foti's role irrelevant.)</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>309. Marshall scheduled a meeting with the Brookstone/Advantis sales people to go over the entire business, including sales scripts. <i>Ex. 41</i>; DE 284-14, <i>Madden July 2017 Decl. at Page ID 8125, 8296 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 41 at</i></p>	<p>Marshall: Disputed. Defedant never scheduled any such meeting because his inquiries about the overall operation was never satisfied, and the discussions between co-defendants and Marshall never reached the stage where such a meeting was actually warranted. The meeting of this kind never</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>166:2-7, 167:9-17); DE 284-8, <i>Theisman Decl. at Page ID 7485, 7533-34 ¶ 4.e.</i></p>	<p>in fact happened—an Marshall does not recall following up to make it happen later. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to Foti.</p>
<p>310. Marshall first appeared in the <i>Wright v. Bank of America</i> litigation on July 20, 2015. DE 13-1, <i>Madden May 2016 Decl. at Page ID 833-34, Att. 38.</i></p>	<p>Marshall: Undisputed. Marshall appeared as cocounsel only. Marshall did not manage client contacts. Marshall appeared on the pleadings solely to help with litigation and negotiation strategy. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to both Marshall and Foti.</p>
<p>311. Marshall appeared on pleadings in the <i>Wright v. Bank America</i> litigation on behalf of all plaintiffs. DE 13-1, <i>Madden May 2016 Decl. at Page ID 837-41, Att. 39</i>; DE 13-3, <i>Madden May 2016 Decl. at Page ID 904-08, Att. 49</i>; <i>Ex. 62</i>, DE 218-2,</p>	<p>Marshall: Undisputed. Marshall appeared as cocounsel only. Marshall did not manage client contacts. Marshall appeared on the pleadings solely to help with litigation and negotiation strategy. Up to seven attorneys appeared on the pleadings in the <i>Wright</i></p>	<p>Undisputed as to both Marshall and Foti.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 <i>Madden April 2017 Decl.</i> 2 <i>at Page ID 6009-12, Att.</i> 3 <i>12; DE 284-14, <i>Madden</i> 4 <i>July 2017 Decl. at Page</i> 5 <i>ID 8126, 8418 ¶ 3, Att.</i> 6 <i>15, Marshall's First</i> 7 <i>RFA's, RFA 56 admitted</i> 8 <i>pursuant to FRCP</i> 9 <i>36(a)(3); id. at ¶ 2.h, Att.</i> 10 <i>8, DE 284-14, Page ID</i> 11 <i>8125, 8310, Marshall</i> 12 <i>Depo. (testimony</i> 13 <i>authenticating Ex. 62 at</i> 14 <i>253:8-254:9); DE 284-8,</i> 15 <i>Theisman Decl. at Page</i> 16 <i>ID 7489 ¶ 5.</i></i></p>	<p>litigation but Plaintiff only sued Torchia and Marshall. Marshall Decl., at ¶ --. Foti: DENY - Not applicable to Mr. Foti</p>	
<p>17 312. As a counsel of 18 record, Marshall received 19 the "Separate Case 20 Management Statement of 21 Defendants" filed in the 22 <i>Wright v. Bank of</i> 23 <i>America</i> litigation 24 highlighting 25 Brookstone's, Torchia's, 26 Broderick's, and 27 Kutzner's checkered 28 histories. DE 13-1, <i>Madden May</i> 2016 Decl. at Page ID 809, 816, 818-20, 822, Att. 36; DE 284-14, <i>Madden July 2017 Decl.</i> at Page ID 8125, 8310-11</p>	<p>Marshall: Undisputed. Marshall appeared as co- counsel only. Marshall received and read the statement, which appeared to be tendentious boilerplate intimidation tactics. The juge agreed and admonished defendant Bryan Cave— attorney Stuart Price. Marshall Decl., at ¶ --. Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to both Marshall and Foti.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>¶ 2.h, Att. 8, Marshall Depo. at 255:13-256:13; 257:2-9, 259:7-8</p>		
<p>313. Marshall appeared in the <i>Wright v. Bank of America</i> litigation because if <i>Wright v. Bank of America</i> were dismissed it would hamper his ability to market new mass joinder litigation under the “Advantis” name. DE 218-2, <i>Madden April 2017 Decl. at Page ID 6075</i>, Marshall Depo. at 250:4-11, 251:15-16, Att. 16.</p>	<p>Marshall: Disputed. Marshall stated that if the <i>Wright</i> case was lost, it would hurt the credibility of joinder cases in general. For that reason, he sought to keep the case alive and thriving. His goal was to bring credibility to joinder cases so he could file one someday himself and vindicate borrower rights in such a case.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>
<p>314. Marshall told Foti and Kutzner that the <i>Wright</i> matter and his participation in it and any settlement was dependent on his “presenting well for Advantis.” <i>Ex. 55</i>, DE 218-2, <i>Madden April 2017 Decl. at Page ID 6006</i>, Att. 10; DE 284-14, <i>Madden July 2017 Decl. at Page ID</i></p>	<p>Marshall: Undisputed. But by Advantis, Marshall was referring to Advantis Law Group <i>only</i>. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti</p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>8125, 8307 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 55 at 222:4-14); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5.</p>	<p>ever received, knew about or had anything to do with them.)</p>	<p>submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>315. Marshall worked to ensure the <i>Wright</i> case "stays on track" due to its importance and told Foti he had "done all the right things to keep that baby alive." Ex. 57, DE 218-2, Madden April 2017 Decl. at Page ID 6007, Att. 11; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8308 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 57 at 226:24-227:11); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5.</p>	<p>Marshall: Undisputed. Based on his foreclosure litigation expertise, Marshall believed the <i>Wright</i> case was the only joinder case still alive in June of 2016 when the FTC sued everyone. It was alive partially due to Marshall's efforts, for which he never sought or received compensation of any kind. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti</p>	<p>Undisputed as to Marshall.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p>ever received, knew about or had anything to do with them.)</p>	<p>submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>316. Marshall participated in the <i>Wright</i> matter, signing a pleading as "Advantis Law Group, PC, Charles Marshall, Attorneys for All Plaintiffs." <i>Ex. 62, DE 218-2, Madden April 2017 Decl. at Page ID 6009, 6012, Att. 12; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8310 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 62 at 253:8-254:9); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5.</i></p>	<p>Marshall: Undisputed. Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to both Marshall and Foti.</p>
<p>317. After his bar suspension concluded in</p>	<p>Marshall: Disputed. Marshall did not deepen</p>	<p>Undisputed as to Marshall. He does not</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>2016, Marshall deepened his involvement in Brookstone matters, telling Jonathan Tarkowski that, per instructions from Foti and Kutzner, he would need “access to all the pleadings for recent Brookstone joinder cases that you filed. I need to review and assess status of hearings, pleadings, next steps, etc.”</p> <p><i>Ex. 53, DE 278-1 at Page ID 6995, 6998, Madden May 22, 2017 Decl. at ¶ 2.a, Att. 1; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8304 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 53 at 210:13-211:14); DE 284-8, Theisman Decl. at Page ID 7485, 7537 ¶ 4.h (attaching and authenticating Ex. 53); id. at DE 284-8, Page ID 7488, DE 284-12, Page ID 7903-04 ¶ 4.gggg; DE 284-14, Madden July 2017 Decl. at Page ID 8126, 8417-18 ¶ 3, Att.</i></p>	<p>his involvement but lessened it overall. He never signed back onto the <i>Wright</i> or any other case. He went off the <i>Jason Le</i> case too. And when he returned to that case after his suspension, he signed back on under his name—NOT under Advantis Law Group. Marshall requested pleadings of the different Brookstone cases because again, he intended to do what he could to make the pleadings better from a litigation point of view. Marshall believed that if the cases were dismissed with prejudice, it would hurt foreclosure joinder cases generally. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>15, Marshall's First RFAs, RFA 57-62 admitted pursuant to FRCP 36(a)(3) .</p>		<p>of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>318. In numerous emails including Marshall, Advantis was referred to as "Advantis" or "Advantis Law." DE 284-8, at Page ID 7487, DE 284-10, DE 284-11, at Page ID 7803-7822, <i>Theisman Decl.</i> ¶ 4.mmm; DE 218-2, <i>Madden April 2017 Decl.</i>, at Page ID 6055-57, 6004, 6006, 6007-08 (attaching Exs. 30, 44, 55, and 57); DE 284-14, <i>Madden July 2017 Decl.</i> at Page ID 8125, 8286-87, 8289, 8296-97, 8299, 8302, 8308 ¶ 3, Att. 15, <i>Marshall Depo.</i> (testimony authenticating Exs. 30, 32, 41, 43-44, 51, 55, 57 at 80:16-18, 81:11-82:5, 93:18-94:10, 166:2-</p>	<p>Marshall: Disputed. Co-defendants might have used these terms interchangeably but the ONLY Advantis entity Marshall was aware of was Advantis Law Group—using "Advantis" or "Advantis Law" as shorthand.</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>

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<p>7, 167: 9-17, 172:7-21, 178:7-12, 179:1-20, 203:25-204:18, 222:4-14, 226:24-227:11; DE 284-8, <i>Theisman Decl. at Page ID 7489 ¶ 5</i>; <i>id. at DE 284-8, Page ID 7485, 7518, 7533-36 ¶¶ 4.a, 4.e, 4.f, & 4.g.</i></p>		
<p>319. Marshall signed a payment processing application for “Advantis Law.” DE 284-8, at Page ID 7487, DE 284-11, at Page ID 7835-40, <i>Theisman Decl. ¶ 4.mmm.</i></p>	<p>Marshall: Dsipated [sic]. Marshall did not sign a payment processing application for Advantis Law, P.C., but for Advantis Law Group, P.C., which was referred to in short hand as Advantis Law. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>
<p>320. Marshall appeared on behalf of and signed the stipulation for the preliminary injunction in this matter on behalf of “Advantis Law Group P.C.” and “Advantis Law P.C.” DE 50 at Page ID 2959; DE 53 at Page ID 2967-69, DE 53-1 at Page ID 2972-3005</p>	<p>Marshall: Disputed. Marshall was never aware that Advantis Law, P.C., was a separate entity [sic] that predates Advantis Law Group, P.C. Marshall appeared solely to state that he had a legal conflict and could not represent either entity. Marshall was factually mistaken about who and what</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	Advantis Law was believing it to be an aka for Advantis Law Group, P.C. Marshall Decl., at ¶ --. Foti: DENY - Not applicable to Mr. Foti	Undisputed as to Foti.
321. Marshall was aware that Torchia and Brookstone were facing bar discipline related to the mass joinder practice. <i>Ex. 30, DE 218-2, Madden April 2017 Decl. at Page ID 6055-57, Att. 15; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8286-87 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 30 at 80:16-18, 81:11-82:5); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5; DE 218-2, Madden April 2017 Decl. at Page ID 6061-62, Marshall Depo. at 24:6-25:14, Att. 16.</i>	Marshall: Undisputed. Marshall learned of Torchia and Brookstone's troubles, which is why he did not associate with Torchia and why he signed onto Advantis Law Group, so that the new corporate entity could do matters right and be Bar and otherwise legally compliant. Marshall Decl., at ¶ --. Foti: DENY - Not applicable to Mr. Foti	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment. Undisputed as to Foti.
322. Notwithstanding his knowledge of Torchia's California State Bar disciplinary issues related to Brookstone's	Marshall: Dsipated[sic]. Marshall decided to not involve himself directly with Torchia and Brookstone, deciding to	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at

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<p>mass joinder litigations, Marshall did no systematic analysis of the Brookstone mass joinder cases, undertook no investigation and did not research the bar complaints against Torchia at “any kind of level of detail.”</p> <p>DE 218-2, <i>Madden April 2017 Decl. at Page ID 6061-62, 6068-69, Marshall Depo. at 24:6-25:14, 146:12-16, 196:18-20, Att. 16.</i></p>	<p>create a new entity— Advantis Law Group, P.C. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>
<p>323. Marshall was aware of Kutzner’s history, including that ULG had been shut down by criminal law enforcement.</p> <p>DE 218-2, <i>Madden April 2017 Decl. at Page ID 6074, Marshall Depo. at 245:24-246:1-17, Att. 16;</i></p> <p>DE 13-1, <i>Madden May 2016 Decl. at Page ID 815-16, Att. 36.</i></p>	<p>Marshall: Undisputed. Marshall was later made aware.</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to both Marshall and Foti.</p>
<p>324. Marshall claims he relied solely on Kutzner’s oral representations that the Brookstone/Advantis practices were bar compliant.</p>	<p>Marshall: No response</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to both Marshall and Foti.</p>

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<p>1 DE 218-2, Madden April 2 2017 Decl. at Page ID 3 6071, 6073, Marshall 4 Depo. at 215:23-216:24; 5 244:19-25, Att. 16.</p>		
<p>6 325. Marshall testified 7 he never saw any 8 documents corroborating 9 Kutzner's claim that any 10 advertising materials were 11 vetted and bar compliant. 12 DE 218-2, Madden April 13 2017 Decl. at Page ID 14 6074, Marshall Depo. at 15 247:10-248:5, Att. 16.</p>	<p>Marshall: Dispute—I specifically relied on his oral representations that a specific attorney vetted same practices—I was not relying on Kutzner per se—I was relying on the attorney he indicated had done the due diligence. Clearly I would not rely on Kutzner for this due diligence—as he is not an attorney and thus would not clearly know all the rules himself.</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self- serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>
<p>16 326. Marshall testified 17 that at no time did he do 18 "an independent 19 corroboration" of what 20 Kutzner told him. 21 DE 218-2, Madden April 22 2017 Decl. at Page ID 23 6077, Marshall Depo. at 24 261:3-9, Att. 16.</p>	<p>Marshall: True.</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to both Marshall and Foti.</p>
<p>25 327. Marshall relied 26 exclusively on the word</p>	<p>Marshall: True.</p>	<p>Undisputed as to both Marshall and Foti.</p>

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<p>of Kutzner, a non-lawyer with a checkered history, as conclusively establishing the legality of the business practices. DE 218-2, <i>Madden April 2017 Decl. at Page ID 6074</i>, <i>Marshall Depo. at 247:10-248:5, Att. 16.</i></p>	<p>Foti: DENY - Not applicable to Mr. Foti</p>	
<p>328. Marshall was aware of Broderick's past involving another alleged mass joinder fraud as of early March 2015, communicating with Foti and Kutzner regarding the Federal District Court actions of the Florida and Connecticut Attorneys General. <i>Ex. 35, DE 218-2, Madden April 2017 Decl. at Page ID 6013-52, Att. 13; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8291 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 35 at 101:19-102:18); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5; DE 218-2 at Page ID 6067, Marshall Depo. at 101:21-103:7; Ex. 36; DE</i></p>	<p>Marshall: See 324 again—dispute and reference that language.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>284-14, <i>Madden July 2017 Decl. at Page ID 8125, 8293 ¶ 2.h, Att. 8, Marshall Depo.</i> (testimony authenticating <i>Ex. 36 at 121:16-122:7</i>); DE 284-8, <i>Theisman Decl. at Page ID 7485, 7527-28 ¶ 4.c.</i></p>		<p>defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>329. The Federal District Court actions of the Florida and Connecticut Attorneys General against Broderick involved a mass joinder litigation scheme by a purported law firm using advertising tactics like those used by Brookstone and Advantis. <i>Ex. 35, DE 218-2, Madden April 2017 Decl. at Page ID 60134, 6015-17, Att. 13 at ¶¶ 3, 7-11; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8291 ¶ 2.h, Att. 8, Marshall Depo.</i> (testimony authenticating <i>Ex. 35 at 101:19-102:18</i>); DE 284-8, <i>Theisman Decl. at Page ID 7489 ¶ 5.</i></p>	<p>Marshall: This Defendant does not have any personal knowledge of these actions and on that basis can neither dispute nor declare this fact as undisputed.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a public record. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>330. The Federal District Court Complaints filed by the Florida and Connecticut Attorneys General identify Broderick as the "front man" for the mass joinder litigation scheme. <i>Ex. 35, DE 218-2, Madden April 2017 Decl. at Page ID 6021, Att. 13 at ¶ 31; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8291 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 35 at 101:19-102:18); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5.</i></p>	<p>Marshall: This Defendant does not have any personal knowledge of these actions and on that basis can neither dispute nor declare this fact as undisputed.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>evidence to controvert the fact at issue.</p> <p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a public record. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>331. Marshall acknowledges analyzing/investigating the Florida and Connecticut Attorneys</p>	<p>Marshall: Undisputed. But this is exactly why Marshall would not go under the Brookstone umbrella, but insisted on</p>	<p>Undisputed as to Marshall.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>General action against Broderick and tells Kutzner and Foti the “results are quite unfavorable.”</p> <p><i>Ex. 36; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8293 ¶ 2.h, Att. 8, Marshall Depo. at 127:20-129:3 (testimony authenticating Ex. 36 at 121:16-122:7); DE 284-8, Theisman Decl. at Page ID 7485, 7527-28 ¶ 4.c.</i></p>	<p>having a new corporate vehicle to file the cases using due diligence. Marshall Decl., at ¶ 46.</p> <p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>332. In one email related to Broderick's past involving another alleged mass joinder fraud, Marshall stated: “misgivings, given the situation with Brookstone” and that Brookstone's and Broderick's history was</p>	<p>Marshall: Undisputed. But this is exactly why Marshall would not go under the Brookstone umbrella, but insisted on having a new corporate vehicle to file the cases using due diligence. Marshall Decl., at ¶ 46.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>creating “a lot of liability for me,” he wanted to continue because “[a]t the end of the day, though, we are in complete agreement that this is fundamentally a business decision. So I am moving forward in that light. The business prospect still looks quite good.”</p> <p><i>Ex. 37, DE 218-2, Madden April 2017 Decl. at Page ID 6053, Att. 14; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8295 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 37 at 129:11-130:10); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5.</i></p>	<p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant’s computer or on-site at the receivership defendant’s premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>333. Marshall knew that Advantis misrepresented its capabilities, telling Foti that Advantis was not a “group of attorneys” as Foti was representing, but that Marshall was the “only attorney moving forward.”</p> <p><i>Ex. 37, DE 218-2, Madden April 2017 Decl.</i></p>	<p>Marshall: Disputed. Marshall’s going forward was based upon BOTH a perception of sound business and legal principles. Marshall Decl., ¶ 47.</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Page ID 6053, Att. 14; DE 284-14, Madden July 2017 Decl. at Page ID 8125, 8295 ¶ 2.h, Att. 8, Marshall Depo. (testimony authenticating Ex. 37 at 129:11-130:10); DE 284-8, Theisman Decl. at Page ID 7489 ¶ 5.</i></p>	<p>Foti: DENY - Objections (irrelevant; failure to authenticate; hearsay. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.)</p>	<p>Undisputed as to Foti. The fact is relevant. The document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact. The evidence is not hearsay as a statement of a party opponent. Finding documents on a defendant's computer or on-site at the receivership defendant's premises in fact makes it more likely it was used. For support, Foti cites no evidence to controvert the fact at issue.</p>
<p>334. Marshall knew about multiple misrepresentations on the Advantis website regarding its experience, locations, areas of practice, attorneys, paralegals, and legal assistants. DE 218-2, Madden April 2017 Decl. at Page ID 6073, Marshall Depo. at 241:1-244:11; Ex. 61, DE 14-4, Gales Decl., at</p>	<p>Marshall: Disputed. Marshall did not have knowledge of the content of the website; he rarely, if ever, viewed the content. Marshall Decl., at ¶ 48.</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment.</p> <p>Undisputed as to Foti.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 <i>Page ID 1367-76, Att. 18;</i> 2 <i>DE 284-14, Madden July</i> 3 <i>2017 Decl. at Page ID</i> 4 <i>8126, 8415-16 ¶ 3, Att.</i> 5 <i>15, Marshall's First</i> 6 <i>RFAs, RFAs 13-27</i> 7 <i>admitted pursuant to</i> 8 <i>FRCP 36(a)(3).</i></p>		
<p>9 335. The FTC sought 10 discovery regarding any 11 defenses Marshall might 12 assert, issuing 13 interrogatories requiring 14 him to: (1) identify any 15 defenses he might assert 16 and further identify all 17 individuals, entities, and 18 documents that might 19 support those defenses; 20 and (2) identify all 21 individuals or entities that 22 have information 23 suggesting that any 24 Defendant was not liable 25 for the alleged conduct 26 and for each individual or 27 entity, state the factual 28 information they possess that relate to any of the claims in the complaint. In his March 13, 2017 response, Marshall did not substantively respond, but stated a response would</p>	<p>Marshall: Unidsputed. While it is true Marshall has not provided initial disclosures and other responses to discovery, he attempted several times (two at least formally) with the Court—which were rejected—when he attempted to file a formal amended answer, withdrawing his Fifth Amendment plea, and associated motion to amend answer identifying both defenses and affirmative defenses. Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Not applicable to Mr. Foti</p>	<p>Undisputed as to both Marshall and Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>be provided at a later date. To date Marshall has not provided any additional response. In addition, Marshall has not provided initial disclosures as required by FRCP 26(a)(1). <i>DE 284-14, Madden July 2017 Decl. at Page ID 8126-28, 8423-26 ¶¶ 4-6, Att. 16 (excerpt of Marshall First Int. Resp., Int. Nos. 7-8 identifying no defenses and identifying no entities or individuals with information suggesting any Defendant is not liable).</i></p>		
<p>336. The FTC sought discovery requesting all documents supporting Marshall's response to any interrogatory, including those interrogatories requiring him to: (1) identify any defenses he might assert and further identify all individuals, entities, and documents that might support those defenses; and (2) identify all</p>	<p>Marshall: Unidsputed. While it is true Marshall has not provided initial disclosures and other responses to discovery, he attempted several times (two at least formally) with the Court—which were rejected—when he attempted to file a formal amended answer, withdrawing his Fifth Amendment plea, and associated motion to</p>	<p>Undisputed as to both Marshall and Foti.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 individuals or entities that</p> <p>2 have information</p> <p>3 suggesting that any</p> <p>4 Defendant was not liable</p> <p>5 for the alleged conduct</p> <p>6 and for each individual or</p> <p>7 entity, state the factual</p> <p>8 information they possess</p> <p>9 that relate to any of the</p> <p>10 claims in the complaint.</p> <p>11 In his March 13, 2017</p> <p>12 response, Marshall did not</p> <p>13 substantively respond, but</p> <p>14 stated a response would</p> <p>15 be provided at a later date.</p> <p>16 To date Marshall has not</p> <p>17 provided any additional</p> <p>18 response.</p> <p>19 DE 284-14, at Page ID</p> <p>20 8126-28, 8423-26, DE</p> <p>21 284-15, at Page ID 8432-</p> <p>22 33, <i>Madden July 2017</i></p> <p>23 <i>Decl. ¶¶ 4-5, Att. 16</i></p> <p>24 <i>(excerpt of Marshall First</i></p> <p>25 <i>Int. Resp., Int. Nos. 7-8</i></p> <p>26 <i>identifying no defenses</i></p> <p>27 <i>and identifying no entities</i></p> <p>28 <i>or individuals with</i></p> <p><i>information suggesting</i></p> <p><i>any Defendant is not</i></p> <p><i>liable), Att. 17 (excerpts</i></p> <p><i>of Marshall First RFP</i></p> <p><i>Resp., RFP No. 2.)</i></p>	<p>amend answer identifying</p> <p>both defenses and</p> <p>affirmative defenses.</p> <p>Marshall Decl., at ¶ --.</p> <p>Foti: DENY - Not</p> <p>applicable to Mr. Foti</p>	
337. The FTC sought	Marshall: Unidsputed.	Undisputed as to both

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>discovery from Marshall requesting all documents supporting or tending to disprove that Corporate Defendants: (1) were likely to obtain relief for consumers; (2) would seek to void consumers' mortgages; (3) had a team of experienced lawyers and personnel to litigate mass joinder fraud cases for hundreds or thousands of clients; and (4) would file a lawsuit on behalf of each mass joinder client. Marshall has produced no documents in response to these requests.</p> <p><i>DE 284-14, at Page ID 8127-28, DE 284-15, at Page ID 8434-42, Madden July 2017 Decl. at ¶ 5, Att. Att. 17, (excerpts of Marshall First RFP Resp., RFP Nos. 10-17.)</i></p>	<p>While it is true Marshall has not provided initial disclosures and other responses to discovery, he attempted several times (two at least formally) with the Court—which were rejected—when he attempted to file a formal amended answer, withdrawing his Fifth Amendment plea, and associated motion to amend answer identifying both defenses and affirmative defenses. Marshall Decl., at ¶ --. Foti: DENY - Not applicable to Mr. Foti</p>	<p>Marshall and Foti</p>
<p>Foti's Past Involves Telemarketing, Debt Settlement, and Attempts to Hide His Ownership of Companies.</p>		
<p>338. In 2006, Foti was President and owned and operated a mortgage brokerage called Americor Lending Group</p>	<p>Marshall: This Defendant cannot state with any certainty whether this fact is disputed or not because it predates this</p>	<p>Undisputed as to both Marshall and Foti</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Inc. ("Americor"). DE 78-1, <i>Foti July 2016 Decl. at Page ID 3540</i>, ¶ 16.</p>	<p>Defendant's involvement with Advantis Law Group, P.C., and/or individual codefendants.</p> <p>Foti: ADMIT - Objection (irrelevant) <i>Foti Declaration ¶ 4 (re: Americor.)</i></p>	
<p>339. For acts that took place while Foti was an owner and President, Americor was sanctioned by the State of Washington for alleged unlawful lending practices. DE 69-2 at Page ID 3249-52; DE 78-1, <i>Foti July 2016 Decl. at Page ID 3540-41</i>, ¶¶ 16-21.</p>	<p>Marshall: This Defendant cannot state with any certainty whether this fact is disputed or not because it predates this Defendant's involvement with Advantis Law Group, P.C., and/or individual codefendants.</p> <p>Foti: DENY - Objections (Irrelevant; misstates the terms of the Order) <i>Foti Declaration ¶ 5 and 6 (re: Americor); DE 69-2 at Page ID 3249-52 (Americor was sanctioned for, in some instances, failing to maintain records, failing to disclose that the broker fee had increased from the date of the last Good Faith Estimate to the date of settlement; (3) failing</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p> <p>Undisputed as to Foti. The fact is relevant. He cites no evidence to controvert the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
	<p><i>to disclose the yield spread premium before settlement, (4) failing to pay a late fee for its 2006 annual report, and (5) failing to submit its 2007 annual report and annual assessment fee. These were technical violations discovered in an annual audit of a company that was winding down its business activities in the State of Washington as the mortgage boom had ended. There were no allegations of any misrepresentations in the marketing of any loans or any other violations relating to alleged deception. Order makes clear that subsequent violations will incur additional penalties, but no evidence of any subsequent violations.)</i></p>	
<p>340. For acts that took place while Foti was an owner and operator, Americor received a "citation" from the Federal Communications</p>	<p>Marshall: This Defendant cannot state with any certainty whether this fact is disputed or not because it predates this Defendant's involvement</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Commission for alleged unlawful telemarketing practices.</p> <p>DE 284-14, <i>Madden July 2017 Decl. at Page ID 8125, 8314-16 ¶ 2.i, Att. 9, CITATION, File No. EB-07-TC-821, Letter to Messrs Foti, McIlwain, Bottom, Americor Lending Group, Inc., from Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission (March 9, 2007).</i></p>	<p>with Advantis Law Group, P.C., and/or individual codefendants.</p> <p>Foti: DENY - Objections (irrelevant - no evidence Americor "received" the citation; no allegations of any telemarketing violations in this action; "Citation" against Americor imposed no fine and provides little indication regarding the nature of the conduct that is the subject of the claimed violation, apart from contacting phone numbers without "prior express consent," which is not involved in this action. Citation makes clear that subsequent violations will incur fines of \$11,000 per violation, but no evidence of any subsequent violations.)</p> <p><i>Foti Decl. ¶7 (re: Americor/FCC)</i></p>	<p>Undisputed as to Foti. The fact is relevant. He cites no evidence to controvert the fact at issue.</p>
<p>341. Foti provided consulting services, office space, and capital to a firm known as Morgan Drexen, Inc. ("Morgan</p>	<p>Marshall: This Defendant cannot state with any certainty whether this fact is disputed or not because it predates this</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>Drexen”), which was in the debt settlement business. DE 284-13, <i>Theisman Decl. at Page ID 8050-51 ¶ 15, Att. 12, Foti Depo. at 24:15-25:15, 26:3-5.</i></p>	<p>Defendant’s involvement with Advantis Law Group, P.C., and/or individual codefendants. Foti: DENY - Objection (irrelevant; misstates the evidence) <i>Foti Decl ¶ 9 (re: Morgan Drexen)</i></p>	<p>issue. Undisputed as to Foti. The fact is relevant. He cites no evidence to controvert the fact at issue.</p>
<p>342. Foti owned and operated Kirkland Green, a debt settlement business. DE 284-13, <i>Theisman Decl. at Page ID 8050-51 ¶ 15, Att. 12, Foti Depo. at 22:24-23:3, 26:14-17.</i></p>	<p>Marshall: This Defendant cannot state with any certainty whether this fact is disputed or not because it predates this Defendant’s involvement with Advantis Law Group, P.C., and/or individual codefendants. Foti: ADMIT - Objection (irrelevant - no evidence of any violations by Kirkland Green). <i>Foti Decl ¶ 8 re: KLG (3 complaints out of 6,900 clients)</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti.</p>
<p>343. Kirkland Green has generated consumer complaints. DE 284-8, <i>Theisman Decl. at Page ID 7491 ¶ 14 (attaching consumer complaints submitted to</i></p>	<p>Marshall: This Defendant cannot state with any certainty whether this fact is disputed or not because it predates this Defendant’s involvement with Advantis Law</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

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<i>the FTC).</i>	Group, P.C., and/or individual codefendants. Foti: ADMIT - Objection (irrelevant - only three consumer complaints regarding client's purported inability to reach company - one made to the CFPB, one to the BBB and one to the FTC. The FTC has initiated no investigations or enforcement actions based on any consumer complaints against Kirkland Green or Mr. Foti while it was in business. <i>Foti Decl ¶ 8 re: KLG (3 complaints out of 6,900 clients)</i>	Undisputed as to Foti.
344. In his debt settlement business, Foti interceded to reduce attorney supervision of salespersons' telephone calls because the attorney was admonishing sales staff not to make guarantees. DE 284-8 , at Page ID 7487, DE 284-10 , at Page ID 7794-96, <i>Theisman</i>	Marshall: This Defendant cannot state with any certainty whether this fact is disputed or not because it predates this Defendant's involvement with Advantis Law Group, P.C., and/or individual codefendants. Foti: DENY - Objections (irrelevant; failure to	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. The

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p><i>Decl. ¶ 4.eee.</i></p>	<p>authenticate; hearsay; misstates the evidence. No foundation the documents are genuine, who prepared them, whether Mr. Foti ever received, knew about or had anything to do with them.) <i>Foti Decl. ¶ 87</i></p>	<p>document(s) are genuine and authentic, as established by the evidence the FTC submitted in support of the fact for this paragraph. The evidence is not hearsay because it is an opposing party's statement. Finding documents on a receivership computer from the defendant's office or from the defendants' premises taken over by the receivership in fact makes it more likely it was used.</p> <p>In response, Foti cites only his self-serving declaration, which cannot controvert a fact on summary judgment, and the cited reference to the Foti Decl. does not address the fact at issue.</p>
<p>345. Foti makes use of "shelf companies" with "nominee services," allowing him to own companies while hiding his ownership from the public. <i>DE 284-13, Theisman</i></p>	<p>Marshall: This Defendant cannot state with any certainty whether this fact is disputed or not because it predates this Defendant's involvement with Advantis Law Group, P.C., and/or</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue.</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 <i>Decl. at Page ID 8074 ¶</i> 2 <i>15, Att. 12, Foti Depo. at</i> 3 <i>153:23-154:10, 156:3-9.</i></p>	<p>individual codefendants. Foti: ADMIT - Objection (irrelevant) <i>Foti Decl. ¶ 91</i></p>	<p>Undisputed as to Foti.</p>
<p>6 346. The Corporate 7 Defendants paid more 8 than \$1.5 million to 9 Webstar, a shelf company 10 owned and controlled by 11 Foti. 12 DE 14-6 at Page ID 1436, 13 <i>1438, Declaration of Emil</i> 14 <i>George, May 17, 2016</i> 15 <i>("May 17 George Decl.")</i> 16 <i>at ¶ 10, Att. B.</i></p>	<p>Marshall: <i>This Defendant</i> lacks the knowledge or information and belief to dispute or declare this fact undisputed. Foti: DENY - Objection (irrelevant; misstates the evidence) <i>Foti Decl. ¶ 73 re:</i> <i>Webstar</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. He cites no evidence to controvert the fact at issue.</p>
<p>16 347. Foti never told 17 Torchia, Brookstone's 18 purported owner, that he 19 owned and controlled 20 Webstar. 21 DE 186-4, <i>Torchia Decl.</i>, 22 <i>at Page ID 5381, ¶ 27.</i></p>	<p>Marshall: <i>This Defendant</i> lacks the knowledge or information and belief to dispute or declare this fact undisputed. Foti: DENY - Objection (irrelevant; Misstates the evidence) <i>Thurman Decl.</i>, <i>Attachment 61 (Webstar</i> <i>Advertising/Marketing</i> <i>Agreement signed by Mr.</i> <i>Torchia on 12/7/10);</i></p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti. The fact is relevant. Foti's cited evidence does not controvert the fact at issue. The agreement he cites to does not identify Foti by name or address. He admitted he did not tell Vito Torchia he owned Webstar. DE 284-</p>

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
		8 at Page ID 7512.
348. Foti's agreement with Brookstone included a "confidentiality" clause preventing Brookstone from publicly disclosing his involvement. <i>DE 78-1, Foti July 2016 Decl., at Page ID 3547, ¶ 7, Ex. A.</i>	Marshall: <i>This Defendant lacks the knowledge or information and belief to dispute or declare this fact undisputed.</i> Foti: ADMIT <i>Foti Decl ¶ 12 (confidentiality clause)</i>	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti.
349. On June 6, 2016, Foti left a voice mail with FTC Counsel Benjamin Theisman, stating he was with a mortgage company that subleased from Advantis and claiming to be making the call on behalf of the mortgage company rather than himself or any of the defendants. <i>DE 284-13, Theisman Decl. at Page ID 8033-37 ¶ 13, Att. 10.</i>	Marshall: This Defendant cannot state with any certainty whether this fact is disputed or not because it predates this Defendant's involvement with Advantis Law Group, P.C., and/or individual codefendants. Foti: ADMIT <i>Foti Decl ¶ 88, 89, and 90</i>	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue. Undisputed as to Foti.
Marshall Has a History of MARS Fraud.		
350. In October 2011, Marshall stipulated to findings that he violated his ethical duties to five different sets of clients related to short sale and loan modification representation, taking fees	Marshall: Disputed. The stipulation with the California State Bar does not reference violations of MARS or any other FTC rule. Marshall Decl., at ¶ 53.	Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self-serving declaration, which cannot be used to create a

Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<p>1 for work that he then did 2 not perform. 3 DE 16-2, <i>Kennedy Decl.</i> 4 <i>Page ID 1691-96, Att. 3.E</i> 5 <i>(In the Matter of: Charles</i> 6 <i>Thomas Marshall, State</i> 7 <i>Bar Court of California,</i> 8 <i>Case Nos. 10-O-07313,</i> 9 <i>10-O-10279, 10-O-10779,</i> 10 <i>10-O-10781, 11-O-</i> <i>16059).</i></p>	<p>Foti: No response</p>	<p>genuine dispute as to a material fact on summary judgment. Undisputed as to Foti.</p>
<p>11 351. In December 2013, 12 Marshall stipulated to 13 findings that he violated 14 his ethical duties by 15 taking advance fees for a 16 loan modification. 17 DE 16-1, <i>Kennedy Decl.</i> 18 <i>at Page ID 1662-67, Att.</i> 19 <i>3.C, ¶¶ 7,14 (In the</i> 20 <i>Matter of: Charles</i> <i>Thomas Marshall, State</i> <i>Bar Court of California,</i> <i>Case No. 12-O-17880.)</i></p>	<p>Marshall: Disputed. The stipulation with the California State Bar does not reference violations of MARS or any other FTC rule. Foti: No response</p>	<p>Undisputed as to Marshall. He does not offer any admissible evidence capable of controverting the fact at issue, including his self- serving declaration, which cannot be used to create a genuine dispute as to a material fact on summary judgment. Undisputed as to Foti.</p>
<p>21 352. In the December 22 2013 stipulated findings, 23 Marshall admits that he 24 told the client he would 25 pursue litigation to obtain 26 mortgage relief, but then 27 did not pursue litigation. 28 DE 16-1, <i>Kennedy Decl.</i> <i>Page ID 1662-67, Att. 3.C</i> <i>at ¶¶ 5, 13 (In the Matter</i></p>	<p>Marshall: Undisputed. But in fact his statement to the Bar prior to ultimately signing the stipulation makes clear that he had cooperation problems with his clients, which resulted in no lawsuit being filed. Marshall Decl., at ¶ 55.</p>	<p>Undisputed as to both Marshall and Foti.</p>

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Uncontroverted Fact/ Support	Defendants' Responses	FTC's Reply
<i>of: Charles Thomas Marshall, State Bar Court of California, Case No. 12-O-17880).</i>	Foti: No response	
353. In June 2015 Marshall stipulated to findings that he violated his ethical duties by taking advance fees for a loan modification. DE 16-1 , Kennedy Decl. Page ID 1676-81, Att. 3.D at ¶¶ 3, 9 (<i>In the Matter of: Charles Thomas Marshall, State Bar Court of California, Case No. 14-O-04274</i>).	Marshall: Undisputed. But in fact his statement to the Bar prior to ultimately signing the stipulation makes clear that he had cooperation problems with his clients, which resulted in no lawsuit being filed. Marshall Decl., at ¶ 55. Foti: No response	Undisputed as to both Marshall and Foti.
354. In the June 2015 stipulated findings, Marshall admits that he told the client he would pursue litigation to obtain mortgage relief, but then did not pursue litigation. DE 16-1 , Kennedy Decl. Page ID 1676-81, Att. 3.D at ¶¶ 6, 8 (<i>In the Matter of: Charles Thomas Marshall, State Bar Court of California, Case No. 14-O-04274</i>).	Marshall: Undisputed. But in fact his statement to the Bar prior to ultimately signing the stipulation makes clear that he had cooperation problems with his clients, which resulted in no lawsuit being filed. Marshall Decl., at ¶ 55. Foti: No response	Undisputed as to both Marshall and Foti.

CONCLUSIONS OF LAW

1 The FTC notes that neither Foti nor Marshall responded to the FTC’s
2 Conclusions of Law. Additionally, Marshall included the FTC’s Conclusions of
3 Law in his own separate statement, as if they were his own. Marshall’s lawyer also
4 signed his separate statement as an attorney for the Federal Trade Commission.
5 The Conclusions of Law below are as originally submitted:

6 1. This Court has jurisdiction over the subject matter and the parties pursuant
7 to 28 U.S.C. §§ 1331, 1337(a), and 1345; 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c),
8 and 6105(b); and Section 626 of the Omnibus Act, as clarified by Section 511 of
9 the Credit Card Act, and amended by Section 1097 of the Dodd-Frank Act, 12
10 U.S.C. § 5538.

11 2. Venue is proper as to all parties in this district under 28 U.S.C. §§
12 1391(b)(1), (b)(2), (c)(1), (c)(2), and (d), and 15 U.S.C. § 53(b).

13 3. Defendant’s activities are in or affecting commerce, as defined in Section 4
14 of the FTC Act, 15 U.S.C. § 44.

15 4. The Complaint states a claim upon which relief may be granted pursuant to
16 Section 13 of the FTC Act, 15 U.S.C. §§ 53 and 57b, and Section 626 of the
17 Omnibus Act.

18 5. Defendants Brookstone Law P.C. (California), Brookstone Law P.C.
19 (Nevada), Advantis Law P.C., and Advantis Law Group P.C. (the “Corporate
20 Defendants”), violated Section 5 of the FTC Act when they made material
21 misrepresentations to consumers when selling them mass joinder litigation against
22 their lenders. *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009); *FTC v.*
23 *Pantron I Corp.*, 33 F.3d 1088, 1095-96 (9th Cir. 1994) (“Express product claims
24 are presumed to be material.”).

25 6. The Corporate Defendants were providers of mortgage assistance relief
26 services (“MARS”) as defined by the Mortgage Assistance Relief Services Rule
27 (“MARS Rule”), 12 C.F.R. § 1015.2, and they violated the MARS Rule when they:
28

- a. Requested or received payment of any fee or other consideration from consumers in advance of executing a written agreement with the consumer’s loan holder or servicer; 12 C.F.R. § 1015.5(a);
- b. Misrepresented, expressly or by implication, material aspects of MARS that they sold; 12 C.F.R. § 1015.3; or
- c. Failed to make mandatory disclosures in all commercial communications; 12 C.F.R. §§ 1015.4(a)(1)-(2), 1015.4(b)(1)-(3), 1015.4(c).

7. The Corporate Defendants formed a “common enterprise,” rendering each liable for the others’ conduct. *See Delaware Watch v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964); *FTC v. Network Svcs Depot*, 617 F.3d 1127, 1142 (9th Cir. 2010) (“[Q]ualities that may be demonstrated by a showing of strongly interdependent economic interests or the pooling of assets and revenues.”); *accord FTC v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000) (common enterprise shown where corporate defendants were under common control; shared office space, employees, and officers”).

8. Defendant Jeremy Foti (“Foti”) is liable for injunctive relief because he had control over the Corporate Defendants and/or participated in the wrongful conduct. *FTC v. Publishing Clearinghouse Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997).

9. Defendant Charles Marshall (“Marshall”) is liable for injunctive relief because he had control over the Corporate Defendants and/or participated in the wrongful conduct. *FTC v. Publishing Clearinghouse Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997).

10. Foti is liable for monetary relief because he had, at least, “actual knowledge of material misrepresentations, . . . reckless[] indifferen[ce] to the truth or falsity of a misrepresentation, or . . . awareness of a high probability of fraud along with an intentional avoidance of the truth.” *FTC v. Grant Connect LLC*, 763 F.3d 1094, 1101-02 (9th Cir. 2014). In fact, the evidence shows he intended to defraud consumers.

1 11. Marshall is liable for monetary relief because he had, at least, “actual
2 knowledge of material misrepresentations, . . . reckless[] indifferen[ce] to the truth
3 or falsity of a misrepresentation, or . . . awareness of a high probability of fraud
4 along with an intentional avoidance of the truth.” *FTC v. Grant Connect LLC*, 763
5 F.3d 1094, 1101-02 (9th Cir. 2014). In fact, the evidence shows he intended to
6 defraud consumers.

7 12. The FTC is entitled to monetary relief in the full amount consumers paid to
8 the Corporate Defendants. *See, e.g., FTC v. Figgie Int’l*, 994 F.2d 595, 605-06
9 (9th Cir. 1993) (holding that consumers are assumed to have relied upon the
10 deceptive claims because they were widely disseminated, and that consumers were
11 entitled to full refunds because the fraud was in the selling).

12 13. Therefore, Foti’s and Marshall’s monetary liability for violations of the FTC
13 Act and the MARS Rule is joint and several with each other and the Corporate
14 Defendants for the time period they had control or participated in the wrongful
15 conduct. *See FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009) (rejecting
16 arguments that defendants should not be liable for the full amount of consumer loss
17 because they only received a percentage of the funds); *FTC v. Commerce Planet*
18 *Inc.*, 815 F.3d 593, 603 (9th Cir. 2016).

19 14. There is a cognizable danger that Foti and Marshall will violate the FTC
20 Act and the MARS Rule again; therefore, a permanent injunction to fence in future
21 conduct is appropriate. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633
22 (1953); *FTC v. USA Fin., LLC*, 415 Fed. App’x 970, 975 (11th Cir. 2011) (per
23 curiam); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395, 85 S. Ct. 1035, 1048
24 (1965); *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982) (quoting *FTC*
25 *v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)).

26
27 Executed this 14th day of August, 2017.

28 /s/ Benjamin J. Theisman
BENJAMIN J. THEISMAN
GREGORY J. MADDEN
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Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

INDEX TO EVIDENCE

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Declaration of Gregory Madden	877-1198

1 Benjamin J. Theisman, *pro hac vice*
2 btheisman@ftc.gov
3 Gregory J. Madden, *pro hac vice*
4 gmadden@ftc.gov
5 FEDERAL TRADE COMMISSION
6 600 Pennsylvania Ave. NW, CC-9528
7 Washington, DC 20580
8 Tel: (202) 326-2223, -2426; Fax: (202) 326-3197

9 Thomas Syta, Cal. Bar No. 116286
10 tsyta@ftc.gov
11 FEDERAL TRADE COMMISSION
12 10877 Wilshire Blvd., Suite 700
13 Los Angeles, CA 90024
14 Tel: (310) 824-4343; Fax: (310) 824-4380

15 Attorneys for Plaintiff
16 FEDERAL TRADE COMMISSION

17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 FEDERAL TRADE COMMISSION,
20 Plaintiff,
21 v.
22 DAMIAN KUTZNER, *et al.*,
23 Defendants.

24 Case No. SACV 16-0999 BRO (AFMx)

25 **DECLARATION OF GREGORY J.**
26 **MADDEN IN SUPPORT OF**
27 **PLAINTIFF’S REPLY**
28 **MEMORANDUM FOR SUMMARY**
JUDGMENT AGAINST
DEFENDANTS JEREMY FOTI
AND CHARLES MARSHALL AS
TO ALL COUNTS

Pursuant to 28 U.S.C. § 1746, I, Gregory J. Madden, declare under penalty of perjury:

1. I am counsel for Plaintiff Federal Trade Commission (“FTC”) in the above-captioned action. I am a United States citizen and over 18 years of age. My business address is 600 Pennsylvania Avenue, NW, Mailstop

1 CC-9528, Washington, D.C. 20580. I have personal knowledge of the
2 facts stated herein and, if called to testify, could and would competently
3 testify to the same.

4 2. I am attaching to this declaration true and correct copies of the
5 following documents:

- 6 a. **Attachment 1** – April 28, 2016 email with attachment from Damian
7 Kutzner to Jeremy Foti, Geoffrey Broderick, Subject: Lets get this ok
8 by Jonathan, Attachments: Brookstone Law – Invoices to Wright and
9 Lawley clients3.docx, identified with Bates Nos. FTC-RAD-002-
10 0541665 to FTC-RAD-002-0541668;
- 11 b. **Attachment 2** –April 28, 2016 email from Jonathan Tarkowski to
12 Damian Kutzner, Jeremy Foti, Geoffrey Broderick, Subject: Invoice
13 email Language, Ex. 106, [DE 304-1](#), Page ID 9805-06 identified with
14 Bates Nos. FTC-RAD-006-0008267 to FTC-RAD-006-0008268;
- 15 c. **Attachment 3** – excerpts of Deposition Testimony of Jonathan
16 Tarkowski (June 23, 2017), *In the Matter of: FTC v. Damian*
17 *Kutzner, et al.* and FTC counsel copies of Exhibits 117 and 118 used
18 at Tarkowski’s deposition;
- 19 d. **Attachment 4** – email and letter from Edward Chang, McNamara
20 Benjamin LLP dated May 8, 2017, to Vito Torchia, Jr., Re: *Federal*
21 *Trade Commission v. Kutzner, et al.*, U.S. District Court (C.D. Cal.)
22 Case No. SACV16-00099-BRO (AFMx), cc: Michael Thurman,
23 Gregory Madden, Benjamin Theisman;
- 24 e. **Attachment 5** – “ADVERTISING / MARKETING AGREEMENT”
25 between Webstar, Inc. and Brookstone Law, PC bearing a signature of
26 Vito Torchia, CEO, dated December 7, 2010 ([DE 304-1](#), Page ID
27 9807-13;
28

1 f. **Attachment 6** – email chain between Charles Marshall and Jeremy
2 Foti dated July 14-16, 2015 attaching “Executive Employment
3 Agreement” between Advantis Law Group, P.C. and Jeremy Foti,
4 executed by Charles T. Marshall, CEO & President, Advantis Law
5 Group, P.C., (July 16, 2015) and Executive, Jeremy Foti (July 14,
6 2015) identified with Bates Nos. FTC-RAD-001-0177482 to FTC-
7 RAD-001-0177490; and

8 g. **Attachment 7** – emails dated March 25, 2015 between James
9 Macklin, Jeremy Foti, and Damian Kutzner, Subject: Advantis doc’s,
10 identified with Bates No. FTC-RAD-002-0519581.

11 3. I have reviewed Attachments 1 and 2 referenced above, as they relate
12 to Jonathan Tarkowski’s declaration in this matter related to the
13 “Account Due” letter and invoice that was sent to *Wright v. Bank of*
14 *America* Brookstone clients. See Declaration of Jonathan Tarkowski, [DE](#)
15 [186-3](#), Page ID 5363, 5366-69. Tarkowski’s declaration stated he had no
16 knowledge that the Account Due letter and invoice “was sent until after it
17 was sent out.” *Id.* at ¶ 21, Page ID 5363. Foti argues that this declaration
18 is false based on Attachment 2. *Defendant Foti’s memorandum of Points*
19 *and Authorities in Opposition to Plaintiff’s Motion for Summary*
20 *Judgment* (“Foti Opposition”) [DE 304](#), Page ID 9740. A review of
21 Attachments 1 and 2 makes plain they are discussing a letter and invoice
22 different from the “Account Due” letter and invoice sent to *Wright v.*
23 *Bank of America* Brookstone clients. In Tarkowski’s April 28, 2016
24 email, he references:

- 25 i. issues with the “Bradford dismissal dates;” and
- 26 ii. listing the Bradford dismissal as “withdrawn as 6/1/2015.”

27 These are obvious references to the invoice included in Attachment 1
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identifying work on three matters: *Wright v. Bank of America*, *Bradford v. Bank of America*, and *Lawley v. Bank of America*. Importantly, the invoice reflects no charge for work on the *Wright v. Bank of America* matter, no charge for the *Bradford v. Bank of America* matter, and a charge for the recently filed *Lawley v. Bank of America* matter. Notably, in his April 28, 2016 email, Tarkowski asks “exactly where the amount of hours are coming from.” Although the cover letters identified in Attachments 1 and 2 are similar, the attached invoices are dramatically different. Specifically, the Account Due invoice is only for the *Wright v. Bank of America* matter and includes a \$5,000 charge for work performed on that matter. Thus, Tarkowski’s Declaration testimony regarding the Account Due letter and invoice is not contradicted by Attachment 2.

4. Attachment 3 includes excerpts of the deposition testimony of Jonathan Tarkowski as well as FTC counsel’s copies of Exhibits 117 and 118 identified at his June 23, 2017 deposition. I have reviewed the deposition testimony and exhibits and they do not support Foti’s contention that Tarkowski “made several apparent misrepresentations during the course of his deposition.” Foti Opposition, [DE 304](#), Page ID 9740. Tarkowski denied he was a shareholder and managing partner of Brookstone and Foti apparently believes this was a misrepresentation. Exhibit 117 does nothing to establish Tarkowski was a shareholder or managing partner of Brookstone. During his deposition, Tarkowski made clear that while he signed Exhibit 117, it was never counter-signed by Vito Torchia and was thus never operable and never made him a shareholder. Tarkowski Depo. at 47:9-22, 153: 21-154:3. Tarkowski also testified at his deposition that he did not recognize Exhibit 118, did not know if he had signed it (although it looked like his signature), and

1 did not know if it had been submitted to the California Bar. *Id.* at 50: 8-
2 19.

3 5. Attachment 4 is a letter from the Receiver’s attorney, Edward Chang,
4 informing Vito Torchia that certain documents related to the law firm
5 Kehr, Schiff, & Crane, LLP (“Kehr Schiff”) had been identified by the
6 FTC as within the documents the Receiver had taken possession of in
7 June 2016. The Receiver identified that these documents had been
8 prepared for Brookstone Law, P.C. by Kehr Schiff, that the Receiver was
9 the only entity controlling the attorney-client privilege for these
10 documents, and that the Receiver was waiving that privilege and would
11 allow the parties to the case access to those documents. Vito Torchia had
12 previously asserted attorney-client privilege over a Kehr-Schiff document
13 in his personal capacity. Therefore, the Receiver informed Torchia it had
14 concluded Torchia did not have an attorney-client privilege with respect
15 to the identified documents and if Torchia wished to assert any such
16 privilege he would need to seek appropriate relief from the Court.
17 Torchia was provided two weeks in which to inform the Receiver of any
18 intent to file a motion seeking any such relief. The Receiver informed
19 Torchia that if he did not do so, the Receiver was providing the FTC
20 authorization to review those documents as of May 22, 2017. Torchia
21 has not provided notice he would be filing a motion seeking appropriate
22 relief and no such motion has been filed in this matter. Therefore, the
23 Receiver’s waiver of the attorney-client privilege was effective as of May
24 22, 2017.

25 6. Attachment 5 is an “ADVERTISING / MARKETING
26 AGREEMENT” between Webstar, Inc. and Brookstone Law, PC that
27 bears the signature of Vito Torchia, CEO. [DE 304-1](#), Page ID 9807-13.
28

1 This document was located in a safe at Defendant Foti’s home. [DE 305](#),
2 Page ID 9977. In an attempt to discredit Torchia, Foti claims that,
3 notwithstanding his testimony otherwise, Torchia must have known that
4 Foti controlled Webstar because the agreement was signed the same day
5 that Torchia signed the Brookstone consulting agreement with Foti.
6 *Defendant Foti’s Memorandum of Points and Authorities in Opposition*
7 *to Plaintiff’s Motion for Summary Judgment* (“Foti Opposition”) [DE 304](#),
8 Page ID 9749. I have reviewed the December 7, 2010 agreement and it
9 contains no indication whatsoever that Webstar, Inc. has any affiliation
10 with Foti. Indeed, it is unsigned as to Webstar, Inc. without any
11 identification of any corporate officer, and the address on the document
12 for Webstar, Inc. is an address in Helena, Montana.

13 7. Attachment 6 includes an email from Foti attaching his signed copy of
14 an “Executive Employment Agreement” (“Agreement”) between
15 Advantis Law Group, P.C., signed by Marshall as CEO & President, and
16 Foti as Executive. I have reviewed Attachment 5 and the Agreement was
17 signed by Foti on July 14, 2015, and by Marshall on July 14, 2015.
18 Paragraph 3.0 identifies Duties and Functions under the Agreement.
19 Paragraph 3.1 provides that “Executive [Foti] shall be employed as the
20 Chief Operations Manager of the Firm [Advantis Law Group, P.C.] and
21 shall oversee, direct and manage all ‘Non-Legal’ operations of the Firm.”

22 8. Attachment 7 includes a March 25, 2015 email from James Macklin to
23 Jeremy Foti regarding the need to distinguish between using the name
24 Advantis Law and Advantis Law Group. Macklin tells Foti:

25 Charles is in my office for the next two days here in
26 Tahoe...I am having him execute doc’s in the name of
27 “Advantis Law” without using the word “group”, as this
28 presents myriad problems in licensing and for the BAR.”

1 Macklin’s signature block identifies him as “Agent for Charles T.
2 Marshall, Esq. (SBN 176091).” Also included in Attachment 7 is an
3 email from Foti forwarding Macklin’s email to Damian Kutzner.

4 9. Attachments 1, 2, 6, and 7 were obtained by the FTC as described in
5 paragraphs 2-4 of the July 10, 2017 Declaration of Benjamin Theisman
6 ([DE 284-8](#), Page ID 7483-85).

7
8 I, Gregory J. Madden, declare under penalty of perjury that the foregoing is
9 true and correct.

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11 Dated: August 14, 2017.

12 /s/ Gregory J. Madden
13 Gregory J. Madden
14 Attorney for Federal Trade Commission
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From: Damian Kutzner
Sent: Thursday, April 28, 2016 1:23 AM
To: Jeremy Foti; Geoffrey Broderick
Subject: Lets get this ok by Jonathan
Attachments: Brookstone Law - Invoice to Wright and Lawley clients3.docx

ACCOUNT ON HOLD

Dear {name}

Your file needs your immediate attention as we show there is an outstanding balance. We need this to be cleared up with accounting so we can continue to represent you as a plaintiff on this case. We understand that sometimes things like this can get over looked, but the firm must continue to put a substantial amount of work into this case which requires a great deal of financial resources. If you can please give this issue your undivided attention we certainly would appreciate it.

Per the retainer agreement page 5 section E provide provisions that are not covered in your flat fee retainer. These items' for things such as an appeal, individual representation, additional paralegal or attorney staff all are item's not covered in the flat fee retainer. We do have several options for you in order to make it financially feasible for you to continue to have our firm represent you in this case. Attached please find an invoice for services provided and an amount that is currently due.

We strive here at Brookstone Law to make this process as affordable as possible for our loyal clients. Call today to get your account off "Accounting Hold"

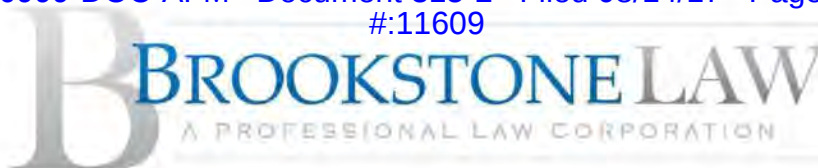
CALL US TODAY at (800) 808-5798.

Sincerely,

BROOKSTONE LAW, PC
ACCOUNTING DEPARTMENT
accounting@brookstonelaw.com

Manhattan, NY | Costa Mesa, CA | Fort Lauderdale, FL | Las Vegas, NV
(800) 808-5798 | www.BrookstoneLaw.com

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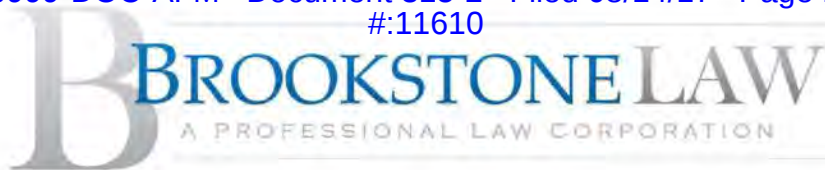
INVOICE

INVOICE # (Invoice No.)
DATE (Date)

TO
 (Name)
 (Company Name)
 (Street Address)
 (City, ST ZIP Code)
 Phone (Phone) | (Email)

FOR Legal Services

Description	Combined Hours	Amount
Wright vs Bank of America (Case #: 30-2011-00449059-CU-MT-CXC)		
Task: Complaint Filed 02/09/11	1998Hrs	Included
Task: 1 st Amended Complaint Filed 05/17/2011	724Hrs	Included
Task: 2 nd Amended Complaint Filed 12/05/2011	1175Hrs	Included
Task: 3 rd Amended Complaint Filed 06/04/12	1861Hrs	Included
Task: Appeal Filed 11/21/2013	(See Below)	
Task: 4th Amended Complaint Filed 12/16/2015	1575Hrs	Included
Task: Stipulation and Order to File 5th Amended Complaint	178Hrs	Included
Total Due: <i>(per your retainer agreement)</i>	(\$125 to \$575 per/Hr) *Hrs.7,511	\$ Included
Wright vs Bank of America – New Appeal (Case #: 30-2011-00449059-CU-MT-CXC)		
Task: Appellants’ (Plaintiffs) Opening Brief 11/21/2013	1237Hrs	Waived
Task: Respondents’ (Defendants) Brief 01/14/2014	175Hrs	Waived
Task: Appellants’ Reply Brief 02/24/2014	453Hrs	Waived
Task: CA Court of Appeal (Victory Win) 12/11/14		
Total Due: <i>(per your retainer agreement)</i>	(\$125 to \$575 per/Hr) *Hrs.1,865	\$ No Charge



Description	Combined Hours	Amount
Bradford vs Bank of America (Case #: BC556820)		
Task: Complaint Filed 11/05/2013	1750Hrs	Paid
Task: 1st Amended Complaint Filed 09/08/2014	590Hrs	Paid
Task: Withdrawn 06/01/2015 (Separate case into Neg-Amortization Clients)		
Task:		
Task:		
Total Due: (per your retainer agreement) (\$125 to \$575 per/Hr)	Hrs.2,340	\$ Paid
Lawley vs Bank of America (Case #: 37-2016-00011715-CU-OR-CTL)		
Task: Complaint Filed 04/11/2016	1375Hrs	DUE
Task:		
Task:		
Task:		
Total Due: -NEW CASE AMOUNT DUE-	Hrs.	\$4,500
TOTAL:		\$ 4,500.00

*(Approximate Total Billable Hours not including Court Fees or Court Appearances)

Payment is due. If you have any questions concerning this invoice, contact
 Regina | 800-808-9648 | info@BrookstoneLaw.com

THANK YOU FOR YOUR BUSINESS!



From: Geoffrey
Sent: Friday, April 29, 2016 3:06 AM
To: Jonathan Tarkowski; 'Damian Kutzner'; Jeremy Foti
Subject: RE: Invoice email language

Thanks Jonathan. Also Jeremy came back to me with the changes noted from his meeting with you. I made those corrections and found a couple of minor errors myself (just punctuation, nothing substantive). ☺

Thank you,

Description: cid:image002.png@01D018943A22660

Geoffrey Broderick, Esq.
Managing Attorney

Office: (800) 730-9934 x110
Fax: (949) 419-3469
Email: Geoffrey@AdvantisLaw.com
Web: www.AdvantisLaw.com

6 Hutton Centre Drive, Suite 1000 | Santa Ana, CA 92707

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From: Jonathan Tarkowski [mailto:JTarkowski@BrookstoneLaw.com]
Sent: Thursday, April 28, 2016 2:08 PM
To: Damian Kutzner <DK@AdvantisLaw.com>; Jeremy Foti <JFoti@BrookstoneLaw.com>; Geoffrey Broderick <Geoffrey@AdvantisLaw.com>
Subject: Invoice email language

First, really appreciate you bringing this to me. Instead of marking up the copy I just typed out the email to make some suggestions but otherwise substance is all good:

Dear (name)

Your file needs your immediate attention as we show there is an outstanding balance. We need this matter to be cleared up with accounting so we can continue to represent you as a plaintiff on this case. We understand that at times things like this may get overlooked, but the firm must continue to put a substantial amount of work into this case which requires a great deal of financial resources. If you can please give this issue your undivided attention we certainly would appreciate it.

Per your retainer agreement, page 5, section E, certain provisions and/or costs are not covered by your flat retainer fee. These items include appeals, individual representation, additional paralegal or attorney staff, filing costs that are not covered in your flat fee retainer. We have several options for you in order to make it financially feasible for you to continue to have our firm represent you in this case. Attached please find an invoice for services provided and an amount that is currently due.

At Brookstone Law, we strive to make this process as affordable as possible for our loyal clients. Call today to get your account off "Accounting Hold."

On that note, not sure exactly where the amount of hours are coming from, but just quick heads up on the Bradford dismissal dates, the most recent Bradford case that Mortimer filed in June 2015 was removed to US District, ruled misjoinder and all plaintiffs but Bradford were dismissed August 18, 2015 and Bradford individually was dismissed September 25, 2015. --it currently lists it withdrawn as 6/1/2015.

Otherwise I think form looks good.

[Redacted signature area]

Jonathan Tarkowski, Esq.
Attorney
Brookstone Law, PC
6 Hutton Centre Drive, Suite 1000
Santa Ana, California 92707

80 Broad Street

Exh. 106

Manhattan, New York 10004
jtarkowski@BrookstoneLaw.com
T: 800.346.9648 ext. 126
Direct: 949.346.8148
F: 949.407.4868

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In the Matter of:

FTC v. Damian Kutzner, et al.

June 23, 2017
Jonathan Tarkowski

Condensed Transcript with Word Index



For The Record, Inc.
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1

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
3 ---
4 FEDERAL TRADE COMMISSION,)
5 Plaintiff,)
6 vs.) CASE NO. 8:16-00999
7 DAMIAN KUTZNER, et al.,) BRO (AFMx)
8 Defendants.)
9 _____)
10
11 DEPOSITION OF JONATHAN TARKOWSKI
12 PASADENA, CALIFORNIA
13 FRIDAY, JUNE 23, 2017
14
15
16
17
18
19
20
21
22
23 REPORTED BY: DENISE D. ISON
24 CSR NO. 6964, RPR, CLR
25 FILE NO: 169884

2

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
3 ---
4 FEDERAL TRADE COMMISSION,)
5 Plaintiff,)
6 vs.) CASE NO. 8:16-00999
7 DAMIAN KUTZNER, et al.,) BRO (AFMx)
8 Defendants.)
9 _____)
10
11 DEPOSITION OF JONATHAN TARKOWSKI, taken on
12 behalf of Defendants, at 215 North Marengo Avenue,
13 3rd Floor, Pasadena, California 91101, on Friday,
14 June 23, 2017, at 9:40 a.m., before Denise D. Ison,
15 CSR No. 6964, RPR, CLR, pursuant to Notice.
16
17
18
19
20
21
22
23
24
25

3

1 APPEARANCES OF COUNSEL
2
3 APPEARING ON BEHALF OF THE PLAINTIFF:
4 FEDERAL TRADE COMMISSION BUREAU OF CONSUMER
5 PROTECTION:
6 BY: GREGORY J. MADDEN, ATTORNEY-AT-LAW
7 600 Pennsylvania Avenue, N.W.
8 Mail stop CC-9528
9 Room 9612
10 Washington DC, 20580
11 Office: (202)326-2426
12 E-mail: gmadden@ftc.gov
13
14 APPEARING ON BEHALF OF THE DEFENDANT JEREMY FOTI:
15 THURMAN LEGAL
16 BY: MICHAEL A. THURMAN, ATTORNEY-AT-LAW
17 1055 East Colorado Boulevard
18 Fifth Floor
19 Pasadena, California 91106
20 Office: (626)399-6205
21 E-mail: michael@thurman-legal.com
22
23 APPEARING ON BEHALF OF THE DEFENDANT CHARLES MARSHALL:
24 STOLLER LAW GROUP
25 BY: MICHAEL T. STOLLER, ATTORNEY-AT-LAW
26 23945 Calabasas Road
27 Suite 103
28 Calabasas, California 91302
29 Office: (818)226-4040
30 E-mail: michael.stoller@stollerlawgroup.com
31
32 ALSO PRESENT:
33 AUBRY THURMAN
34 JEREMY FOTI
35 CHARLES MARSHALL

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FTC v. Damian Kutzner, et al.

6/23/2017

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1 PASADENA, CALIFORNIA; FRIDAY, JUNE 23, 2017
 2 9:40 A.M.
 3 ---
 4
 5 JONATHAN TARKOWSKI,
 6 having first declared under penalty of perjury
 7 to tell the truth, was examined and testified
 8 as follows:
 9
 10 EXAMINATION
 11 BY MR. THURMAN:
 12 **Q. Good morning, Mr. Tarkowski. Have you ever**
 13 **had your deposition taken before?**
 14 A. No.
 15 **Q. Have you ever taken depositions before?**
 16 A. Yes.
 17 **Q. How many, approximately, have you taken?**
 18 A. I don't know. Maybe 30 to 50.
 19 **Q. 30 to 50?**
 20 A. (Nods head.)
 21 **Q. Okay.**
 22 MR. THURMAN: I'd like to mark as our next
 23 exhibit, which I believe 111, a Notice of Rule 45
 24 Subpoena and Deposition of Jonathan Tarkowski.
 25 And then I would like to mark as Exhibit 112

10

1 a proof of service that's signed on the second page,
 2 apparently by Marco Tuscano, dated June 8, 2017.
 3 (Defendants' Exhibits 111 and 112
 4 were marked for identification and are
 5 attached hereto.)
 6 BY MR. THURMAN:
 7 **Q. And do you recognize Exhibit 112?**
 8 A. Yes, I do.
 9 **Q. And were you served with this subpoena on**
 10 **June 8, 2017?**
 11 A. The first page. The second page, when I was
 12 initially served, was not filled out.
 13 **Q. And were you served with a subpoena on**
 14 **June 8, 2017?**
 15 A. Yes, I was.
 16 **Q. Okay.**
 17 MR. THURMAN: And then I'm going to mark as
 18 Exhibit 113 Objections to Subpoena to Testify to
 19 Deposition and Demand For Production of
 20 Jonathan Tarkowski.
 21 (Defendants' Exhibit 113 was marked
 22 for identification and is attached
 23 hereto.)
 24 BY MR. THURMAN:
 25 **Q. And do you recognize Exhibit 113?**

11

1 A. Yes, I do.
 2 **Q. What is that?**
 3 A. Objections.
 4 **Q. You prepared these?**
 5 A. Yes.
 6 **Q. And this is objecting to the subpoena that**
 7 **was served on you on June 8, 2017?**
 8 A. Yes.
 9 **Q. And you forwarded these objections to me via**
 10 **e-mail last night?**
 11 A. Yesterday afternoon.
 12 **Q. Okay. Thank you.**
 13 MR. THURMAN: I want to mark as Exhibit 114
 14 an Amended Notice of Rule 45 Subpoena and Deposition of
 15 Jonathan Tarkowski.
 16 (Defendants' Exhibit 114 was marked
 17 for identification and is attached
 18 hereto.)
 19 BY MR. THURMAN:
 20 **Q. And starting on page 3 of Exhibit 114, there**
 21 **is a subpoena dated June 13, 2017, to you, directing**
 22 **you to appear here today. And I think that subpoena**
 23 **consists of page 3, page 4 and page 5.**
 24 **Were you served with a copy of this subpoena?**
 25 A. This version, no. I received, by e-mail, the

12

1 amended notice, pages 1 and 2, and a proof of service
 2 that is not accurately reflected by the one that was
 3 handed to me.
 4 **Q. Okay.**
 5 MR. THURMAN: And then I'd like to mark as
 6 Exhibit 115 a proof of service that is signed on
 7 June 13, 2017, by Marco Tuscano, Registered Process
 8 Server.
 9 (Defendants' Exhibit 115 was marked
 10 for identification and is attached
 11 hereto.)
 12 BY MR. THURMAN:
 13 **Q. And does Exhibit 115 refresh your**
 14 **recollection that on June 13, 2017, you were served**
 15 **with the subpoena that's reflected -- at least part of**
 16 **the subpoena reflected on the first page of**
 17 **Exhibit 115?**
 18 A. No. I recall receiving a check from
 19 Mr. Marco, but I do not recall the actual document.
 20 **Q. So you recall on June 13, 2017, you received**
 21 **a check from Mr. Marco; is that correct?**
 22 A. That's correct.
 23 **Q. Did you receive an amended notice of Rule 45?**
 24 A. The document marked 114?
 25 **Q. That's correct.**

1 **Q. How about Kevin Rockoff?**
2 A. No.
3 **Q. How about Richard Sturdevant?**
4 A. No.
5 **Q. How about Denise Isfeld?**
6 A. No.
7 **Q. How about Thi, spelled T-H-I, Huyen,**
8 **H-U-Y-E-N?**
9 A. No.
10 **Q. How about Carlos McManis?**
11 A. No.
12 **Q. Was there an attorney at Brookstone named**
13 **Ilene?**
14 A. She worked for Brookstone for a brief period
15 of time. I recall that name.
16 **Q. Do you know her last name?**
17 A. I do not.
18 **Q. Was she an attorney?**
19 A. She was.
20 **Q. How about an attorney named Sarah?**
21 A. There were a number of individuals that
22 worked there that were attorneys for brief periods of
23 time. I believe one was named Sarah.
24 **Q. Do you know Sarah's last name?**
25 A. No, I do not. And the Sarah that I'm

1 thinking of, I believe -- I believe she was not -- I
2 don't know if she was an attorney. I believe she had
3 completed law school but was taking the bar. I don't
4 know if she -- I don't believe she was an attorney at
5 the time. I believe she was an intern. But there may
6 have been other individuals.
7 **Q. Did Mr. Broderick hire you as an unpaid**
8 **intern with Advantis?**
9 A. Yes.
10 **Q. And who hired you as an attorney for**
11 **Brookstone in July 2015?**
12 A. I believe that was Geoffrey Broderick.
13 **Q. And who --**
14 A. And I believe he had done so with the
15 knowledge or after discussions with Vito and other
16 individuals.
17 **Q. Were you an owner of any of the law firms?**
18 A. No.
19 **Q. Did you enter into a shareholder agreement**
20 **with any of the law firms?**
21 A. No.
22 **Q. Did you ever have a managing relationship**
23 **with any of the law firms?**
24 A. No.
25 **Q. What was your title when you worked at**

1 **Brookstone Law?**
2 A. Attorney.
3 MR. THURMAN: I'm going to mark as Exhibit
4 117 a memorandum of understanding between Law Offices
5 of Jonathan Tarkowski and Brookstone Law P.C.
6 (Defendants' Exhibit 117 was marked
7 for identification and is attached
8 hereto.)
9 BY MR. THURMAN:
10 **Q. Do you recognize Exhibit 117?**
11 A. I do.
12 **Q. What is it?**
13 A. It's a memorandum of understanding.
14 **Q. Is that your signature?**
15 A. It is.
16 **Q. And you signed it on or about June 30, 2015?**
17 A. I did.
18 **Q. And does this -- is this the document that**
19 **memorialized your employment with Brookstone Law?**
20 A. At the time, and as you can see, it was not
21 signed, and this agreement in terms of -- never really
22 went into effect.
23 MR. STOLLER: Move to strike as
24 nonresponsive.
25 You want to repeat the question?

1 BY MR. THURMAN:
2 **Q. Did you have an employment agreement with**
3 **Brookstone Law?**
4 A. No.
5 **Q. Did you take on the responsibilities that are**
6 **reflected in Exhibit 117 for Brookstone Law?**
7 A. Can you repeat the question?
8 **Q. Yes.**
9 **Did you take on any of the responsibilities**
10 **reflected in this agreement on behalf of Brookstone**
11 **Law?**
12 A. (Reviews document.)
13 I believe I worked to move the cases forward.
14 **Q. So is that a yes or no?**
15 A. It was a response that I moved the cases
16 forward. But as outlined here, I wouldn't say that
17 my -- that this agreement was carried out.
18 MR. STOLLER: Move to strike as
19 nonresponsive.
20 BY MR. THURMAN:
21 **Q. Yeah.**
22 **The question is: Did you take on any of the**
23 **responsibilities that are reflected in Exhibit 117?**
24 A. Yes.
25 **Q. Which ones?**

1 A. Obviously, complaint drafting and drafting.
2 **Q. What else?**
3 A. Assisting staff.
4 **Q. What else?**
5 A. Consultation and coordination of cases.
6 MR. STOLLER: I'm sorry. Can you speak up,
7 please?
8 THE WITNESS: Consultation and coordination
9 of cases.
10 BY MR. THURMAN:
11 **Q. What else?**
12 A. Coordination with primary points of contact.
13 **Q. What else?**
14 A. (Reviews document.)
15 Strategic support for legal areas, including
16 litigation, pre-litigation, case management.
17 **Q. What else?**
18 A. I think that's about it.
19 **Q. Did you lead or monitor junior attorneys?**
20 A. I worked with other attorneys. I wouldn't
21 say necessarily lead or monitor.
22 **Q. Did you lead and monitor staff that worked on**
23 **Brookstone Law matters?**
24 A. I worked in coordination with other
25 Brookstone staff.

1 MR. THURMAN: I'm going to mark as Exhibit
2 118 an attachment C-1 Standard Law Corporation
3 Guarantee.
4 (Defendants' Exhibit 118 was marked
5 for identification and is attached
6 hereto.)
7 BY MR. THURMAN:
8 **Q. Do you recognize Exhibit 118?**
9 A. No.
10 **Q. Is that your signature next to the printed**
11 **words "Jonathan Tarkowski"?**
12 A. It looks like my signature. I don't know if
13 I signed this specific document or not.
14 **Q. Do you know if this document was submitted to**
15 **the California bar?**
16 A. I do not.
17 **Q. If it was submitted to the California bar,**
18 **was it done so with your permission?**
19 A. That, I don't know.
20 MR. THURMAN: I'm going to mark as Exhibit
21 119 a four-page document. It says "Bank of America" at
22 the top, "certified copy of corporate resolutions."
23 (Defendants' Exhibit 119 was marked
24 for identification and is attached
25 hereto.)

1 BY MR. THURMAN:
2 **Q. These were documents that were produced by**
3 **the Federal Trade Commission in connection with this**
4 **action.**
5 **If you turn to the third page, which is**
6 **FTC-RFP-0130778 in the lower right-hand corner, and**
7 **look at the printed words "Jonathan Tarkowski, Esquire,**
8 **Attorney," is that your signature next to those words?**
9 A. This is -- that looks like my signature, but
10 I can tell you I, for certain, did not sign this
11 document, and that this document is a forgery filled
12 out by somebody else. I believe Brittany Richards
13 completed this.
14 **Q. And did you authorize Ms. Richards to**
15 **complete this on your behalf?**
16 A. No, I did not.
17 **Q. Did you know this document was completed on**
18 **your behalf?**
19 A. Not until after the FTC filed the suit.
20 **Q. And who is Brittany Richards?**
21 A. I believe she is the wife of Damian Kutzner.
22 And I can say that looking at this document,
23 especially, I believe, turning your attention to
24 page 4, further evidence of that forgery or falsity, if
25 you look at consumer 1, Jonathan Tarkowski, apparently

1 signed by Brittany Richards, where it says
2 "identification I.D. issuer California," I don't have a
3 California driver's license.
4 **Q. Did you have a California driver's license in**
5 **2016?**
6 A. No.
7 **Q. Did you have any state license in 2016?**
8 A. An Arizona driver's license.
9 **Q. And do you still have an Arizona driver's**
10 **license?**
11 A. Yes, I do.
12 **Q. What is your I.D. number?**
13 A. I don't recall off the top of my head.
14 **Q. Do you have it in your wallet?**
15 A. I do.
16 **Q. Can you check it?**
17 MR. MADDEN: For the record, to the extent
18 this has personally identifiable information in it,
19 we're going to have to designate the record as
20 confidential.
21 MR. THURMAN: Thank you, Greg. Or what we
22 can do is substitute the exhibit and redact, if that's
23 acceptable, and supply copies to everyone.
24 MR. MADDEN: And for the record, you might --
25 you can show Mike and confirm that it's not the same

1 **probation, and you didn't know what probation mean?**

2 A. That's correct.

3 **Q. Do you know what it means now?**

4 A. No.

5 **Q. Did you ever see any documentation of any**
6 **sanctions for Mr. Geist?**

7 A. No.

8 **Q. Did you have any involvement with ensuring**
9 **that the law firm performed its obligations from a**
10 **human relations standpoint?**

11 MR. MADDEN: Objection. Vague.

12 THE WITNESS: Yeah. I'm not sure what you
13 mean by obligation to human...

14 BY MR. THURMAN:

15 **Q. You know, not firing people for the wrong**
16 **reason or, you know, following a measured and**
17 **appropriate disciplinary process, getting the**
18 **appropriate information when you hire and terminate**
19 **people, things like that.**

20 A. I did not have that responsibility.

21 **Q. Did you contemplate having that**
22 **responsibility when you signed the agreement with**
23 **Mr. Torchia at the time you were hired with the firm?**

24 A. I don't believe Mr. Torchia signed the
25 agreements. And as far as I was concerned,

1 **issues that you raised with Mr. Kutzner about Mr. Geist**
2 **were resolved?**

3 A. I'm not sure what you mean by "steps."

4 **Q. Did you do any follow-up after that last**
5 **meeting that you reference in paragraph 17?**

6 A. I don't know if I specifically took steps to
7 follow up. I mean, I think Mr. Geist was terminated
8 not too long after that point.

9 **Q. And why was he terminated?**

10 A. I believe it was a combination of issues.

11 **Q. Who terminated Mr. Geist?**

12 A. I believe that was -- I was not present at
13 that termination.

14 **Q. So you don't know?**

15 A. So I don't know.

16 **Q. Do you know why he was terminated?**

17 A. Not specifically. Again, I was not present
18 at that.

19 **Q. In paragraph 18, you say that:**

20 **"Damian Kutzner and Jeremy Foti**
21 **developed and sent out**
22 **Brookstone/Advantis marketing materials**
23 **and client communications."**

24 **I think you testified earlier today that**
25 **Brookstone, to the best of your knowledge, was not**

1 Mr. Broderick was still the managing attorney. I
2 didn't have any ownership at that point in time or any
3 time that I was employed by Brookstone.

4 MR. THURMAN: Objection. Nonresponsive.

5 Can you read back the question?

6 (The question was read back by the
7 reporter as requested:

8 "Q. Did you contemplate having
9 that responsibility when you signed the
10 agreement with Mr. Torchia at the time
11 you were hired with the firm?")

12 THE WITNESS: No, I did not contemplate or
13 focus on what I would consider HR issues or concerns.
14 I was focused on the cases.

15 BY MR. THURMAN:

16 **Q. So you didn't agree to take on an HR role on**
17 **behalf of Brookstone Law when you signed the memorandum**
18 **of understanding?**

19 A. I did not become involved in hiring of
20 personnel.

21 **Q. But you did undertake to be involved had that**
22 **agreement been performed; is that correct?**

23 A. I don't know.

24 **Q. Okay.**

25 **Did you take any steps to make sure that the**

1 **sending out marketing materials during the time that**
2 **you were employed there. Is that correct?**

3 A. That's correct. I don't recall things such
4 as mass mailers.

5 **Q. Right.**

6 A. However, in terms of marketing materials, if
7 you include items such as website maintenance,
8 Mr. Kutzner and Mr. Foti had the relationship with the
9 IT person who maintained the Brookstone website and
10 handled, you know, communications with that individual
11 for either upgrading or sending out information for
12 that.

13 **Q. Which attorney is responsible for supervising**
14 **the firm's website?**

15 A. At what time?

16 **Q. During the time you worked with Brookstone?**

17 A. I believe that was Mr. Broderick.

18 **Q. Based on your own personal knowledge, what**
19 **client communications did Mr. Foti develop?**

20 A. I believe Mr. Foti was responsible with the
21 accounting notices.

22 **Q. So --**

23 A. And I know that he also was involved in
24 discussions about materials that were sent out, such
25 as, you know, case status updates.

1 earlier that it would have been sometime after February
 2 of 2016, considering it notes the Evannova (phonetic)
 3 decision.
 4 **Q. Do you recall how long Mr. Marshall was**
 5 **unable or inactive to practice law?**
 6 A. I believe it was a 90-day suspension spanning
 7 approximately mid to late November to, I believe, late
 8 February.
 9 **Q. During February 2016, Mr. Marshall was not**
 10 **active to practice, from your understanding?**
 11 A. I don't remember the specific dates. But it
 12 was, again, mid to end November is approximately when
 13 it started, to approximately end of February.
 14 MR. STOLLER: Thank you. Nothing further.
 15 MR. THURMAN: Were we're off the record.
 16 (An off-the-record discussion was
 17 held.)
 18 MR. THURMAN: Back on the record.
 19 The witness and the parties have just reached
 20 a stipulation with the witness that the witness will
 21 have seven days from the date he receives the
 22 transcript to review and make any changes, and sign it
 23 and return it, and if he fails to return the signed
 24 transcript within that period of time, any of the
 25 parties can use an unsigned version for the purposes of

1 summary judgment as if it were a signed version.
 2 And if the witness fails to return a signed
 3 version within 30 days after he receives it, the
 4 parties can use an unsigned version for any purpose in
 5 the case.
 6 MR. STOLLER: Also, if he fails to let us
 7 know of any changes within the seven days, then we can
 8 use whatever copies we have at that time.
 9 So stipulated.
 10 MR. MADDEN: So stipulated.
 11 MR. THURMAN: Thank you. So stipulated.
 12 THE WITNESS: So stipulated.
 13 (Deposition concluded at 7:50 p.m.)
 14
 15
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 22
 23
 24
 25

1 I, the undersigned, a Certified Shorthand
 2 Reporter of the State of California, do hereby certify:
 3 That the foregoing proceedings were taken
 4 before me at the time and place herein set forth; that
 5 any witnesses in the foregoing proceedings, prior to
 6 testifying, were duly sworn; that a record of the
 7 proceedings was made by me using machine shorthand,
 8 which was thereafter transcribe under my direction;
 9 that the foregoing transcript is a true record of the
 10 testimony given.
 11 Further, that if the foregoing pertains to
 12 the original transcript of a deposition in a federal
 13 case, before completion of the proceedings, review of
 14 the transcript [X] was [] was not requested.
 15
 16 I further certify I am neither financially
 17 interested in the action nor a relative or employee of
 18 any attorney or party to this action.
 19 IN WITNESS WHEREOF, I have this date
 20 subscribed my name.
 21
 22 Dated: July 5, 2017
 23
 24 _____
 25 Denise D. Ison
 RPR, CLR, CSR No. 6964

1 DECLARATION UNDER PENALTY OF PERJURY
 2 Case Name: FEDERAL TRADE COMMISSION vs. DAMIAN KUTZNER,
 3 ET AL.
 4
 5 Date of Deposition: 6/23/17
 6 Job No: 169884
 7
 8 I, JONATHAN TARKOWSKI, hereby certify under
 9 penalty of perjury under the law of the State of
 10 _____ that the foregoing is true and correct.
 11 Executed this _____ day of
 12 _____, 20____, at _____.
 13
 14
 15 _____
 16 JONATHAN TARKOWSKI
 17
 18
 19
 20 NOTARIZATION (If Required)
 21 Subscribe and sworn before me
 22 This _____ day of _____, 20____.
 23
 24 _____
 25 (Signature and seal of Notary)

Tarkowski

FTC v. Damian Kutzner, et al.

6/23/2017

1 earlier that it would have been sometime after February
2 of 2016, considering it notes the Evannova (phonetic)
3 decision.

4 Q. Do you recall how long Mr. Marshall was
5 unable or inactive to practice law?

6 A. I believe it was a 90-day suspension spanning
7 approximately mid to late November to, I believe, late
8 February.

9 Q. During February 2016, Mr. Marshall was not
10 active to practice, from your understanding?

11 A. I don't remember the specific dates. But it
12 was, again, mid to end November is approximately when
13 it started, to approximately end of February.

14 MR. STOLLER: Thank you. Nothing further.

15 MR. THURMAN: Were we're off the record.

16 (An off-the-record discussion was
17 held.)

18 MR. THURMAN: Back on the record.

19 The witness and the parties have just reached
20 a stipulation with the witness that the witness will
21 have seven days from the date he receives the
22 transcript to review and make any changes, and sign it
23 and return it, and if he fails to return the signed
24 transcript within that period of time, any of the
25 parties can use an unsigned version for the purposes of

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Tarkowski

FTC v. Damian Kutzner, et al.

6/23/2017

1 summary judgment as if it were a signed version.

2 And if the witness fails to return a signed
3 version within 30 days after he receives it, the
4 parties can use an unsigned version for any purpose in
5 the case.

6 MR. STOLLER: Also, if he fails to let us
7 know of any changes within the seven days, then we can
8 use whatever copies we have at that time.

9 So stipulated.

10 MR. MADDEN: So stipulated.

11 MR. THURMAN: Thank you. So stipulated.

12 THE WITNESS: So stipulated.

13 (Deposition concluded at 7:50 p.m.)

14

15

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24

25

For The Record, Inc.
(301) 870-8025 - www.ffrinc.net - (800) 921-5555

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby certify:

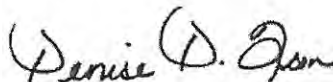
3 That the foregoing proceedings were taken
4 before me at the time and place herein set forth; that
5 any witnesses in the foregoing proceedings, prior to
6 testifying, were duly sworn; that a record of the
7 proceedings was made by me using machine shorthand,
8 which was thereafter transcribe under my direction;
9 that the foregoing transcript is a true record of the
10 testimony given.

11 Further, that if the foregoing pertains to
12 the original transcript of a deposition in a federal
13 case, before completion of the proceedings, review of
14 the transcript [X] was [] was not requested.

15
16 I further certify I am neither financially
17 interested in the action nor a relative or employee of
18 any attorney or party to this action.

19 IN WITNESS WHEREOF, I have this date
20 subscribed my name.

21
22 Dated: July 5, 2017



23 _____
24 Denise D. Ison
RPR, CLR, CSR No. 6964

#11625

JT testimony Public

Memorandum of Understanding between Law Offices of Jonathan Tarkowski (hereinafter "JT") AND Brookstone Law, P.C. (hereinafter "BL"), jointly the Parties

JT will do the following re business arrangement between Parties:

- o 1. Take on Partnership role with BL with an accompanying 2% share ownership thereof, Thereafter to:
 - o Lead and provide strategic and goal management (for BL) for legal areas involving litigation and pre-litigation, including case management, reassessment of client matrix, Complaint drafting and redrafting, and other current needs of BL;
 - o Lead and monitor junior attorneys and staff who are handling matters for BL;
 - o Consultation Services to BL on Best Practices or relevant intel on pleadings (ie. causes of action or approaches to same), from Jim Macklin, etc.;
 - o Assist BL staff with CFPB submissions and Intake Questionnaire;
 - o Assist Human Resources and the developments of BL Divisions;
 - o Consultation and coordination of the BL Affiliate Program as to other firms utilizing the experience; expertise; and infrastructure of BL for their "back-end" support;
 - o Consultation and coordination as to cases potentially assigned from other firms; compensation to BL; and coordination with primary points of contact from said other firms, to be determined.

BL will do the following re business arrangement between the parties:

- o Coordinate with JT to effectuate all the above-referenced items;
- o Effect the following schedule re compensation to JT for services in the partnership:
 - o 2% Ownership Stock (completely vested after period of 12 months);
 - o Initial cash compensation, starting at \$1,500/month
 - o 1% of all BL net contingency fee awards, generated within next 6 months, not allocated to Client;
 - o 2% of all BL net contingency fee awards, generated after 6 months, not allocated to Client;
 - o BL to provide JT with complete Client information for quality control and customer service purposes.

The following signatories agree to the foregoing:

[Signature]
Jonathan Tarkowski, Principal, on behalf of Law Offices of Jonathan Tarkowski

6/30/15
Date

[Signature]
Vito Torchia, Jr., Stock Holder, on behalf of Brookstone Law, PC

Date

Ex. 117



THE STATE BAR OF CALIFORNIA
LAW CORPORATION
180 Howard Street • San Francisco, CA 94105-1617
(888) 800-3400 • lawcorp@calbar.ca.gov

FOR OFFICIAL STATE BAR USE ONLY

Application #: _____

Attachment C-1 Standard Law Corporation Guarantee

1) NOTES

See the Law Corporation Guarantee Worksheet, or Section #11 of the Annual Renewal Form for instructions on calculating the correct dollar amount for the guarantee.

This guarantee is not valid without original signatures.

2) DECLARATION

The undersigned, being shareholder(s) of

Brookstone Law, P.C.

(Set forth complete name of corporation including corporate designation)

hereby guarantee(s) payment by the corporation (and, if our corporation shall have more than one shareholder, this obligation shall be joint and several among the shareholder(s) of all claims established against it by its clients for errors or omissions arising out of the practice of law by the corporation in an amount not to exceed \$ 100,000.00 for each claim with an aggregate maximum liability not to exceed \$ 200,000.00 per calendar year; provided that any payment required to be made hereunder shall be offset by the amount paid by any insurance company providing errors or omissions insurance for the corporation or any of its shareholders.

DATE EXECUTED: 06/29/2015

EFFECTIVE DATE: 06/29/2015

SHAREHOLDER(S) SIGNATURE(S)
(All Shareholders must sign. Signatures MUST be original.)

Print Name	Signature
<u>Jonathan Tarkowski</u>	<u>[Signature]</u>
<u>Francis Cabibi</u>	<u>[Signature]</u>
_____	_____
_____	_____
_____	_____

Additional Sheets are Attached

Attach this form to your Annual Renewal if you are executing a new guarantee

Ex. 118

McNAMARA BENJAMIN LLP
LAWYERS

Public
EDWARD CHANG
DIRECT 619-269-0446
OFFICE 619-269-0400
FAX 619-269-0401
echang@mcnamarallp.com
WWW.MCNAMARALLP.COM

May 8, 2017

Via Email (torchialaw@gmail.com)

Vito Torchia Jr.
8033 W Sunset Blvd Ste 819
Los Angeles, CA 90046-2401

Re: *Federal Trade Commission v. Kutzner, et al.*
U.S. District Court (C.D. Cal.) Case No. SACV16-00999-BRO (AFMx)

Dear Mr. Torchia:

As you know, we are counsel to Thomas W. McNamara, the Court-appointed Receiver for the “Receivership Entities” that includes Brookstone Law P.C. (California), Brookstone Law P.C. (Nevada), and other entities in the above-referenced matter.

On April 5, 2017, we telephoned you about a memorandum entitled “Brookstone Ethical Issues,” dated April 25, 2011, authored by Robert L. Kehr and Rachelle Cohen, and directed to you. This memorandum was located on one of the forensic images of computers from the offices of the Receivership Entities at 6 Hutton Centre Drive, Suite 1000, Santa Ana, California.

Even though you transmitted the memorandum via email to Damian Kutzner and Jeremy Foti on April 26, 2011, you asserted that the memorandum is privileged and demanded that the memorandum be clawed back. After the telephone call, the Receiver sent an email to counsel for the Federal Trade Commission (“FTC”) and Jeremy Foti. For your convenience, a copy of the email chain is attached hereto as Exhibit A.

Following your claim of privilege, an FTC paralegal who is not part of the underlying case team searched for documents that include the word “Kehr” in the documents located on the forensic images. The FTC paralegal segregated these documents and the FTC case team agreed not to review those documents until your assertion of privilege was resolved.

The FTC paralegal also identified documents that contain the word “Kehr” in documents that were provided by the FTC to Jeremy Foti in response to his discovery requests. The FTC case

Vito Torchia Jr.
May 8, 2017
Page 2

team did not review these documents and instead sent them to us for review. A copy of these documents is attached hereto as Exhibit B.¹

We have now had an opportunity to review these various documents and, more generally, your assertion of attorney-client privilege. Initially, we have been unable to ascertain a basis for your assertion that you hold a privilege as to any of these documents; the only facts of which we are aware suggest that only Brookstone Law, P.C., as an entity, holds any privilege, and that privilege is now controlled by the Receiver.

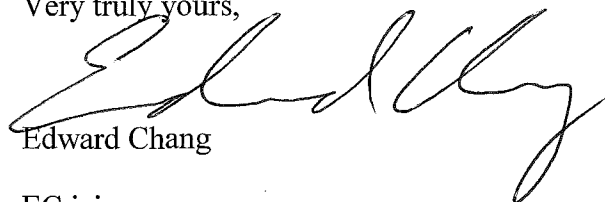
Specifically, the retainer letter from Kehr, Schiff & Crane, LLP identifies that law firm's client as solely Brookstone Law, P.C. Brookstone Law, P.C. also is the sole client identified in the billing statements, and advice appears to have been consistently directed at the entity. Also, in the letter from Robert L. Kehr to Better Business Bureau, Mr. Kehr stated that they represent Brookstone Law, P.C. We have not identified any documents identifying you as a client.

Additionally, some of the segregated documents are plainly not privileged. For example, there are letters between Robert L. Kehr and Better Business Bureau, emails coordinating the taping of an infomercial, and emails concerning payment of Kehr, Schiff & Crane, LLP's invoice. None of that is privileged.

Other documents may have been privileged (i.e., memos from Kehr, Schiff & Crane, LLP), but, as stated, it appears that the privilege belongs to Brookstone Law, P.C. To the extent any of these documents are privileged, the privilege belongs to Brookstone Law, P.C. The Receiver waives the privilege held by Brookstone Law, P.C.

Notwithstanding our position, and what we believe to be the clear weight of the evidence, we want to ensure you have an opportunity to be heard on this matter by the Court if you so desire. Therefore, the Receiver will withhold granting the FTC authorization to review these documents until after fourteen days from the date of this letter, which will be May 22, 2017. If, on or before that date, you give notice of an intent to bring a timely motion seeking the appropriate relief, we will withhold authorization from the FTC to review those documents pending a ruling by the Court. However, should you fail to act, we will deem you to have agreed to the facts as stated herein and we will authorize the FTC to commence their review of these documents.

Very truly yours,



Edward Chang

EC:jej
Enclosures

¹ These exhibits will not be provided to Messrs. Thurman, Theisman, and Madden pending resolution of the privilege issues addressed herein.

Vito Torchia Jr.
May 8, 2017
Page 3

cc: Michael Thurman (*michael@thurman-legal.com*) without enclosures
Gregory Madden (*gmadden@ftc.gov*) without enclosures
Benjamin Theisman (*btheisman@ftc.gov*) without enclosures

ADVERTISING / MARKETING AGREEMENT

THIS AGREEMENT is made this 7th day of December, 2010 by and between Webstar Inc. ("WEBSTAR") and Brookstone Law, PC ("Customer").

Recitals

- A. WEBSTAR is in the business of providing marketing and advertising services for a fee.
- B. Customer desires to have WEBSTAR render certain marketing and advertising services (the "Services") as set forth in Exhibit B.
- C. WEBSTAR desires to render certain marketing and advertising services as set forth in Exhibit B.

Agreements

In consideration of the mutual covenants set forth in this Agreement, Customer and WEBSTAR hereby agree as follows:

1. Engagement of Services.

WEBSTAR agrees to render to Customer services in connection with the planning, preparing and creation of marketing services for Customer as follows:

- a) Provide consulting services to Customer in the form of an analysis of Customer's current products, goods or services as it relates to Customer's present and/or target markets.
- b) Develop advertising ideas and creative content for Customer for approval for use in future marketing programs.
- c) Prepare estimates of costs and expenses associated with idea and content development and present them to Customer for approval.
- d) Design, contract or otherwise arrange for the preparation of creative content, advertising, campaign management and other related services.
- e) Execute advertising and marketing services as agreed upon in Exhibit B.
- f) Provide proofing services on behalf of Customer in order to check for accuracy, completeness, adherence to specifications and Customer branding in all forms of contracted advertising that WEBSTAR handles on behalf of Customer.
- g) Audit all invoices and expenses provided by third-party to ensure accuracy.

h) Provide other such services as Customer may request from time to time such as content creation, assistance to Customer's staff and employees, market research, analysis or additional project consulting.

2. Specifications.

WEBSTAR agrees to develop the advertising and consulting services pursuant to the specifications set forth in Exhibit B attached hereto (the "Specifications").

3. Services Completion.

WEBSTAR will use reasonable diligence in the development of the Advertising and Marketing Services and endeavor to deliver to Customer all agreed upon specifications (or "Milestones") outlined in Exhibit B no later than 48 hours from request. Customer acknowledges, however, that this delivery deadline, and the other payment milestones listed in Exhibit A, are estimates, and are not required delivery dates. WEBSTAR will be retaining all creative source code, original works, files, digital media and other intellectual property for the entire project and providing Customer with the output formats only. Customer shall retain all of its intellectual property rights in any logos, graphics, text, images or other components it owns and transmits to WEBSTAR for use in fulfillment or creation of services.

4. Marketing Customer's Content.

Customer represents and warrants that Customer's marketing and mailing complies with all laws of the jurisdiction it is being mailed to as well as all federal laws, contains no material that constitutes a copyright infringement, contains no defamatory material, is not inaccurate or intended to misrepresent or deceive the general public, contains no false claims or misstatements of law, does not contain a trademark or trade dress that the mailer does not own, does not constitute unfair competition, does not knowingly violate the rights of others, does not constitute an invasion of privacy or contain an image or likeness that the advertiser is not entitled to use. Should WEBSTAR have claims made or a lawsuit filed against it based upon any claim that Customer violated any of the representations or warranties stated herein then Customer agrees to indemnify, hold harmless and pay any and all cost of legal defense including but not limited to legal fees and expert witness fees of WEBSTAR in defending any such claims. WEBSTAR shall be entitled to select its own legal counsel. These representations and warranties shall survive the expiration or termination of this Agreement until such time as the action on account of any matter covered by this indemnity is barred by the applicable statute of limitations.

5. Ownership Rights.

- a) WEBSTAR shall endeavor to insure that Customer shall be able to retain, under the fullest extent under the law, any and all intellectual property rights in any text, images or other components created for Customer pursuant to this agreement.
- b) Customer agrees that any material, content, plan or idea prepared by WEBSTAR or submitted to Customer for approval at any stage which is not utilized at the termination of this agreement, shall remain the property of WEBSTAR. Customer agrees to return to WEBSTAR any materials it may have of WEBSTAR such as artwork, mock-ups, comps, text, digital media, film, photos or any other physical embodiment of WEBSTAR's creative work performed while under this agreement. WEBSTAR agrees that any material created by Customer remains the property of Customer.
- c) Upon termination or expiration of Agreement, Customer agrees to be solely responsible for any additional use of materials and advertisements, created by WEBSTAR, pursuant to this agreement. Additional expenses may include, but are not limited to: Fees, Licenses, Translations, Royalties, Talent and other associated fees. WEBSTAR's obligation in 4.a shall not apply with any respect to foreign use.

6. Compensation.

For all of WEBSTAR's services under this Agreement, Customer shall compensate WEBSTAR, in cash, pursuant to the terms of Exhibit A attached hereto. In the event Customer fails to make any of the payments referenced in Exhibit A by the deadline set forth in Exhibit A, WEBSTAR have the right, but are not obligated, to pursue any or all of the following remedies: (1) terminate the Agreement, (2) withhold all materials, services and creative content administered by WEBSTAR on behalf of Customer, (3) bring legal action.

7. Confidentiality.

Customer and WEBSTAR acknowledge and agree that the Specifications and all other documents and information related to the engagement of marketing or advertisement development (the "Confidential Information") will constitute valuable trade secrets of WEBSTAR. Customer shall keep the Confidential Information in confidence and shall not, at any time during or after the term of this Agreement, without WEBSTAR's prior written consent, disclose or otherwise make available to anyone, either directly or indirectly, all or any part of the Confidential Information. Excluded from the "Confidential Information" definition is anything that can be seen by the public in any advertising medium or channel prior to the engagement of WEBSTAR to provide services, or information which was provided to WEBSTAR by Customer for publication as a requirement of fulfillment of the Specifications.

8. Limited Warranty and Limitation on Damages.

Customer agrees to indemnify and hold WEBSTAR harmless with respect to any claims, loss, lawsuit, liability or judgment suffered by Customer which results from the use of any material prepared or execution of service by WEBSTAR or at the direction of WEBSTAR which has been materially changed from the Specifications by any advertisers, publishers, hosts, radio and television broadcasts, quotes, testimonials, print journalism or other third-party entity.

WEBSTAR agrees to obtain and/or maintain in force for the length of this agreement, at WEBSTAR's expense, an appropriate liability policy or policies, naming Customer as an additional insured and loss payee under such policy or policies as applicable.

In the event of any litigation, proceeding or suit against Customer by any regulatory agency or in the event of a court action challenging any advertising or marketing service prepared by WEBSTAR, WEBSTAR shall assist in the preparation of defense of such action and cooperate with Advertiser. Customer acknowledges that WEBSTAR are not responsible for the results obtained by Customer from any creative, advertising, programs, ideas or execution thereof. Customer waives any claim for damages, direct or indirect, and agrees that its sole and exclusive remedy for damages (either in contract or tort) is the return of the consideration paid to WEBSTAR as set forth in Exhibit A attached hereto.

9. Independent Contractor.

WEBSTAR will be retained as independent contractors. WEBSTAR will be fully responsible for payment of their own income taxes on all compensation earned under this Agreement. Customer will not withhold or pay any income tax, social security tax, or any other payroll taxes on WEBSTAR's behalf. WEBSTAR understands that they will not be entitled to any fringe benefits that Customer provides for its employees generally or to any statutory employment benefits, including without limitation worker's compensation or unemployment insurance.

10. Resources and Equipment.

Customer agrees to make available to WEBSTAR, for WEBSTAR's use in performing the services required by this Agreement, all logos, graphics, photos, branding, collateral, items of hardware and software as Customer and WEBSTAR may agree are reasonably necessary for such purpose.

11. General Provisions:

11.1 Entire Agreement

This Agreement contains the entire agreement between the parties relating to the subject matter hereof and supersedes any and all prior agreements or understandings, written or oral, between the parties related to the subject matter hereof. No modification of this Agreement shall be valid

unless made in writing and signed by both of the parties hereto.

11.2 Governing Law.

This Agreement has been entered into in the city of Placentia, state of California and shall be governed by and construed in accordance with the laws of the State of California. Exclusive jurisdiction and venue shall be in Orange County, California Superior Court.

11.3 Binding Effect.

This Agreement shall be binding upon and inure to the benefit of Customer and WEBSTAR and their respective successors and assigns, provided that WEBSTAR may not assign any of his obligations under this Agreement without Customer's prior written consent.

11.4 Waiver.

The waiver by either party of any breach or failure to enforce any of the terms and conditions of this Agreement at any time shall not in any way affect, limit, or waive such party's right thereafter to enforce and compel strict compliance with every term and condition of this Agreement.

11.5 Good Faith.

Each party represents and warrants to the other that such party has acted in good faith, and agrees to continue to so act, in the negotiation, execution, delivery, performance, and any termination of this Agreement.

11.6 Right to Withhold Content, Creative and Services.

In the event Customer fails to make any of the payments set forth on Exhibit A within the time prescribed in Exhibit A, WEBSTAR has the right to withhold further content, creative and services perform for or on behalf of Customer until payment in full is paid, plus accrued late charges of 1 ½% per month.

11.7 Indemnification.

Customer warrants that everything it gives WEBSTAR to use in fulfillment of services is legally owned or licensed to Customer. Customer agrees to indemnify and hold WEBSTAR harmless from any and all claims brought by any third party relating to any aspect of the services, creative or other content, including, but without limitation, any and all demands, liabilities, losses, costs and claims including attorney's fees arising out of injury caused by Customer's products/services, material supplied by Customer, copyright infringement, and defective products sold via the advertising or services. Further, customer agrees to indemnify WEBSTAR from responsibility for problems/disruptions caused by third party services and contractors that Customer may use such as media buyers, transportation, merchant accounts, shopping carts, shipping, hosting services, real time credit card processing and other services that relate to the execution of the services outline in this agreement by WEBSTAR.

11.8 Use of Services and Creative Content for Promotional Purposes. Customer grants WEBSTAR the right

to use the creative content, description of services performed, results of services and campaign data as it sees fit for promotional purposes.

11.9 No Responsibility for Theft.

WEBSTAR has no responsibility for any third party taking all or any part of the content, ideas, or services provided to Customer by WEBSTAR.

11.10 Attorney's Fees.

In the event any party to this Agreement employs an attorney to enforce any of the terms of the Agreement, the prevailing party shall be entitled to recover its actual attorney's fees and costs, including expert witness fees.

11.11 Term of Agreement.

This agreement shall begin on 10/7/2011 and shall continue in full force until terminated by either party upon at least (30) days prior written notice.

11.12 Authority of Signatory.

Customer warrants and represents that the individual signing on behalf of Customer has the power and authority to bind Customer and has obtained all consents necessary for the authorization, execution, delivery and performance of this Agreement.

11.13 Further Assurances.

Subject to the terms and conditions herein, each of the parties hereto agrees to use its reasonable best efforts to take, or cause to be taken, all appropriate action, and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated by this Agreement.

11.14 Modification.

It is understood between the parties that this Agreement contains the entire understanding of the parties and no change or modification of this Agreement shall be valid unless the same be in writing and signed by all parties to this Agreement.

11.15 Invalid Provision.

The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof and the Agreement shall be construed in all respects as if such invalid or unenforceable provision had been omitted.

Each party represents and warrants that, on the date first written above, they are authorized to enter into this Agreement in entirety and duly bind their respective principals by their signature below:

From: cmarshall@marshallestatelaw.com
Sent: Thursday, July 16, 2015 7:46 PM
To: Jeremy Foti; Damian Kutzner; Damian Kutzner
Subject: RE: FW:
Attachments: Document (2)a.pdf

#:11637

Public

Agreement Attached. Let's meet (you, Damian, and myself only), tomorrow at Irvine office, to fully clarify important matters of coordination, etc.

Jim will be into the Irvine office around noon or so, and we will all collectively have matters to discuss at some point as well.

Best time for this, will be 11 am. Let me know shortly if you wouldd what works for you guys.

Thanks,

----- Original Message -----
Subject: FW:
From: "Jeremy Foti" <jfoti@advantislaw.com>
Date: 7/16/15 12:06 pm
To: cmarshall@marshallestatelaw.com

-----Original Message-----
From: Jeremy Foti [mailto:jfoti@advantislaw.com]
Sent: Tuesday, July 14, 2015 10:35 AM
To: 'cmarshall@marshallestatelaw.com'
Subject: FW:

Here is my signed copy of employment agreement. If you can please sign and send back that would be great. It is time to power up! Thanks

-----Original Message-----
From: copier@advantislaw.com [mailto:copier@advantislaw.com]
Sent: Tuesday, July 14, 2015 7:22 AM
To: Jeremy Foti
Subject:

This E-mail was sent from "Lanier-LD425c" (MP C2500/LD425c).

Scan Date: 07.14.2015 10:21:54 (-0400)
Queries to: copier@advantislaw.com

EXECUTIVE EMPLOYMENT AGREEMENT

This Employment Agreement dated as of July 8, 2015 is by and between Advantis Law Group, P. C, a California professional corporation (the "Firm") and JEREMY FOTI (the "Executive").

In consideration of the mutual covenants and the mutual benefits provided in this Employment Agreement, the receipt and sufficiency of which are hereby acknowledged, the Firm and Executive agree as follows:

1.0. Reserved.

2.0. Term of Employment.

2.1. The Firm will employ Executive commencing on the date of July 8, 2015 ("Effective Date") and for a period of five years thereafter (such five-year period plus any additional renewal terms as provided for herein, collectively, the "Employment Period"), unless Executive's employment is terminated prior to the end of the Employment Period in accordance with the terms of this Agreement, and Executive accepts employment with the Firm on the terms and conditions contained in this Agreement. The Employment Period may be renewed for successive one year periods in the discretion of Executive effective upon Executive's election by written notice to the Firm on or before the end of the current term; provided, however, that if Executive fails to send written notice of such election to renew, Executive shall be deemed to have elected to renew for an additional one year term if Executive continues to work after the end of the then current term.

3.0 Duties and Functions.

3.1. Executive shall be employed as the Chief Operations Manager of the Firm and shall oversee, direct and manage all "Non-Legal" operations of the Firm. Executive shall report directly to the Board of Directors. Executive agrees to undertake the duties and responsibilities inherent in the position of Chief Operations Officer of the Firm which may also encompass different or additional duties as may, from time to time, be assigned by the Board, and the duties and responsibilities undertaken by Executive may be altered or modified from time to time by the Board provided such changes are consistent with the role of a Chief Operations Manager. Executive agrees to abide by the rules, regulations, instructions, personnel practices and policies of the Firm (collectively, "Rules") and any changes which may be adopted at any time by the Firm provided a copy of such Rules and changes is first provided to Executive.

3.2. During the Employment Period, Executive will work part time on a weekly basis for the Firm during regular business hours. Executive and the Firm are permitted to engage in consulting work or any other trade or business for their own account or for or on behalf of any other person, firm or corporation, whether or not such activity or business

competes, conflicts or interferes with the Firm or the performance of their respective duties herein.

4.0 Compensation.

4.1. Base Salary. As compensation for his services under this Agreement, during Executive's employment as Chief Operations Officer, the Firm agrees to pay Executive a base salary at the rate of Three Hundred and Fifty Thousand Dollars (US \$350,000.00) per annum, payable in accordance with the Firm's normal payroll schedule, or on such other periodic basis as may be mutually agreed upon. Such salary shall be subject to annual review by the Board for possible upward adjustment based on Firm policy and contributions made by Executive to the enterprise. The Firm may withhold from any amounts payable under this Agreement such federal, state or local taxes as shall be required to be withheld pursuant to any applicable law or regulation.

4.2. Automobile Allowance. Executive shall receive a monthly car allowance of \$1800 during each month of the Employment Period, payable on the 1st day of each calendar month commencing on **August 1, 2015**.

4.3. Business Expenses. In addition to the compensation provided for above, the Firm agrees to pay or to reimburse Executive during his employment for all reasonable, ordinary and necessary, properly vouchered, client-related business or entertainment expenses incurred in the performance of his services under this Agreement in accordance with Firm policy in effect from time to time. Executive shall submit vouchers and receipts for all expenses for which reimbursement is sought.

4.4. Fringe Benefits. In addition to the compensation provided for above, Executive shall be entitled to receive 4 weeks of paid vacation each year plus the benefits available generally to Firm Executives pursuant to Firm programs, including, by way of illustration, personal leave, paid holidays, sick leave, retirement, disability, dental, vision, group sickness, accident or health insurance programs of the Firm which may now or, if not terminated, shall hereafter be in effect, or in any other or additional such programs which may be established by the Firm, as and to the extent any such programs are or may from time to time be in effect, as determined by the Firm in its sole discretion.

5.0 Reserved.

6.0. Reserved.

7.0. Firm Property.

7.1. All correspondence, records, documents, software, promotional materials, and other Firm property, including all copies, which come into Executive's possession by, through or in the course of his employment, regardless of the source and whether created by Executive, are, subject to the rights of licensors with respect to any software and other materials

and property that are licensed to the Firm, the sole and exclusive property of the Firm, and immediately upon the termination of Executive's employment, Executive shall return to the Firm all such property of the Firm.

8.0. Termination of Employment.

8.1. If the Firm terminates the employment relationship "for cause," or if Executive resigns without "good reason," the Firm shall pay Executive's salary through the date of termination and Executive shall not be entitled to any further compensation, remuneration or benefits from the Firm whatsoever other than any benefits and compensation that have accrued through such date.. The Firm may only terminate the Executive "for cause," after the finding of **a 2/3 majority of the Firm's Board of Directors so finds. Executive shall continue to receive compensation unless and until such a finding;** however, all amounts paid during this time shall be returned to Firm from the date of first allegation of "for cause," if there is a finding of cause as defined herein.

8.2. If Executive resigns for "good reason," the Firm will provide severance in the amount calculated in accordance with Section 9.2. of this Agreement.

8.3. As used in this Agreement, "cause" or "for cause" for termination means the occurrence of any one or more of the following: (a) embezzlement, fraud, or theft of or **conduct** directly affecting the Firm's assets.

8.4. As used in this Agreement, "good reason" for Executive to resign means, without Executive's express written consent (except for section 8.4(j) below), the occurrence of any one or more of the following: (a) a material reduction or alteration in the nature, scope or status of Executive's authorities, duties or responsibilities; (b) a material reduction by the Firm of Executive's compensation; and (c) the Firm's failure to pay any part of Executive's compensation within two (2) weeks (or within 5 days if there has been a prior failure to timely pay Executive compensation within the prior 12 month period in question) after such compensation was due, or (d) if the current shareholder of the Firm is, for any reason, no longer a shareholder of the Firm, whether due to death or transfer of their stock or otherwise, or if, for any reason, the current shareholder of the Firm is no longer employed on a full time basis by the Firm; or (e) the Firm's breach of any software or leasing or licensing agreements with any company that is directly owned in part by Executive (an "Executive Firm") and such breach is not cured by the Firm within the express cure period provided for in any of such agreements; or (e) the relocation of the offices of the Firm or the relocation of Executive's job location to a location that is more than 15 miles from the current offices of the Firm unless approved by Executive; or (f) the cessation of business of the Firm for any reason; or (g) the liquidation or dissolution of the Firm; or (g) the occurrence of a Change of Control Event (as defined below); or (h) if the Firm declares or is the subject of a bankruptcy filing or proceeding, is placed in receivership, or if any local, state or federal regulator assumes control of the Firm or orders the Firm to cease some or all of its operations; or (i) if the Firm is no longer owned by attorneys that are licensed to practice law in the State of California; or (j) if any software license agreements between Broadbase, a Nevada limited liability company and the Firm is terminated for cause by

the licensor thereunder, with the proviso that no breach by the Firm **will be accounted until 6 months has passed from the inception of this Agreement.**

At least ten (10) days prior to the effective date of his resignation, Executive shall provide the Firm with written notice stating the reasons for his resignation due to a good reason as defined above, and Executive's resignation shall be deemed for "good reason" unless the Firm fails to satisfactorily address and rectify the matter(s) (if capable of cure) within thirty (30) days after receiving such written notice from Executive; provided, however that such 30 day cure period shall be reduced to **fifteen days** if an event constituting good reason had previously occurred within 12 month prior to the good cause event in question.

8.5. In the event Executive becomes permanently disabled during employment with the Firm, the Firm may terminate Executive's employment by giving thirty (30) days notice to Executive of its intent to terminate, and unless Executive resumes performance of the duties set forth in Section 3 within five (5) days of the date of the notice and continues performance for the remainder of the 30 day notice period, Executive's employment shall terminate at the end of the thirty (30) day period. In the event that Executive's employment is terminated as provided for in this Section 8.5., Executive will be entitled to receive, in addition to compensation that accrued through the date of termination, compensation totaling **one year** of Executive's then current base pay, payable within 30 days after the effective date of termination. "**Permanently Disabled**" for the purposes of this Agreement means the inability, due to physical or mental ill health or condition, to perform Executive's duties for one hundred eighty (180) days during any one employment year irrespective of whether such days are consecutive.

8.6. Executive's employment will terminate immediately upon Executive's death and the Firm shall not have any further liability or obligation, with respect to the Firm's obligations under this Agreement, to the Executive, his executors, heirs, assigns or any other person claiming under or through his estate, except that Executive's estate shall receive upon Executive's death any accrued but unpaid salary or bonuses plus, payable within 30 days of Executive's death, and a lump sum payment equal to the base salary that would have been earned for the remainder of the then current term of the Employment Period, but in no event shall such lump sum payment (before tax withholdings) be less than **\$350,000**, plus the **Severance Sum** as described in Section 9.2 below.

9.0. Severance.

9.1. Executive will be entitled to the severance payments described in this Section 9 upon the termination of his employment pursuant to this Agreement: (a) by the Firm under circumstances that constitute a termination "without cause" or (b) by Executive under circumstances that constitute termination for "good reason," both as defined in Section 8 of this Agreement.

9.2 If Executive's employment is terminated "without cause" or "**without good reason**," or if Executive's employment is terminated due to his death, Executive will receive an

amount equal to the sum of (i) the remainder of Executive's base salary for the then current Employment Period payable in a lump sum upon the effective date of termination of employment and (ii) the sum of **Three hundred-fifty (\$350,000) thousand dollars** ("Severance Sum") payable to Executive's estate in equal monthly payments of principal plus monthly interest on the unpaid balance at 7% per annum payable over a **one** year period commencing 30 days after Executive's death and subject to the following: the entire unpaid balance of such **\$350,000** shall be accelerated and shall all be immediately due and payable to Executive's estate if (i) the Firm fails to pay any such monthly payment when due and such failure continues for 15 days after written notice from Executive's representative to the President of the Firm; or (ii) if substantially all the assets or business of the Firm is sold to a third party or if the Firm dissolves or liquidates or ceases doing business or is merged with another corporation; or (iii) if the Firm is the subject of a bankruptcy or insolvency proceeding.

9.3. If Executive's employment is terminated by the Firm in the circumstances described in Section 9.2. of this Agreement and if such termination occurs following a "Change In Control" as defined in Section 10 of this Agreement, Executive will receive the amounts specified in Section 9.2. of this Agreement as follows: the sum of (i) the remainder of Executive's base salary for the then current Employment Period payable in a lump sum upon the effective date of termination of employment and (ii) the sum of \$350,000 payable in a lump sum within 30 days after the effective date of termination of employment.

10.0. "Change In Control."

10.1. For purposes of this Agreement, a "Change In Control" shall occur in any of the following circumstances:

(a) Fifty-one percent (51%) or more of the outstanding voting stock of the Firm as of the date of this Agreement is acquired or beneficially acquired (as defined in Rule 13d-3 under the Securities Exchange Act of 1934, as amended, or any successor rule thereto) by any person or entity other than any current Firm shareholder or any person who obtains such Firm shares through the estate or personal administrator of any current Firm shareholder, in a transaction other than a public offering of the voting stock of the Firm or a new equity offering in exchange for stock of the Firm;

(b) The Firm is merged or consolidated with or into another corporation and the current Firm shareholder or any person who obtains Firm shares through the estate or personal administrator of any current Firm shareholder, in the aggregate hold less than fifty one percent (51%) of the voting stock of the surviving entity or its parent corporation immediately after the merger or consolidation; or

(c) All or substantially all of the assets of the Firm are sold or otherwise transferred to or licensed to any person or entity other than any current Firm shareholder or any person who obtains Firm shares through the estate or personal administrator of any current Firm shareholder (in one transaction or a series of transactions). Notwithstanding the foregoing, a "Change In Control" shall not be deemed to have occurred if the Firm declares bankruptcy, is placed in receivership, or if any local, state or federal regulator assumes control of the Firm.

11.0. Survival of Executive's Obligations.

11.1. Executive's and the Firm's obligations under Sections 6, 7, 12, 14 and 19 of this Agreement shall continue and survive the termination of Executive's employment or the termination or non-renewal of this Agreement for any reason. Executive's obligations under Sections 6, 7, 12, and 19 of this Agreement also shall survive any breach of this Agreement or any other obligation by the Firm, and the Firm's breach shall not in any way alter or relieve Executive's obligations.

12.0. Reserved.

13.0. Reserved.

14.0. Indemnification.

14.1. The Firm shall indemnify and hold Executive harmless for any liability incurred by reason of any act or omission performed by Executive while acting in good faith on behalf of the Firm and within the scope of the authority of Executive pursuant to this Agreement and under the rules and policies of the Firm that were provided in writing to Executive prior to the act or omission in question, except that Executive must have in good faith believed that such action was in the best interest of the Firm and such course of action or inaction must not have constituted gross negligence, fraud, willful misconduct, or breach of a fiduciary duty.

14.2 Executive shall indemnify and hold the Firm harmless for any liability incurred by reason of any grossly negligent act performed by Executive with regard to services performed under this Agreement. Such indemnification by Executive excludes any damages with respect to lost profits or consequential damages and in all cases the aggregate liability of Executive under this Section 14.2 shall be limited to the salary paid to Executive for the 12 month period immediately preceding the act of gross negligence in question.

15.0. Binding Agreement.

15.1. This Agreement shall be binding upon and inure to the benefit of the parties hereto, their heirs, personal representatives, successors and assigns. In the event the Firm is acquired, is a non surviving party in a merger, or transfers substantially all of its assets, this Agreement shall not be terminated and the transferee or surviving company shall be bound by the provisions of this Agreement. The parties understand that the obligations of Executive are personal and may not be assigned by him.

16.0. Entire Agreement.

16.1. This Agreement contains the entire understanding of Executive and the Firm with respect to employment of Executive and supersedes any and all prior understandings, written or oral. This Agreement may not be amended, waived, discharged or terminated orally, but only by an instrument in writing, specifically identified as an amendment to this Agreement,

and signed by all parties. By entering into this Agreement, Executive certifies and acknowledges that he has carefully read all of the provisions of this Agreement and that he voluntarily and knowingly enters into it.

17.0. Severability.

17.1. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be deemed severable from the remainder of this Agreement, and the remaining provisions contained in this Agreement shall be construed to preserve to the maximum permissible extent the intent and purposes of this Agreement. Any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

18.0. Governing Law and Submission to Jurisdiction.

18.1. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California. Executive expressly consents to the jurisdiction of the State of California and federal courts located in Orange County, California and acknowledges that venue is proper in any judicial district within Orange County, California. For the purposes of expediting the resolution of any claim or dispute, the parties waive a trial by jury.

19.0. Notices.

19.1. Any notice provided for in this Agreement shall be provided in writing. Notices shall be effective from the date of service, if served personally on the party to whom notice is to be given, or on the third (3rd) business day after mailing, if mailed by first class mail, postage prepaid. Notices shall be properly addressed to the parties at their respective addresses or to such other address as either party may later specify by notice to the other.

20.0. Miscellaneous.

20.1. No delay or omission by the Firm in exercising any right under this Agreement shall operate as a waiver of that or any other right. A waiver or consent given by the Firm on any one occasion shall be effective only in that instance and shall not be construed as a bar or waiver of any right on any other occasion.

20.2. The captions of the sections of this Agreement are for convenience of reference only and in no way define, limit or affect the scope or substance of any section of this Agreement.


20.3. The Firm and Executive participated jointly in the negotiation and preparation of this Agreement, and each has had the opportunity to obtain the advice of legal counsel of its/his own choosing and to review, comment upon, and redraft this Agreement. Accordingly, it is agreed that no rule of construction shall apply against either the Firm or Executive or in favor

of either of them. This Agreement shall be construed as if the Firm and Executive jointly prepared this Agreement, and any uncertainty or ambiguity shall not be interpreted against any either of them or in favor of either of them.

20.4 In the event of a dispute arising out of the interpretation or enforcement of this Agreement, the prevailing party shall be awarded its reasonable attorneys fees and costs (including any costs of experts) as determined by the court.

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be duly executed and delivered, by its authorized officers or individually, as of the date first written above.

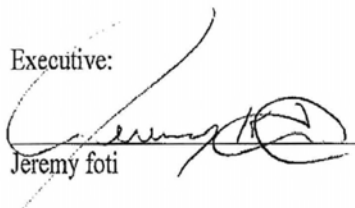
Advantis Law Group, P.C., a California professional corporation



7/16/2015

By: Charles T. Marshall, CEO & President

Executive:



7.14.15

Jeremy foti

From: Jeremy Foti
Sent: Wednesday, March 25, 2015 7:18 PM
To: Damian Kutzner
Subject: Fwd: Advantis doc's

Public

Begin forwarded message:

From: james macklin <jimlmacklin@yahoo.com>
Date: March 25, 2015 at 10:15:32 AM PDT
To: Jeremy Foti <jfoti@1kg.com>
Subject: Advantis doc's
Reply-To: james macklin <jimlmacklin@yahoo.com>

Ok...Charles is in my office for the next two days here in Tahoe...I am having him execute doc's in the name "Advantis Law" without using the word "group", as this presents myriad problems in licensing and for the BAR.

This will be done by tomorrow. Accounts may then be opened. If at a later time, there is cause to add the word "Group"..then we can execute a simple name change...meantime...please adjust the outgoing mail to reflect the deletion. The advertisement must be correct and legal. Charles' BAR No. must also appear on the advert. as you know.

I will have him confirm details as they become available. I guess someone has to be a closer..looks like its me.(Haaa!).

Call me with any questions...

James L. Macklin, Managing Director
Secure Document Research (Paralegal Services/Legal Project Management)
Agent for Charles T. Marshall, Esq. (SBN 176091)
917 Tahoe Blvd #201 A
Incline Village NV 89451
530-888-9000

This communication is not intended as legal advice and should not be construed as such. SDR does not engage in the practice of law and does not offer any opinion, writing or other communication as legal advice. Competent counsel should be sought for any and all questions as to rights, claims and duties. This communication should be considered as private. If you have received this in error, please delete the information. This communication may contain information that is privileged under the attorney/client privilege. Any use of the information by an outside agency, or otherwise similarly situated entity, is strictly prohibited.

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3 **UNITED STATES DISTRICT COURT**
4 **CENTRAL DISTRICT OF CALIFORNIA**

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7 Federal Trade Commission,
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Plaintiffs,

v.

DAMIAN KUTZNER, individually and as an officer of BROOKSTONE LAW P.C. (California), BROOKSTONE LAW P.C. (Nevada), ADVANTIS LAW P.C., and ADVANTIS LAW GROUP P.C.; VITO TORCHIA, JR., individually and as an officer of BROOKSTONE LAW P.C. (California) and BROOKSTONE LAW P.C. (Nevada); JONATHAN TARKOWSKI, individually and as an officer of BROOKSTONE LAW P.C. (California) and BROOKSTONE LAW P.C. (Nevada); R. GEOFFREY BRODERICK, individually and as an officer of ADVANTIS LAW P.C. and ADVANTIS LAW GROUP P.C.; CHARLES T. MARSHALL, individually and as an officer of ADVANTIS LAW P.C. and ADVANTIS LAW GROUP P.C.; BROOKSTONE LAW P.C., d/b/a BROOKSTONE LAW GROUP, a California professional corporation; BROOKSTONE LAW P.C., d/b/a BROOKSTONE LAW GROUP, a Nevada professional corporation; ADVANTIS LAW P.C., a California professional corporation; ADVANTIS LAW GROUP P.C., a California professional corporation, and JEREMY FOTI, individually and as an officer of BROOKSTONE LAW P.C. (California), BROOKSTONE LAW P.C. (Nevada), ADVANTIS LAW P.C., and ADVANTIS LAW GROUP P.C.

Defendants.

No. 8:16-cv-00999-BRO (AFMx)

RESPONSE FROM DR. BRUCE ISAACSON TO DEFENDANT'S OBJECTIONS TO MY EXPERT REPORT OFFERED IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

1 1. I have been retained by the Federal Trade Commission (FTC) in the above matter. My
2 Expert Report in this matter, which I signed on June 5, 2017, provided the results of a survey I
3 conducted measuring the experiences of consumers who retained Brookstone Law P.C.
4 (“Brookstone”). My survey interviewed clients who had retained Brookstone, and asked about
5 their experience with that law firm, such as why they hired Brookstone, and what they were told
6 they could achieve by retaining Brookstone.

7 2. The Defendants in this matter have described their objections to my survey in a filing
8 entitled, “Defendant’s Objections to Expert Report Offered in Support of Plaintiff’s Motion for
9 Summary Judgment” (“Defendant’s Objections”).¹ This responsive report addresses the opinions
10 expressed in the Defendant’s Objections, including topics such as the questions asked in my
11 survey, whether my survey used double-blind research methods, the sample size and response rate
12 for my survey, and biases allegedly resulting from the methods used in my survey.

13 3. As described in this response, the Defendants’ criticisms of my survey are without merit,
14 and are not consistent with generally-accepted methods for surveys or with sources such as the
15 “Reference Guide on Survey Research.”² The Defendant’s Objections compare my survey in this
16 matter with a survey discussed in *In re Autozone, Inc.*,³ but their discussion does not recognize
17 important differences between the two surveys. Due to these differences, the Court’s criticisms in
18 *Autozone* do not apply to my survey.⁴

19 4. Specific objections provided by the Defendants, and my responses, include the following:
20 i. Questions used in my survey: The Objections criticized the questions asked in my
21 survey as leading, suggestive, not open-ended, or as providing innocuous
22 responses. However, the survey questions directly ask about issues in dispute in
23 this matter, use neutral phrasing, include an open-ended question, and provide

24 _____
25 ¹ The Defendant’s Objections are dated August 7, 2017.
26 ² *In Reference Manual on Scientific Evidence, Third Edition*. Federal Judicial Center, National Research
27 Council, 2011. This reference was cited in Footnote 19 to my report.
28 ³ *In re Autozone, Inc.*, 2016 U.S. Dist. LEXIS 105746, No. 3:10-md-02159-CRB (August 10, 2016).
⁴ The Defendants also make a misplaced comparison with the survey in *Duran v. U.S. Bank Nat. Ass’n*, 172
Cal. Rptr. 3d 371 (2014), which had only 21 respondents in the final database.

1 many responses that are not innocuous. In the Objections, the Defendants
2 recommend alternative phrasing for Question 6 from my survey, which asked,
3 “What, if anything, did Brookstone Law representatives say or suggest to you
4 about what you would achieve by hiring them?” Their recommended phrasing is
5 vague, and does not measure the issues disputed in this matter. The Objections
6 also claim that Question 6 is not open-ended, which is incorrect. Also, contrary to
7 the Defendant’s Objections, a response of “probably” is neither vague nor
8 speculative, but simply represents a different evaluation of the chances that an
9 outcome will occur than is indicated by a response of “definitely.”

10 ii. The use of double-blind research methods: The Defendant’s Objections criticize
11 the fact that my survey mentioned the Federal Trade Commission. The
12 Defendants’ claims that all surveys use double-blind methods are incorrect,
13 particularly when revealing the survey’s sponsor can provide credibility to increase
14 response rates, and is not likely to affect survey responses. As I explained in my
15 Expert Report, my survey mentioned the FTC because otherwise respondents
16 might have been suspicious about why they were called. Contrary to the
17 Defendant’s Objections, my survey was partially blinded, because both
18 respondents and interviewers were not told of the survey’s purpose, and also not
19 told that the survey was conducted for use in a litigation matter.

20 iii. Sample size and response rate: The Defendants argue that the sample size and
21 response rate for my survey were inadequate. However, my survey has sufficient
22 sample size to provide reliable results with an acceptable margin of error, as shown
23 by statistical calculations in this report. Although the Defendants claim that the
24 response rate for my survey was 5.4%, it was actually 20.6% or 29.2%, using
25 proper calculation methods. The Defendants’ response rate calculation includes
26 records that should be excluded, such as contact records that had no working
27 phone number. Also, my Expert Report clearly described the methods for
28 contacting respondents at random.

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iv. Other comparisons with the *Autozone* survey: The Defendants compare my survey in this matter with the survey in *Autozone*, and raise criticisms based on nonresponse, self-interest bias, and whether respondents can remember events related to the survey. However, my survey is very different from the *Autozone* survey, and was conducted in a different context. The rate of nonresponse in my survey is much lower than the Defendants calculated. The chain of events that would be required to create self-interest bias in my survey is unlikely, and those events may work in favor of the Defendants. Also, the importance and infrequency of the events asked about in the survey make it likely that respondents will remember those events.

5. After addressing my qualifications, materials reviewed, and compensation, I will address the Defendants' arguments in more detail.

Qualifications, Materials Reviewed, and Compensation

6. As I described in my Expert Report, over my career I have personally designed, conducted, and analyzed many hundreds of research studies, including surveys for matters involving litigation. I have conducted surveys, and provided testimony relating to my surveys, in matters involving federal courts, the Trademark Trial and Appeal Board (TTAB), the United States Department of Justice, the United States Federal Trade Commission, the United States International Trade Commission, the National Advertising Division of the Better Business Bureau, and other venues and authorities.

7. For purposes of this responsive report, I have reviewed the Defendant's Objections to Expert Report Offered in Support of Plaintiff's Motion for Summary Judgment, dated August 7, 2017. I have also reviewed other materials referenced in this report.

8. For my current activities in this matter, my time is billed at \$600 per hour.

1 **Responses to The Defendant’s Objections**

2 9. This section describes my responses to the Defendant’s Objections in detail.

3
4 I. The Defendants’ criticisms of the survey questions lack merit.

5 10. The Defendant’s Objections criticized the questions asked in my survey as leading,
6 suggestive, not open-ended, and as merely providing innocuous responses. However, the
7 questions directly ask about issues in dispute in this matter, use neutral phrasing, include an open-
8 ended question, and provide many responses that are not innocuous. Also, contrary to the
9 Defendant’s Objections, a response of “probably” is neither vague nor speculative.

10 11. In their Objections, the Defendants claim that my survey asked 23 questions of
11 respondents, and “... all 23 are leading and suggestive.”⁵ Even a casual review of the questions
12 asked in my survey show that this is obviously not true. For example, Questions 1, 2, 3, 4, and 5
13 ask whether the respondent, or a second name listed in the contact record, ever hired a law firm
14 called Brookstone Law, Advantis Law, or Darcy Law. Question 11 is an instruction that tells the
15 respondent how to answer questions if they have hired Brookstone Law or Advantis Law
16 regarding more than one mortgage. Given that these 6 questions merely provide instructions or
17 ask about retaining a particular law firm, it cannot be true that all 23 questions in the main part of
18 the survey are leading or suggestive.

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28 ⁵ Defendant’s Objections to Expert Report Offered in Support of Plaintiff’s Motion for Summary Judgment (“Defendant’s Objections”), p. 3, lines 6-9. See also p. 11, lines 1-2.

1 12. As I described in my Expert Report, the other survey questions are asked in a manner that
2 is as non-leading and non-suggestive as possible. For example, the question phrasing provides
3 equal emphasis to the affirmative and the negative response options. The order of presenting
4 response options is rotated, so the affirmative and negative response options have an equal chance
5 of being presented first. Also, the survey uses filter questions to make sure that respondents were
6 only asked questions relevant to them. For example, Question 13 asked what the law firm’s
7 representatives said or suggested about the likelihood that the terms of the mortgage would be
8 changed; this question was only asked of respondents who previously indicated in Question 12
9 that the law firm’s representatives said or suggested something about the likelihood that the terms
10 of their mortgage would be changed as a result of hiring that law firm. Among other filter
11 questions, Questions 7 and 8 served as filters for Question 9, Question 10 was a filter for
12 Questions 11 through 23, Question 12 was a filter for Questions 13 through 15, and Question 14
13 was a filter for Question 15. The survey included other filter questions as well.

14 13. Question 6 in my survey asked, “What, if anything, did Brookstone Law representatives
15 say or suggest to you about what you would achieve by hiring them? If you don’t know or don’t
16 remember, please say you don’t know or don’t remember. Please be as specific as possible.” The
17 Defendant’s Objections discuss this question at length. The Defendants maintain that “...
18 question 6 is *not* open-ended.”⁶ The Defendants also argue that Question 6 implies that
19 Brookstone representatives said something to respondents about what they would achieve by
20 hiring Brookstone, while a “... a truly open-ended question would be, ‘Describe in your own
21 words the discussions, if any, between you and Brookstone representatives.’”⁷

22 14. The Defendants’ criticisms of Question 6, as well as other questions in my survey, are
23 without merit, and, for some criticisms, factually incorrect. For example, despite the Defendants’
24 claims, Question 6 is in fact open-ended. An open-ended question is one which is answered in the
25 respondents’ own words, and this is true of Question 6.⁸

26 ⁶ Defendant’s Objections, p. 6, line 4.

27 ⁷ Defendant’s Objections, p. 6, lines 6-10.

28 ⁸ The Reference Guide (p. 391) states, “Open-ended questions require the respondent to formulate and express an answer in his or her own words...”

1 15. The Defendants suggest alternative phrasing for Question 6, but their phrasing is vague,
2 and does not inquire about the issues disputed in this matter. My understanding is that the FTC
3 alleges that the Defendants made certain statements to prospective clients to induce them to hire
4 Brookstone. For example, the First Amended Complaint states that the Defendants convince
5 prospective clients "... to purchase legal services by telling them that they are likely to prevail in
6 lawsuits against their lenders. Often Defendants tell consumers they will receive at least \$75,000
7 by suing their lender."⁹ In other sections, the First Amended Complaint discusses outcomes that
8 the Defendants' representatives allegedly told prospective clients their law firm could achieve.¹⁰
9 Similarly, Declarations from prior clients describe statements allegedly made by the Defendants
10 as those clients were deciding whether to hire the Defendants' law firm.¹¹ Also, scripts describe
11 interactions between the Defendants' representatives and potential clients, including references or
12 implications regarding future accomplishments.¹²

13 16. These documents show that this dispute involves questions regarding whether
14 Brookstone's representatives said or suggested that prospective clients could achieve certain
15 things if they hired Brookstone. Question 6 is phrased to provide evidence on this issue by asking
16 Brookstone's clients what Brookstone's representatives said or suggested that the clients would
17 achieve by hiring Brookstone. All survey respondents were qualified in Question 1 as having
18 hired Brookstone. It is reasonable to expect that they hired Brookstone to achieve something.
19 The phrasing of Question 6 merely asks what, if anything, they were told they would achieve if
20 they hired Brookstone.

21 _____
22 ⁹ First Amended Complaint for Permanent Injunction and Other Equitable Relief, p. 7, paragraph 16.
23 ¹⁰ For example, First Amended Complaint, pp. 8, 9, 11, 12, 13, 15, and 17.
24 ¹¹ See Declarations and Exhibits Filed in Support of Plaintiff's Ex Parte Application for Temporary
25 Restraining Order With Asset Freeze, Appointment of Temporary Receiver, Limited Expedited Discovery,
26 and Other Equitable Relief, and Order to Show Cause Why Preliminary Injunction Should Not Issue, filed
27 5/31/16, including Declaration of Jesse Chapman, pp. 7, 8; Declaration of Teresa Irannejad, pp. 5, 6, 7;
28 Declaration of Ronald Kolodziej, pp. 7, 8; Declaration of Richard Leonido, pp. 8, 10; Declaration of
Michael Nava, p. 26; Declaration of Raymond Navarro, p. 9; Declaration of Mario Rios, pp. 3, 4; and
Declaration of Malu Lujan, p. 6.
¹² For example, see FTC-RAD-001-0171362, 364, 370, 374, 375, and 376; Document 41-2 Page ID # 2521,
2523, 2526, 2529 and 2532; FTC-RAD-001-0039885, 9958, 9889, and 9890; FTC-RAD-001-0089958;
FTC-RAD-001-0108052, 8057, and 8058; FTC-RAD-002-0133018 and 3019; FTC-RAD-002-0133023
and 3025; FTC-RAD-002-0135922; and FTC-RAD-002-0233901.

17. The alternative phrasing recommended by the Defendants is not sufficiently specific to answer the question of what respondents were told they could achieve by hiring Brookstone. The Defendants' phrasing would ask, "Please describe what was said in your communications with Brookstone representatives." A respondent answering the question as phrased by the Defendants could answer about any aspect of those communications, including the topic (such as how to find Brookstone's offices), the tone (such as whether Brookstone's representatives were polite and friendly), the frequency (such as whether they occurred daily, weekly, or monthly), the mode (such as whether they occurred in person, by phone, or by email), or many other aspects. The alternative phrasing recommended by the Defendants does not provide data that answers the question involved in this dispute.

18. In addition to the criticisms mentioned previously, the Defendants also argue that Question 6, as well as other questions in my survey, are compound because they reference both "say" and "suggest." Also, the Defendants argue that my report is vague, in part because it references response options that were answered as "definite," as well as "probable."¹³

19. The phrasing "say" and "suggest" is appropriate because it incorporates concepts that are explicitly communicated (which someone may "say") and concepts that are communicated in an implicit or implied manner (which someone may "suggest"). Neither of these words are vague, and they are both used in the survey because they address related but different concepts. Surveys that I and others have conducted to measure communications routinely use similar constructions, with the specific phrasing adapted for the particular context of the survey.¹⁴

20. The Objections also argue that my report should not have referenced "definitely or probably" responses, because a "probably" response is "vague and borders on speculative."¹⁵ My

¹³ Defendant's Objections, p. 10, lines 12-25.

¹⁴ For example, a false advertising survey I conducted used the phrase "communicated or implied." (*Church & Dwight v. SPD Swiss Precision Diagnostics*, 14-CV-585 (AJN), U.S. District Court, Southern District of New York, 2015). Other surveys I did not conduct used similar constructions, with phrases such as "imply or state," (*Sanderson Farms*, 547 F. Supp. 2d at 500-01), or "say or suggest" (Manoj Hastak and Dennis Murphy, "Effects of Bristol Windows Advertisement with an 'Up To' Savings Claim on Consumer Take-Away and Beliefs," Federal Trade Commission, 2012) <https://www.ftc.gov/sites/default/files/documents/reports/effects-bristol-windows-advertisement-savings-claim-consumer-take-away-beliefs/120629bristolwindowsreport.pdf>).

¹⁵ Defendant's Objections, p. 10, lines 23-25.

1 report used the phrasing “definitely or probably” because many of the questions in my survey
2 provided respondents with six possible responses, that included some form of “definitely would,”
3 “probably would,” “might or might not,” “probably would not,” “definitely would not,” and
4 “don’t know or don’t remember.” The exact phrasing of these responses was altered to match the
5 construction of each question.

6 21. Contrary to the Defendant’s Objections, a response of “probably” is neither vague nor
7 speculative, but simply represents a different evaluation of the chances that an outcome will occur
8 than is indicated by a response of “definitely.” Respondents who felt that any assessment of the
9 chances that an outcome will occur would be guessing or speculation were offered an option to
10 indicate they didn’t know, and were previously instructed (among other instructions) not to guess.
11 My Expert Report provides data for the “definitely” and “probably” responses combined, and also
12 breaks out “definitely” responses separate from “probably” responses. If the Defendants wish to
13 focus only on “definitely” responses, the Expert Report provides the data to do so.

14 22. The Defendant’s Objections also claim that some of the verbatim responses from my
15 survey that are listed in my Expert Report are “innocuous,” and that only 28% of respondents
16 allege that they paid money to Brookstone.¹⁶ This objection is misleading. All of the verbatim
17 responses listed in my Expert Report come from Question 6. Pages 20 through 23 of my Expert
18 Report list some of the verbatim responses from Question 6. When deciding whether any of these
19 comments are indeed innocuous, it is important to remember that verbatim responses to open-
20 ended questions like Question 6 capture a respondent’s top-of-mind answers, in their own words.
21 While some of the responses were innocuous, many were not. As I stated in my Expert Report,
22 some comments were worded quite strongly.

23 23. Importantly, open-ended questions do not gather exhaustive or comprehensive answers to
24 everything that the respondent knows or is thinking about a subject. For example, Question 6 did
25 not ask respondents if they paid any money to Brookstone, or how much money they paid.
26 However, as shown in Table A of my Expert Report, 28.3% of respondents who provided a
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28 ¹⁶ Defendant’s Objections, p. 8, lines 7-8.

1 verbatim response to Question 6 indicated that they paid Brookstone money or that Brookstone
2 charged them fees. These respondents were asked about the things that Brookstone
3 representatives said or suggested they would achieve, not about whether they paid Brookstone, or
4 how much they paid. Still, in response to Question 6, a number of respondents provided an
5 answer that referenced money or fees. Given that Question 6 is open-ended, it is not correct to
6 conclude that respondents who did not mention payments or fees in response to Question 6 did
7 not pay any money to Brookstone.

8
9 II. Criticisms of my survey for lack of double-blind methods and presence of bias are
10 not valid.

11 24. The Objections criticized my survey for mentioning the Federal Trade Commission, and
12 maintain that double-blind methods are required in surveys. However, given that the survey
13 interviewed Brookstone clients, it was appropriate to mention the FTC to lend credibility to the
14 survey and raise response rates. Despite statements in the Objections, double-blind methods are
15 not always used in surveys, and my survey was partially blinded.

16 25. In their Objections, the Defendants criticize my survey for mentioning the Federal Trade
17 Commission. The Defendants maintain that this violates double-blind research methods, which
18 they argue are “requisite,” “requirements,” and “critical... to a survey’s objectivity and
19 reliability.”¹⁷ They cite the Reference Guide on Survey Research in support of their argument,
20 and also maintain that my Expert Report acknowledges “... the importance of a double-blind
21 interviewing technique,” and “... fully endorses the necessity of conducting surveys on a double-
22 blind basis.”¹⁸

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¹⁷ Defendant’s Objections, p. 3, lines 20-25.

28 ¹⁸ Defendant’s Objections, p. 4, lines 12-13 and 18-19.

1 26. The Objections maintain that identifying the FTC as the survey’s sponsor created bias
2 among the responses, as some respondents were likely at risk, distressed homeowners.¹⁹ The
3 Defendants also maintain that that interviewers were made aware of the “purpose and intended
4 outcome of the survey.”²⁰

5 27. The Defendants’ discussion relating to double-blind research methods is incorrect in two
6 respects: whether double-blinding is a required element of all surveys, and whether my survey
7 was not blinded. This section addresses both of these issues.

8 28. Double-blind research methods are not required in all surveys. Despite the Defendants’
9 claims, my Expert Report in this matter does not contain any statement or assertion suggesting
10 that double-blinding is critical, important, requisite, or required in this matter. Similarly, the
11 section of the Reference Guide cited in the Defendant’s Objections²¹ does not state that double-
12 blind research is always standard practice in litigation surveys, but rather states that double-blind
13 methods are standard practice “whenever possible.” The Reference Guide also suggests that
14 researchers evaluate the likely biases introduced by awareness of the survey’s sponsorship, such
15 as whether the sponsor has views and expectations that are apparent.²² The Reference Guide goes
16 on to state, “Nonetheless, in some surveys (e.g., some government surveys), disclosure of the
17 survey’s sponsor to respondents (and thus to interviewers) is required.”

18 29. As I described in my report, it was appropriate to reveal the FTC as the survey’s sponsor
19 to help establish the survey’s legitimacy. Otherwise, prospective respondents might have been
20 suspicious about the survey and how their name was obtained. If the FTC’s allegations in this
21 matter are true, potential respondents contacted for the survey, at some point, were contacted by
22 the Defendants, and paid the Defendants for mortgage-related services that were not provided as
23 promised. Such respondents may be wary or suspicious of future telephone calls involving

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25 ¹⁹ As noted in my Expert Report, none of the responses to open-ended questions referenced the FTC’s
26 litigation against Brookstone, the FTC, the federal government, any state government, or any other
27 government agency or entity.

28 ²⁰ Defendant’s Objections, p. 5, lines 9-11 and 20-25. See also p. 6, lines 2-3.

²¹ Defendant’s Objections, p. 4.

²² Reference Guide on Survey Research, Third Edition, p. 411.

1 mortgage-related inquiries. The FTC alleges that these respondents include distressed
2 homeowners at risk of foreclosure; such respondents may have been hesitant to participate in a
3 survey asking them about experiences related to their mortgage, as they may have viewed this
4 topic as sensitive, private, or in some way relating to or reflecting negatively on their self-
5 image.²³

6 30. Mentioning the FTC allowed the survey to demonstrate legitimacy, which likely
7 encouraged participation and increased response rates.²⁴ Importantly, as I mentioned in my
8 Expert Report, the FTC was mentioned in a manner designed to avoid bias. The survey
9 mentioned the FTC in a single instance, where the interviewer stated, “I am calling on behalf of
10 MMR Strategy Group and we are conducting a brief survey sponsored by the Federal Trade
11 Commission.” The FTC was mentioned briefly, in a neutral manner, in the same sentence that
12 mentioned MMR Strategy Group. The interviewers did not describe the Federal Trade
13 Commission, did not explain the FTC’s purpose or mission, and did not mention that the survey
14 was conducted in conjunction with litigation or with an investigation into possible false or
15 misleading practices. (Some respondents may have known the Federal Trade Commission only
16 as a government agency, and may not have known that it investigates companies for marketplace
17 practices that may be false or misleading.)

18 31. Despite the claims made in the Objections, double-blinding is not a required element of all
19 surveys. In fact, as I mentioned in my Expert Report, many surveys do not use double-blind
20 methods, such as the following:

- 21 i. The United States Census, conducted by the U.S. Census Bureau.²⁵

22 _____
23 ²³ Survey respondents may be hesitant to discuss topics that they view as personal, possibly threatening,
and/or involving issues of self-presentation or social desirability. See Seymour Sudman and Norman M.
Bradburn, *Response Effects in Surveys*. Aldine Publishing Company, 1974, Chapter 2: Task Variables.

24 ²⁴ Seymour Sudman, “Survey Research and Ethics,” *NA - Advances in Consumer Research Volume 25*, eds.
25 Joseph W. Alba and J. Wesley Hutchinson, Association for Consumer Research, 1998, pp. 69-71. (“If there
is reason to believe that the sponsor’s identity will affect people’s willingness to participate in the research,
26 then the sponsor should be identified.”) See also, William G. Zikmund and Barry J. Babin, *Essentials of*
Marketing Research, South-Western Cengage Learning, 2012, p. 176. (“Sponsorship by well-known and
27 prestigious organizations such as universities or government agencies may significantly improve response
rates.”)

28 ²⁵ The 2010 Census questionnaire (<https://www.census.gov/history/pdf/2010questionnaire.pdf>).

- 1 ii. The National Survey on Drug Use and Health, conducted by the U.S. Department
- 2 of Health and Human Services.²⁶
- 3 iii. The National Survey of Family Growth, conducted by the Centers for Disease
- 4 Control and Prevention.²⁷
- 5 iv. The Current Population Survey, conducted by the Bureau of Labor Statistics.²⁸

6 32. In at least one other matter, an expert report revealing the FTC as the sponsor of a survey
7 was upheld. In that matter, as in this matter, the survey was conducted among respondents who
8 had purchased from the defendants, so, “... it was important to give respondents confidence that
9 the sponsor of the survey was credible and legitimate, and to avoid any confusion or suspicion
10 about who was sponsoring the survey. To name no sponsor but to reveal knowledge of the
11 product purchase would implicitly (and falsely) convey to survey respondents that the survey was
12 sponsored by the defendants or by someone who had come by the consumers’ contact information
13 illegitimately.”²⁹

14 33. As mentioned earlier, respondents may be hesitant to discuss sensitive topics that they feel
15 relate to or threaten their self-image, which can include income, weight, personal finances, or
16 other topics. The surveys listed above reveal the name of the sponsor, at least in part, to establish
17 legitimacy, particularly when a survey deals with a sensitive topic, such as income or health
18 behaviors. Similar circumstances apply to my survey in this matter.

19 34. The second flaw with the Defendants’ arguments about double-blind research methods is
20 that my survey was partially blinded. There are a number of different types of blinding in
21 surveys. For example, blinding can apply either to interviewers or respondents, and it can involve
22 awareness of a survey’s sponsor or a survey’s purpose.

24 ²⁶ The National Survey on Drug Use and Health, conducted by the U.S. Department of Health and Human
Services (<https://nsduhweb.rti.org/respweb/homepage.cfm>)

25 ²⁷ The National Survey of Family Growth, conducted by the Centers for Disease Control and Prevention
26 (<https://www.cdc.gov/nchs/nsfg/index.htm>)

27 ²⁸ The Current Population Survey, conducted by the Bureau of Labor Statistics (<https://www.bls.gov/cps/>)

28 ²⁹ *Federal Trade Commission v. John Beck Amazing Profits*, U.S. District Court, Central District of
California, Case No. CV-09-4719-JHN (CWx). Quote from Second Declaration of Frederica Conrey,
Ph.D., dated October 7, 2011, p. 4.

1 35. In my survey, interviewers and respondents knew that the Federal Trade Commission was
2 the sponsor of the survey. However, respondents and interviewers were blind as to the survey's
3 purpose. The survey's introduction, and all other communications with interviewers and
4 respondents, did not communicate that the survey was conducted for use in litigation, or even that
5 there was any litigation. The sponsor of the survey was appropriately revealed to interviewers
6 and respondents, but the purpose of the survey was blinded.

7
8 III. Criticisms of my survey's sample size and response rate are without basis.

9 36. In their Objections, the Defendants criticize the sample size and response rate from my
10 survey. These criticisms are factually inaccurate and without merit. My survey has sufficient
11 sample size to provide reliable results with an acceptable margin of error. Although the
12 Defendants claim that the response rate for my survey was 5.4%, it was actually 20.6% or 29.2%,
13 when using an appropriate calculation method. Also, my Expert Report clearly described the
14 methods for contacting respondents at random. The criticisms reference surveys in the *Autozone*
15 and *Duran* matters, but my survey methods, sample size, and response rate are very different than
16 the surveys conducted in those matters.

17 37. In their Objections, the Defendants claim that my survey sample of 138 interviews is too
18 small to be reliable.³⁰ This is not correct. The key question regarding the sample size for a
19 survey is whether it provides a sufficient number of interviews so that the measures from the
20 survey are stable and reliable. This can be evaluated using statistics to calculate the margin of
21 error associated with the measures from the survey.³¹

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³⁰ Defendant's Objections, p. 7, lines 17-23.

27 ³¹ Because the data were gathered by "convenience sampling," the margin of error should be treated as a
28 general indicator of the reliability of the survey results. See Reference Guide on Survey Research, cited
earlier, pp. 382-383.

1 38. For example, Question 10 in my survey asked which, if any, of certain outcomes
2 Brookstone Law representatives said or suggested that the respondent would achieve by hiring
3 Brookstone. In response, 85.5% of respondents indicated they would achieve at least one
4 outcome.³² The margin of error associated with 85.5%, at a sample size of 138 interviews, at the
5 95% level of confidence, is approximately plus or minus (+/-) 5.9%. Similarly, Questions 9, 13,
6 17, 21, and 23 asked what Brookstone’s representatives said or suggested about the likelihood
7 that certain events would occur. In response, 80.4% of respondents answered that Brookstone’s
8 representatives said or suggested that they would definitely or probably achieve at least one of
9 five outcomes.³³ The margin of error associated with 80.4%, at a sample size of 138 interviews,
10 at the 95% level of confidence, is approximately +/- 6.6%.³⁴

11 39. In my experience, these margins of error, and margins of error for other measures from the
12 survey, are well within the range typically expected of survey measures. In other words, a sample
13 size of 138 interviews is sufficiently large to provide a stable and reliable basis for analysis, and is
14 associated in this context with an acceptable margin of error.

15 40. The Defendant’s Objections compare my survey to the survey in *Duran*,³⁵ but the
16 comparison is misplaced. The sample size of the *Duran* survey included only 21 respondents, and
17 had a margin of error of +/- 43.3 percent. The sample size for my survey is 138 respondents,
18 much larger than the *Duran* survey. As a result, the margin of error associated with the measures
19 from the *Duran* survey are much larger than the margin of error associated with the measures
20 from my survey in this matter.

21 _____
22 ³² As shown in Table E of my Expert Report, the outcomes included changing the terms of their mortgage,
receiving money, having their mortgage voided, and getting their property free and clear of their mortgage.

23 ³³ As shown in Table R of my Expert Report, the events included winning their lawsuit, changing the terms
24 of their mortgage, receiving money, having their mortgage voided, and getting their property free and clear
of their mortgage.

25 ³⁴ The margin of error at the 95% level of confidence is approximately (SE X 1.96). SE is the standard
26 error, calculated as the square root of (p X (1-p)/n). The margin of error can be used to calculate a
confidence interval, which equals the measured percentage plus or minus the margin of error. See, for
27 example, *Introduction to the Practice of Statistics, Sixth Edition*, by David S. Moore, George P. McCabe,
and Bruce A. Craig, W.H. Freeman and Company, 2009, Chapter 8.

28 ³⁵ *Duran v. U.S. Bank Nat. Ass’n*, 172 Cal. Rptr 3d 371 (2014). The comparison is from Defendant’s
Objections, p. 7, lines 22-24.

1 41. The Defendant’s Objections also state that “many of the survey questions were only posed
2 to smaller sub-sets of the 138 respondents. For example, question number 15 was asked of only
3 28 of the 138 respondents.”³⁶ That criticism ignores my survey’s use of filter questions. As
4 described earlier, filter questions make sure respondents are only asked questions relevant to
5 them. Filter questions “... lay the groundwork for the substantive question by first asking the
6 respondent if he or she has an opinion about the issue or happened to notice the feature that the
7 interviewer is preparing to ask about.”³⁷ By asking a substantive question only of those
8 respondents who provided certain responses to a preceding filter question, filter questions ensure
9 that the substantive question is only asked of respondents who can provide an informed answer.
10 The use of filter questions can reduce guessing and “weed out ‘yea-sayers’.”³⁸

11 42. While the Objections criticize my survey for incorporating filter questions, the Objections
12 provide no basis or explanation as to why filter questions are not acceptable. Indeed, filter
13 questions are frequently necessary in litigation surveys.

14 43. For example, Question 14 in my survey asked, “Did any of the law firm’s representatives
15 say or suggest anything about how the terms of your mortgage would be changed?”³⁹ The 28
16 respondents who answered “Yes” to Question 14 were asked Question 15, “Did any of the law
17 firm’s representatives say or suggest anything about the following types of changes to the terms
18 of your mortgage as a result of hiring them?”⁴⁰ The respondents who answered “No” or “I don’t
19 know or don’t remember” to Question 14 were not asked Question 15 because their answer to
20 Question 14 made Question 15 irrelevant for them. This filtering process is not a flaw in the
21 survey, but standard survey practice that improves the reliability of responses to properly-filtered
22 substantive questions.

23 ³⁶ Defendant’s Objections, p. 3, lines 15-17. In my Expert Report, I noted the low response rate for those
24 particular questions and explained that those numbers “should be interpreted with caution given the small
25 sample size.”

26 ³⁷ Reference Guide on Survey Research, Third Edition, p. 390.

27 ³⁸ “Survey Evidence in False Advertising Cases,” by Bruce P. Keller, in *Trademark and Deceptive*
28 *Advertising Surveys: Law, Science, and Design*, edited by Shari Seidman Diamond and Jerre B. Swann.
American Bar Association, 2012, p. 188.

³⁹ See my Expert Report, paragraph 45.

⁴⁰ See my Expert Report, paragraph 45.

1 44. Even with the use of filter questions, almost all substantive questions in my survey still
2 had substantial sample sizes. For items numbered from Question 1 to Question 23 in my survey,
3 which included 19 actual questions asked of respondents,⁴¹ only 2 questions were asked of 28
4 respondents, compared with 15 questions asked of at least 50 respondents, and 10 questions asked
5 of at least 80 respondents.

6 45. The Objections also claim that the response rate of my survey was 5.4%.⁴² This is also
7 incorrect. As I stated in my Expert Report, the FTC provided me with an electronic file listing
8 customers of Brookstone Law and/or Advantis Law. I understand that the FTC compiled the list
9 from records maintained by the Defendants. After removing duplicates and records with invalid
10 phone numbers, the list contained 2,551 records,⁴³ but not all of these records had valid contact
11 information. Because the list came from records maintained by the Defendants, the quality of the
12 list depended on the Defendants' record keeping.

13 46. Table A below shows the disposition of each name contacted from the list. As shown in
14 Table A, many of the records could not be reached, or were invalid for other reasons.

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26 ⁴¹ The remaining four items did not ask questions of any respondent, including Question 2, Question 4,
27 Question 5, and Question 11.

28 ⁴² Defendant's Objections, p. 7, line 22.

⁴³ See my Expert Report, p. 3. A valid phone number is not necessarily the correct phone number for that respondent.

Table A: Disposition of Contact List

Disposition	Number of Records
Total Records	2,551
Non-reachable records	1,880
Non-working number	667
Answering machine	615
No answer	189
Callbacks	177
Language problem	94
Non-residential	74
Fax/modem	42
Busy	21
Maximum attempts	1
Reachable records ⁴⁴	671
Interviews terminated for not qualifying	50
Reachable records after qualification	621
Completed interviews (final sample size)	138
Completed interviews removed from the database	58
Initial refusal	410
Breakoff part way or incomplete interviews	15

47. Of 2,551 records in the initial list, 1,880 were not reachable, leaving 671 reachable records. Of those 671 records, 50 were terminated for not qualifying for the survey, leaving 621 reachable and qualified records. Of those, 196 completed the survey. Respondents who were terminated, or who completed the survey, are shaded in Table A. The remaining records include 410 who refused to participate in the survey, and 15 who began but did not complete the survey.

⁴⁴ Details for completed interviews removed from the database, and of terminated interviews, are provided in Exhibit 4 to my Expert Report. As explained in Exhibit 4, respondents were terminated or removed because they had never hired, or did not know if they had hired, Brookstone or Advantis; for inattentive verbatim responses; and for responses to the control question (Q.3).

1 48. There are a number of ways to properly calculate the response rate. Using a method from
2 the *Autozone* case cited by the Defendants, which divides usable responses by reachable records,
3 my survey's response rate is 20.6%.⁴⁵ An alternative method for calculating response rate divides
4 all completed interviews by the number of reachable records after qualification; this response rate
5 is 29.2%.⁴⁶ These calculations do not reflect the 50 interviews in which respondents were
6 terminated for giving non-qualifying responses. After accounting for those interviews, the
7 response rate of my survey would be even higher. The Objections compare the response rate in
8 my survey to a 3.43% to 6.0% response rate for the survey in *Autozone*.⁴⁷ The lowest properly
9 calculated response rate associated with my survey is more than three times that of the *Autozone*
10 survey.⁴⁸ In my experience, the response rate for my survey meets or exceeds expectations for a
11 telephone survey.⁴⁹

12 49. One additional comment applies regarding the discussion of sample size. The Defendant's
13 Objections also claim that my report does not explain how my sample was selected using a
14 random sampling method.⁵⁰ On the contrary, my report explains the random sampling method in
15 detail, in paragraph 49 and footnote 26 of my Expert Report. These two locations explain the
16 sequence of dialing records, the number of calls made to each record, the days that calls were
17 made, and other details. The criticism that my report does not explain the random selection
18 process is unsupported.

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⁴⁵ Calculated as 138 completed interviews divided by 671 reachable records.

23 ⁴⁶ Calculated as 138 plus 58 completed interviews divided by 671 reachable records.

24 ⁴⁷ Defendant's Objections, p. 7, lines 17-26.

25 ⁴⁸ If 6.0% is used as a comparison, my response rate is more than 3 times the response rate from *Autozone*.

26 ⁴⁹ Even if my survey had a higher rate of nonresponse, the survey nonresponse rate is a highly imperfect
27 predictor of nonresponse bias ("...while nonresponse bias clearly does occur, the nonresponse rate of a
survey alone is not a very good predictor of the magnitude of the bias." Robert M. Groves, "Nonresponse
Rates and Nonresponse Bias in Household Surveys," *Public Opinion Quarterly*, Vol 70, No.5, Special
Issue 2006, p. 662.

28 ⁵⁰ Defendant's Objections, p. 7, lines 25-26.

1 IV. Comparisons to the survey in *Autozone* are not appropriate, as my survey is very
2 different from the survey in *Autozone*.

3 50. The Defendants compare my survey in this matter with the survey in *Autozone*, but the
4 two surveys are very different, and were conducted in different contexts. Unlike in *Autozone*, the
5 chain of events that would be required to create self-interest bias in this context are unlikely (and
6 those events may work in favor of the Defendants). Also, the importance and infrequency of the
7 events asked about in this survey make it likely that respondents will remember those events.

8 51. The Defendants incorrectly argue that a number of biases have affected the survey results.

9 52. For example, the Defendants argue that the results may have been affected by nonresponse
10 bias, which the Objections describe as "... a failure to account/adjust for respondents who self-
11 select out of the survey."⁵¹ As described earlier, my survey's response rate is much higher than
12 calculated in the Objections, and my survey's nonresponse rate is much lower than calculated in
13 the Objections. Consequently, nonresponse bias is not a problem in my survey.

14 53. The Objections also discuss "self-interest bias," which is described as a connection
15 between potential monetary gain for the respondent, and the survey responses that respondent
16 provides. According to the Defendants, because respondents knew that the FTC sponsored the
17 survey, there was a "... risk that respondents would make a connection between monetary gain
18 and how they responded to survey questions." The Objections suggest that "... negative answers,
19 critical of Brookstone's conduct, could lead to an FTC action against it, potentially resulting in
20 monetary gain to the respondents."⁵²

21 54. The chain of events that Defendants posit as due to self-interest bias is far-fetched and
22 extremely unlikely. Neither interviewers nor respondents were told the purpose of the survey, or
23 informed that the survey was used for an FTC investigation or for any type of litigation. The
24 questionnaire provided no suggestion that certain types of survey responses could lead to
25 monetary gain, and the Objections do not explain how a respondent might come to believe that
26 answers critical of Brookstone might lead to monetary gain. In fact, it is possible that some

27 ⁵¹ Defendant's Objections, p. 8, lines 10-12.

28 ⁵² Defendant's Objections, p. 9, lines 14-15, 23-25.

1 respondents may not know of the FTC’s roles or responsibilities, other than having a general
2 sense that the FTC is a government agency. To accept the idea of self-interest bias, one would
3 have to accept that a single mention of the Federal Trade Commission in the survey’s instructions
4 has a material effect on the survey results by leading respondents to realize that there is an action,
5 causing them to assume they potentially stood to gain from the action, and to also believe that
6 they would only gain if they provided answers critical of Brookstone.

7 55. Although the Defendants compare my survey in this matter to the survey in *Autozone*, the
8 facts were much different in that case. The survey in *Autozone* was conducted for a class action
9 matter, and the survey respondents were members of the class who were told, “Your contact
10 information was obtained as part of a class action lawsuit.... The information you provide will be
11 used in connection with this lawsuit to help resolve it.”⁵³ Unlike the survey in *Autozone*, my
12 survey was not conducted among class members for a class action lawsuit, respondents in my
13 survey were not told about the existence of a lawsuit of which they may be beneficiaries, and
14 were also not told that their answers would be used as part of the lawsuit. The analogy between
15 my survey in this matter and the survey in *Autozone* is misplaced and inappropriate.

16 56. The Defendants also maintain that another *Autozone* factor applies to my survey, positing
17 that the events that are the subject of my survey “... occurred far enough in the past that the
18 responses were unreliable...”⁵⁴

19 57. Once again, the analogy is misplaced. The decision in *Autozone* asked about events that
20 had occurred between 3 ½ and 11 years ago, and might be difficult for some respondents to
21 remember, because they involved the specific length of their work shifts and the number of breaks
22 they took. The court noted inconsistencies in respondents’ answers on these questions that
23 appeared to be due to the difficulty inherent in remembering “... specific information they would
24 have no way of recalling,”⁵⁵ such as relatively small differences in shift lengths.

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26 _____
⁵³ *In re Autozone, Inc.*, p. 41, lines 6-9.

27 ⁵⁴ Defendant’s Objections, p. 10, lines 8-9.

28 ⁵⁵ *In re Autozone, Inc.*, p. 42, lines 5-6.

1 58. My survey was quite different. Based on the First Amended Complaint, I understand that
2 the Defendants have marketed mortgage relief services since 2011,⁵⁶ so the furthest back a
3 respondent in my survey might be asked to recall is 6 years. Unlike the events in *Autozone*,
4 which involved shift lengths calculated over a relatively long period of time, my survey asked
5 about hiring Brookstone, an event that, for most respondents was likely to occur only once.

6 59. Also, for most respondents, hiring Brookstone was likely a major decision. According to
7 scripts supplied by the Defendants, respondents who hired Brookstone were asked to first meet in
8 person with a Brookstone representative, at Brookstone’s offices. Respondents paid substantial
9 sums of money, allegedly amounting to thousands of dollars, to retain Brookstone, and they
10 retained Brookstone to address a major event, namely difficulty with a mortgage, the largest
11 financial instrument many consumers ever obtain.

12 60. Marketers typically distinguish between “low involvement” decisions and “high
13 involvement” decisions. High involvement decisions are those that involve greater consequences,
14 such as the purchase of medical care, education, a home, or legal services such as Brookstone’s
15 services. They can be contrasted with low involvement decisions, such as the decision about
16 whether to buy a pack of gum on impulse at a drug store. If the consumer selects the wrong pack
17 of gum, the consequence is much lower than if the consumer selects the wrong doctor, the wrong
18 medical procedure, the wrong school, or the wrong lawyer. (Consequences may be financial or
19 may involve other issues, such as health or career.)

20 61. When faced with high involvement decisions, such as the decision whether or not to retain
21 Brookstone, consumers are likely to give the decision more thought and are more likely to
22 remember the decision.⁵⁷ It is reasonable to expect that respondents will remember their
23 experience with hiring Brookstone sufficiently well to answer survey questions about it,
24 particularly when the experience likely occurred only once, involved an important topic (financial
25 difficulty with a mortgage), and likely required them to visit Brookstone’s offices in person.

26 ⁵⁶ First Amended Complaint, p. 7, line 19.

27 ⁵⁷ Wayne D. Hoyer, and Deborah J. MacInnis, *Consumer Behavior*. South-Western/Cengage Learning,
28 page 178. See also, Jay Lindquist and M. Joseph Sirgy, *Shopper, Buyer, and Consumer Behavior: Theory, Marketing Applications, and Public Policy Implications*. Cengage Learning, 2009, p. 231.

1 62. Despite the likelihood that respondents remembered their interaction with Brookstone
2 sufficiently well to answer survey questions, the risk of forgetting is also mitigated because my
3 survey questionnaire offered respondents the opportunity to indicate that they could not
4 remember. All substantive survey questions included a response option labelled, “I don’t know or
5 don’t remember.” Also, survey instructions told respondents that they should not guess, and
6 should indicate that they don’t know or don’t remember if they don’t know how to answer or
7 don’t remember.

8
9 **Conclusions**

10 63. In conclusion, I believe that the criticisms of my survey raised by the Defendant’s
11 Objections are without merit, based on misguided comparisons with other surveys, and in some
12 cases factually incorrect. My response to specific criticisms can be summarized as follows.

- 13 i. The Objections criticized the questions asked in my survey as leading, suggestive,
14 not open-ended, or as merely providing innocuous responses. However, the
15 questions directly ask about issues in dispute in this matter, use neutral phrasing,
16 include an open-ended question, and provide many responses that are not
17 innocuous. Also, contrary to the Defendant’s Objections, a response of
18 “probably” is neither vague nor speculative, but simply represents a different
19 evaluation of the chances that an outcome will occur than is indicated by a
20 response of “definitely.”
- 21 ii. The Objections criticized my survey for mentioning the Federal Trade
22 Commission, and maintain that double-blind methods are required in surveys.
23 Given that the survey interviewed Brookstone clients who had allegedly been
24 deceived regarding their choice of legal representation, it was appropriate to
25 mention the FTC to lend the survey credibility and raise response rates. Double-
26 blind methods are not always used in surveys, and my survey was partially
27 blinded.

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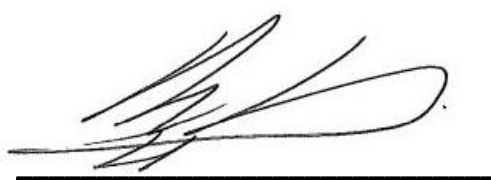
- iii. The Defendants argue that the sample size and response rate for my survey were inadequate. However, my survey has sufficient sample size to provide reliable results with an acceptable margin of error. Although the Defendants claim that the response rate for my survey was 5.4%, it was actually 20.6% or 29.2%, using proper calculation methods. Also, my Expert Report clearly described the methods for contacting respondents at random.

- iv. The Defendants compare my survey in this matter with the survey in *Autozone*, citing issues such as self-interest bias and the possibility of forgetting events, but the two surveys are very different, and were conducted in different contexts. The chain of events that would be required to create self-interest bias are unlikely, and those events may work in favor of the Defendants. Also, the importance and infrequency of the events asked about in the survey make it likely that respondents will remember those events.

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my belief.

Executed in Encino, California, on August 14, 2017.



Dr. Bruce Isaacson

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	CV 16-00999-BRO (AFMx)	Date	August 28, 2017
Title	FEDERAL TRADE COMMISSION V. DAMIAN KUTZNER ET AL.		

Present: The Honorable	BEVERLY REID O’CONNELL, United States District Judge		
Renee A. Fisher	Not Present	N/A	
Deputy Clerk	Court Reporter	Tape No.	
Attorneys Present for Plaintiff:	Attorneys Present for Defendants:		
Not Present	Not Present		

Proceedings: (IN CHAMBERS)

ORDER RE PLAINTIFF’S MOTION FOR DEFAULT JUDGMENT [295]

I. INTRODUCTION

Pending before the Court is Plaintiff Federal Trade Commission’s (“Plaintiff” or the “FTC”) Motion for Default Judgment against Defendants Brookstone Law P.C. (California), Brookstone Law P.C. (Nevada), Advantis Law P.C., and Advantis Law Group P.C. (collectively referred to as the “Corporate Defendants”)¹ pursuant to Federal Rule of Civil Procedure 55(b)(2). (See Dkt. Nos. 295 (hereinafter, “Motion” or “Mot.”), 295-1, 295-2.) The FTC requests entry of default judgment against the Corporate Defendants and seeks a permanent injunction enjoining the Corporate Defendants from future violations of Sections 5(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a), and the Mortgage Assistance Relief Services Rule (“MARS Rule”), 16 C.F.R. Part 322, recodified as 12 C.F.R. Part 1015. (See Mot. at 2.) The FTC seeks a judgment requiring the Corporate Defendants to pay restitution representing the Corporate Defendants’ net revenue gained as a result of the alleged deceptive practices. (See Mot. at 8.) After considering the papers filed in support of this unopposed Motion, the Court deems this matter appropriate for resolution without oral argument of counsel.

¹ Brookstone Law P.C (California) and Brookstone Law P.C. (Nevada) will be collectively referred to as “Brookstone.” Advantis Law P.C., and Advantis Law Group P.C will be collectively referred to as “Advantis.” The six additional Defendants in this action, named individually and in their capacities as officers of the Corporate Defendants, will be referred to as “Individual Defendants.” (See Dkt. No. 61.)

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See Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. For the following reasons, the Court **GRANTS** Plaintiff’s Motion.

II. BACKGROUND

A. Factual Background

Corporate Defendants Advantis and Brookstone are a common enterprise, using the above names interchangeably while engaging in the unlawful acts alleged by the FTC. (Dkt. No. 61, (hereinafter, “FAC”) ¶ 14.) They operated under common control and from the same address while marketing the same services. (See FAC ¶¶ 14, 32.) Two Individual Defendants that are officers or attorneys for Corporate Defendants were previously investigated for their prior involvement with mortgage assistance services and others have been disciplined in connection to their mortgage assistance practices. (See FAC ¶¶ 8-13.)

The instant action arises from the Corporate Defendants’ alleged scheme to fraudulently “extract thousands of dollars in upfront fees” from consumers for mortgage assistance relief services, while “they provide little or nothing” in return. (FAC ¶ 16.) Specifically, Plaintiff claims that the Corporate Defendants are fronts created by Individual Defendants to falsely represent litigation experience to distressed homeowners and convince them that if added to lawsuits against their lender, they can expect a significant recovery of “at least \$75,000.” (See FAC ¶¶ 16–45.)

In order to participate in the mass joinder litigation, the Corporate Defendants required consumers to pay upfront fees, including a large initial fee and subsequent monthly fees to remain as plaintiffs in the mass joinder cases. (See FAC ¶¶ 46–52.) According to Plaintiff, the Corporate Defendants failed to keep these fees in client trust accounts. (FAC ¶ 51.) Plaintiff also claims that the Corporate Defendants’ mailers, websites, and fee agreements failed to include disclosures required by law. (See FAC ¶¶ 28, 29, 35.)

Plaintiff also claims that, despite their representations to the contrary, Brookstone and Advantis have “not won a single mass joinder case” (FAC ¶ 52), that their attorneys lack the experience or resources to litigate the mass joinder cases (see FAC ¶¶ 21, 31),

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and that they routinely fail to initiate or prosecute claims on behalf of their paying clients (see FAC ¶¶ 55, 57).

B. Procedural History

On May 31, 2016, the FTC filed its original Complaint alleging violations of: (1) Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) (Dkt. No. 1 ¶¶ 69–71); and (2) the MARS Rule, 16 C.F.R. Part 322, recodified as 12 C.F.R. Part 1015 (Dkt. No. 1 ¶¶ 80–82). In its Complaint, the FTC requests that the Court: (1) award preliminary injunctive and ancillary relief to avert further consumer injury during the pendency of the action; (2) permanently enjoin Defendants from violating the FTC Act; (3) permanently enjoin Defendants from violating the MARS Rule; (4) order Defendants to pay restitution, disgorge all funds received from their illegal conduct, and provide other relief necessary to redress injury to consumers; (5) award Plaintiff the costs of bringing this action; and, (6) grant such other and further relief as the Court may determine to be just and necessary. (See Dkt. No. 1 ¶ 86.) On July 5, 2016, the FTC filed its First Amended Complaint alleging the same violations, and seeking the same relief, but adding an additional Individual Defendant. (See FAC.)

On June 10, 2016, the FTC filed its Proof of Service upon the Corporate Defendants, indicating that a registered California process server personally served an authorized representative of Brookstone Law P.C. (California), Brookstone Law P.C. (Nevada), Advantis Law P.C., and Advantis Law Group P.C. on June 2, 2016. (See Dkt. Nos. 30–31, 33–34.) The Proof of Service attached to the First Amended Complaint indicates that a copy of the First Amended Complaint was served through the ECF system and via email to Vito Torchia and Geoffrey Broderick in their personal capacities as the owner, director, or officers of Brookstone Law P.C. (California), Brookstone Law P.C. (Nevada), Advantis Law P.C., and Advantis Law Group P.C. (See Dkt. No. 61-2.)

The Corporate Defendants have failed to answer either the Complaint or the First Amended Complaint, and on September 8, 2016, the FTC requested the Clerk to enter default judgment against the Corporate Defendants for failure to respond to the Complaint within the applicable timeframe. (See Dkt. No. 112.) On September 8, 2016, the Clerk entered default against Corporate Defendants. (See Dkt. No. 113.) On July 31, 2017, the FTC filed the instant Motion for Default Judgment. (See Mot.) Along with its

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Motion, the FTC also filed a Proposed Order for Permanent Injunction and Other Equitable Relief as to Defendants Brookstone Law P.C. (California), Brookstone Law P.C. (Nevada), Advantis Law P.C., and Advantis Law Group P.C. (See Dkt. No. 295-2.) The Corporate Defendants have not opposed the Motion. Brookstone has yet to appear in this action.

III. LEGAL STANDARD

Entry of default is appropriate “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend.” Fed. R. Civ. P. 55(a). A party has no duty to defend, however, unless the plaintiff properly served the defendant with the summons and complaint, or waives such service, pursuant to Federal Rule of Civil Procedure 4. See *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (holding “one becomes a party officially, and is required to take action in that capacity, only upon service of a summons”).

Before courts decide whether to grant default judgment, Federal Rule of Civil Procedure 55(b)(2) requires the Clerk’s entry of default. In the Central District of California, plaintiffs seeking default judgment must also satisfy the requirements of Local Rule 55-1. However, entry of a defendant’s default does not automatically entitle the plaintiff to a court-ordered judgment. See *Draper v. Coombs*, 792 F.2d 915, 924–25 (9th Cir. 1986). Indeed, a district court has discretion in deciding whether to enter a default judgment. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In exercising this discretion, courts may consider a number of factors: (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff’s substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and, (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits (collectively, the “Eitel factors”). *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). In deciding a motion for default judgment, all factual allegations in the plaintiff’s complaint are deemed to be true, except those relating to the amount of damages. See *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987); see also *DirecTV, Inc. v. Huynh*, 503 F.3d 847, 854 (9th Cir. 2007).

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IV. DISCUSSION

In ruling on Plaintiff’s Motion, the Court will consider whether: (1) the Corporate Defendants were properly served under Federal Rule of Civil Procedure 4; (2) Plaintiff satisfied the requirements of Federal Rule of Civil Procedure 55 and Local Rule 55-1; and, (3) the *Eitel* factors weigh in favor of granting default judgment.

A. Whether the Corporate Defendants Were Properly Served Under Federal Rule of Civil Procedure 4

“A federal court does not have jurisdiction over a defendant unless the defendant has been served properly under Fed. R. Civ. P. 4.” *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988) (citing *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982)). Federal Rule of Civil Procedure 4(h)(1)(B) provides that a domestic corporation may be served in a judicial district of the United States “by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process” Fed. R. Civ. P. 4(h)(1)(B). Here, a registered process server personally delivered copies of the Summons and Complaint to Vito Torchia, Jr., an authorized person to accept service of process on behalf of Brookstone Law P.C. (California) and Brookstone Law P.C. (Nevada), and to R. Geoffrey Broderick, an authorized person to accept service of process on behalf of Advantis Law P.C., and Advantis Law Group P.C., on June 2, 2016, at 6 Hutton Centre Drive, Suite 1000, Santa Ana, California 92707. (*See* Dkt. Nos. 30–31, 33–34.) Accordingly, the Court finds that the FTC properly served the Corporate Defendants with the original Complaint and summons pursuant to Federal Rule of Civil Procedure 4(h)(1)(B).

Federal Rule of Civil Procedure 5 governs the service of “a pleading filed after the original complaint.” (*See* Fed. R. Civ. P. 5(a)(B).) Under Rule 5, service is completed by “mailing it to the person’s last known address—in which event service is complete upon mailing[.]” Fed. R. Civ. P. 5(a)(b)(2)(C). The Proof of Service attached to the First Amended Complaint indicates that a copy of the First Amended Complaint was served through the ECF system and via email and FedEx to Vito Torchia and Geoffrey Broderick in their personal capacities as the owner, director, or officers of Brookstone Law P.C. (California), Brookstone Law P.C. (Nevada), Advantis Law P.C., and Advantis

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Law Group P.C. (*See* Dkt. No. 61-2.) Thus, the Corporate Defendants were properly served with the Amended Complaint.

B. Whether the FTC Has Complied with Federal Rule of Civil Procedure 55(b)(2) and Local Rule 55-1

The FTC has satisfied the procedural requirements of Federal Rule of Civil Procedure 55(b)(2) as well as Local Rule 55-1. As discussed above, Rule 55(b)(2) requires the Clerk to enter default before the Court may grant a motion for default judgment. *See* Fed. R. Civ. P. 55(b)(2). Given that the Clerk entered default against the Corporate Defendants on September 8, 2016 (*see* Dkt. No. 113), Rule 55(b)(2) is satisfied.

Local Rule 55-1 further requires the movant to make a showing as to the following: (1) when and against what party the default was entered; (2) the identification of the pleadings to which the default was entered; (3) whether the defaulting party is an infant or incompetent person, and if so, whether that person is represented; (4) that the Servicemembers Civil Relief Act does not apply; and, (5) that notice has been served on the defaulting party, if required. C.D. Cal. L.R. 55-1.

The FTC has satisfied Local Rule 55-1. As stated above, the Clerk entered default against Defendants Brookstone Law P.C. (California), Brookstone Law P.C. (Nevada), Advantis Law P.C., and Advantis Law Group P.C. on September 8, 2016, based on the FTC’s First Amended Complaint. (*See* Declaration of Benjamin Theisman (Dkt. No. 295-1) (hereinafter, “Theisman Decl.”) ¶ 3; *see also* Dkt. No. 113.) Further, the Theisman Declaration filed concurrently with Plaintiff’s Motion confirms, under penalty of perjury, that Corporate Defendants are not minors or incompetent persons, and that the Servicemembers Civil Relief Act does not apply in this action. (Theisman Decl. ¶ 4.)

Finally, service of written notice of the application for default judgment is required “[i]f the party against whom a default judgment is sought has appeared personally or by a representative.” Fed. R. Civ. P. 55(b)(2). Brookstone Nevada and Brookstone California have not appeared in this case (Theisman Decl. ¶ 7); therefore, notice is not required. Nonetheless, the Theisman Declaration indicates that the FTC served Brookstone with the instant Motion on July 31, 2017. (Theisman Decl. ¶ 9.) The

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FTC served Charles T. Marshall, attorney of record for Advantis, with the instant Motion on July 31, 2017 via the ECF system, email, and overnight mail. (Theisman Decl. ¶ 8; *see also* Mot. at 11.)

Accordingly, Plaintiff has complied with Federal Rule of Civil Procedure 55(b)(2) and Local Rule 55-1.

C. Whether the *Eitel* Factors Weigh in Favor of Granting Default Judgment

Upon reviewing the relevant *Eitel* factors, the Court finds the factors weigh in favor of granting default judgment. The Court will discuss each factor in turn.

1. First Factor: Prejudice to Plaintiff

The first *Eitel* factor requires the Court to consider whether withholding default judgment would prejudice Plaintiff. Here, absent an entry of default, the FTC “will most likely be without recourse against [the Corporate Defendants], given [the Corporate Defendants’] unwillingness to cooperate and defend.” *Vogel v. Rite Aid Corp.*, 992 F. Supp. 2d 998, 1006 (C.D. Cal. 2014). Because the FTC will not have any recourse against the Corporate Defendants without a default judgment, the Court finds that withholding the default judgment would prejudice the FTC.

2. Second and Third Factors: Merits of Plaintiff’s Substantive Claims and Sufficiency of the Complaint

Under the second and third *Eitel* factors, the Court must determine whether Plaintiff’s substantive claims have merit and whether Plaintiff’s FAC sufficiently sets forth a claim for relief. *Eitel*, 782 F.2d at 1471. “The Ninth Circuit has suggested that these two factors require that a plaintiff ‘state a claim on which the [plaintiff] may recover.’” *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1175 (C.D. Cal. 2002) (citing *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)).

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a. FTC Act

“Section 5 of the FTC Act prohibits deceptive acts or practices in or affecting commerce and imposes injunctive and equitable liability upon the perpetrators of such acts.” *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1138 (9th Cir. 2010). “An act or practice is deceptive if ‘first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.’” *FTC v. Stefanichik*, 559 F.3d 924, 928 (9th Cir. 2009) (quoting *FTC v. Gill*, 265 F.3d 944, 954 (9th Cir. 2001)).

The FTC alleges that, beginning in 2011, the Corporate Defendants operated as a common business enterprise and maintained a substantial course of trade in or affecting commerce. (See FAC ¶¶ 14–16.) The FTC also claims that the Corporate Defendants targeted distressed consumers and made representations regarding their experience in mass joinder litigation (see FAC ¶¶ 17–22), the likelihood of achieving a favorable outcome (see FAC ¶¶ 38–45), and the origination and continued prosecution of claims on their behalf (see FAC ¶¶ 45, 53–62). The FTC thus pleads sufficient facts to show that the Corporate Defendants made representations to consumers.

The FTC’s assertion in its FAC that the Corporate Defendants representations to consumers were false adequately establishes that they were likely to mislead reasonable consumers. See *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994) (noting that presenting a theory that representations are false is among ways to prove that a business misled consumers). The FTC alleged that each of the representations listed above lacked basis in fact. For example, the FTC pled that advertisements to consumers stated that the Corporate Defendants would seek to void consumers’ mortgages, when in fact any claims actually brought on behalf of their customers did not seek that type of relief. (FAC ¶¶ 70–71.)

Lastly, “[e]xpress product claims are presumed to be material.” *Id.* at 1095–96. The FTC pleads that the Corporate Defendants made express claims to consumers at various points in their marketing ploys via their mailers, websites, and client intake meetings. (See FAC ¶¶ 37–45.) For example, the Corporate Defendants represented to consumers that their mortgage documents evidenced that they were victims of fraud and entitled to recovery of “at least \$75,000.” (FAC ¶ 44.)

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Thus, the FTC’s has alleged sufficient facts to show Corporate Defendants violated Section 5(a) of the FTC Act.

b. MARS Rule

To prevail on its claim for violations of the MARS Rule, the FTC must first establish that Corporate Defendants offered MARS as defined by the MARS Rule. The FTC must then establish that the Corporate Defendants were in violation of specific provisions of the MARS Rule.

The MARS Rule defines “mortgage assistance relief service provider” as “any person that provides, offers to provide, or arranges for others to provide, any mortgage assistance relief service” other than the dwelling loan holder, the services of a dwelling loan holder, the servicer of a dwelling loan, or any agent or contractor of such individual or entity. 12 C.F.R. § 1015.2. The FTC claims that the Corporate Defendants are law firms “offering mortgage assistance relief services to consumers by representing them in litigation against their lenders.” (FAC ¶¶ 6–7.) Specifically, the FTC alleges that the Corporate Defendants targeted distressed homeowners with their advertising and offered to add the consumers to mass joinder lawsuits to prevent home foreclosures and void mortgage notes. (FAC ¶¶ 17–26.) The FTC thus pleads sufficient facts to establish that the Corporate Defendants qualify as MARS providers under the MARS Rule.

The FTC claims that the Corporate Defendants violated provisions of the MARS Rule in three ways. First, the FTC asserts that the Corporate Defendants violated 12 C.F.R. § 1015.3(b)(1), which prohibits a MARS provider from “[m]isrepresenting, expressly or by implication . . . [t]he likelihood of negotiating, obtaining, or arranging any represented service or result[.]” 12 C.F.R. § 1015.3. As stated above, the FTC alleges that the Corporate Defendants overstated their experience in mass joinder litigation against lenders and the likelihood of obtaining monetary relief to consumers, and misrepresented the type of relief sought. (FAC ¶¶ 18, 21–23, 53–67, 82.)

The FTC further claims that the Corporate Defendants failed to include disclosures required in commercial communications made by MARS providers as outlined by 12 C.F.R. § 1015.4. The FTC alleges that the Corporate Defendants did not include the

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required disclosures in mailers sent to consumers from Corporate Defendants or on their websites. (FAC ¶¶ 28–29, 25, 83.)

Finally, the FTC claims that the Corporate Defendants received advanced fees in violation of 12 C.F.R. § 1015.5(a), which prohibits a MARS provider from “request[ing] or receiv[ing] payment of any fee or other consideration until the consumer has executed a written agreement between the consumer and the consumer’s dwelling loan holder or servicer incorporating the offer of mortgage assistance relief the provider obtained from the consumer’s dwelling loan holder or servicer.” 12 C.F.R. § 1015.5(a). The FTC alleges that the Corporate Defendants solicited upfront payments for legal analysis of consumers’ loan agreements and ongoing payments for purportedly managing consumers’ claims before obtaining any relief for those consumers. (See FAC ¶¶ 43, 46–52, 81.) Thus, the FTC pleads sufficient facts to support its claim that the Corporate Defendants collected fees in violation of the MARS Rule.

Accordingly, the Court finds that Plaintiff alleges sufficient facts to support its claims. As a result, the second and third factors weigh in favor of granting default judgment.

3. Fourth Factor: The Sum of Money at Stake in the Action

“Under the [fourth] *Eitel* factor, the court must consider the amount of money at stake in relation to the seriousness of [the] [d]efendant’s conduct.” *PepsiCo, Inc.*, 238 F. Supp. 2d at 1176. Here, the FTC seeks restitution in the amount of \$18,146,866.34, which is the total amount that the Corporate Defendants received from consumers, taking into account refunds and chargebacks. (Mot. at 8.) The Corporate Defendants are law firms formed by individuals that were the subject of prior federal investigation. (See FAC ¶ 8.) They are accused of enacting elaborate fraudulent schemes against thousands of consumers. (See FAC.) Thus, when considering the seriousness of the Corporate Defendants’ conduct in relation to the amount of money at stake, this factor weighs in favor of granting default judgment.

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4. Fifth Factor: Possibility of Dispute Concerning Material Facts

When a plaintiff has “supported its claims with ample evidence, and defendant has made no attempt to challenge the accuracy of the allegations in the complaint, no factual disputes exist that preclude the entry of default judgment.” *Landstar Ranger, Inc. v. Parth Enters., Inc.*, 725 F. Supp. 2d 916, 922 (C.D. Cal. 2010); *see also Elektra Entm’t Grp. Inc. v. Crawford*, 226 F.R.D. 388, 393 (C.D. Cal. 2005) (“Because all allegations in a well-pleaded complaint are taken as true after the court clerk enters default judgment, there is no likelihood that any genuine issue of material fact exists.”). Here, the FTC has provided the Court with well-pleaded allegations, and has provided the Corporate Defendants with ample opportunity to defend against them. The FTC has alleged sufficient facts establishing that the Corporate Defendants violated the FTC Act and the MARS Rule. (*See supra* § IV.C.2.) Therefore, the Court finds that this factor weighs in favor of granting default judgment.

5. Sixth Factor: Excusable Neglect

Under the sixth *Eitel* factor, the Court considers the issue of excusable neglect. “This factor favors default judgment when the defendant has been properly served or the plaintiff demonstrates that the defendant is aware of the lawsuit.” *Wecosign, Inc. v. IFG Holdings, Inc.*, 845 F. Supp. 2d 1072, 1082 (C.D. Cal. 2012). Here, the record indicates that the FTC properly served the Corporate Defendants, thus they are, or should be, aware of this action. (*See* Dkt. Nos. 30–31, 33–34, 61-2.) Despite being put on notice of this action, the Corporate Defendants have failed to respond. Their failure to respond does not appear to be excusable. Thus, this factor favors granting default judgment. *See Wecosign*, 845 F. Supp. 2d at 1082.

6. Seventh Factor: Policy of Favoring Decisions on the Merits

Finally, the seventh *Eitel* factor requires the Court to consider whether the Court’s strong preference for deciding cases on the merits should preclude the Court from granting default judgment. Despite this strong policy, courts often find that granting default judgment is appropriate when a defendant fails to adequately defend against a lawsuit. *See, e.g., Wecosign*, 845 F. Supp. 2d at 1083; *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1061 (N.D. Cal. 2010). The Corporate Defendants’ decision

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to not respond to the FAC and their decision to not oppose the instant Motion mitigates the Court’s concern about not deciding this case on the merits. Therefore, this factor does not weigh against granting default judgment.

The FTC has properly served the Corporate Defendants and complied with the applicable procedural requirements. Further, the *Eitel* factors favor granting a default judgment in this case. Accordingly, the Court **GRANTS** the FTC’s Motion for Default Judgment.

V. REQUESTED RELIEF

In its Motion, the FTC seeks (1) permanent injunction against the Corporate Defendants, prohibiting them from engaging in future violations of the FTC Act and the MARS Rule; and, (2) restitution for the amount consumers paid, taking into account refunds and chargebacks. (*See* Mot. at 8–10.)

A. INJUNCTIVE RELIEF

As stated above, the FTC requests that the Corporate Defendants be enjoined from committing future violations of the FTC Act and the MARS Rule. (*See* Mot. at 9–10; FAC ¶ 87.)

By statute, the Court has the authority to grant the injunctive relief sought. 15 U.S.C. §53(b). An injunction may be granted “if there is some cognizable danger of recurring violation.” *FTC v. Gill*, 71 F. Supp. 2d 1030, 1047 (C.D. Cal. 1999). A Court considers the totality of the circumstances, including past unlawful conduct. *See id.* “When the violation has been predicated upon systematic wrongdoing, rather than isolated occurrences, a court should be more willing to enjoin future conduct.” *Id.* (quoting *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir.1979)).

Here, in considering the totality of the circumstances to determine the likelihood of future violations, the Court finds that the FTC has established a reasonable likelihood that the Corporate Defendants will engage in future FTC Act and MARS Rule violations. The degree of scienter here is high. Corporate Defendants orchestrated a complicated

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scheme, spanning more than four years, to extract money from consumers while misrepresenting the services they received in return, which were of little or no value. (See FAC ¶ 16.) Through this scheme the Corporate Defendants realized more than \$18 million. (Mot. at 8.) The fact that the Corporate Defendants offered legal services also weighs in favor of finding a likelihood of future violations, as the Corporate Defendants’ scheme was orchestrated, in part, by licensed attorneys who were presumably aware of the unlawfulness of their practices. (See generally FAC.) Furthermore, a law firm offering similar mortgage assistance services and founded by the same individuals was the subject of prior federal investigation. (See FAC ¶ 8.) The totality of the circumstances of the alleged violations reveals a significant likelihood that the Corporate Defendants will engage in future violations of the FTC Act and the MARS Rule; therefore, an injunction against further violations is proper.

B. EQUITABLE MONETARY RELIEF

As stated above, the FTC seeks restitution in the amount that consumers paid to the Corporate Defendants. Courts have “broad authority to fashion appropriate remedies for violations of the [FTC] Act.” *Pantron I Corp.*, 33 F.3d 1088 at 1102. “This power includes the power to order restitution.” *Id.* The Court adheres to the two-step process for determining restitution awards adopted by the Ninth Circuit. *See, e.g., FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016). First, the FTC must prove that “the amount it seeks in restitution reasonably approximates the defendant’s unjust gains,” measured by the defendant’s net revenues. *Id.* “The burden then shifts to the defendant to show that the FTC’s figures overstate the amount of the defendant’s unjust gains.” *Id.* at 604.

In its Motion, the FTC seeks restitution in the amount of \$18,146,866.34, representing the amount consumers paid as a result of the Corporate Defendants unlawful acts, taking into account refunds and chargebacks. (See Mot. at 8.) In support of its Motion, the FTC submitted the declaration and supporting attachments of its forensic accountant Emil T. George. (See Mot. at 8 (citing Dkt. No. 284-5 (hereinafter “George Declaration” or “George Decl.”) ¶¶ 2–12, Attachs. A–C) (listing the relevant bank

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accounts of the Corporate Defendants, providing a record of the relevant transactions, and documenting the total net receipts from these accounts.) The calculation provided in the George Declaration of gross receipts, with deductions for refunds, chargebacks, and other transactions not representative of consumer transactions, totals \$18,146,866.34. (See George Decl. ¶ 9, Attach. B.) After review of the declaration by the FTC’s forensic accountant, the Court finds that the amount sought by the FTC is a reasonable approximation of the Corporate Defendants’ net revenue during the relevant period, and therefore, the FTC has met its burden. The Corporate Defendants have not disputed the amount requested by the FTC.

Additionally, “a default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.” Fed. R. Civ. P. 54(c). In the FAC, the requested relief included “restitution, the refund of monies paid, and the disgorgement of ill-gotten monies” “necessary to redress injury to consumers resulting from Defendants’ violations of the FTC Act and the MARS Rule[.]” (FAC ¶ 87). This is the same kind of relief sought by the FTC in its instant Motion. Although the numerical amount of restitution sought was not specified in its prayer for relief section in the FAC (see FAC ¶ 87), the FTC provided an estimate elsewhere in its FAC that as of 2014, the Corporate Defendants had “received *at least* \$15 million.” (FAC ¶ 50 (emphasis added).) In support of its Motion, the FTC provided a calculation of consumer receipts since February 27 2015, totaling \$1,784,022.61, and has demonstrated that the total amount received from consumers, when considering refunds and chargebacks, totals \$18,146,866.34. (See George Decl. ¶ 10, Attachs. B–C.) Plaintiff’s request for restitution of the total amount that the Corporate Defendants received from consumers (See FAC ¶ 87) in the FAC put the Corporate Defendants on notice of the extent of their liability when choosing not to defend the claim. Therefore, granting the requested monetary relief is consistent with the damages limitation in Rule 54(c).

In conclusion, the Court finds that the remedies that the FTC seeks in its Motion are appropriate.

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VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff’s Motion. The hearing currently scheduled for Monday, August 28, 2017 is hereby **VACATED**. The Court will enter its Final Judgment as to Defendants Brookstone Law P.C. (California), Brookstone Law P.C. (Nevada), Advantis Law P.C., and Advantis Law Group P.C. Plaintiff is **ORDERED** to file a Proposed Judgment by **September 6, 2017 by 4:00 p.m.**

IT IS SO ORDERED.

:

Initials of
Preparer

rf

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2023, I electronically filed the foregoing Post-Trial Reply Filings, including Complaint Counsel's Post-Trial Reply Brief, Proposed Reply Findings of Fact, and Proposed Reply Conclusions of Law, electronically using the FTC's E-Filing system, and I caused the foregoing document to be sent via email to:

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

*Secretary of the Commission
Clerk of the Court*

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite H-110
Washington, DC 20580

Administrative Law Judge

I further certify that on June 20, 2023, I caused the foregoing documents to be served via email on:

David Z. Gringer
Phoebe Silos
Charles Bridge
Wilmer Cutler Pickering Hale & Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
David.Gringer@wilmerhale.com
Phoebe.Silos@wilmerhale.com
Charles.Bridge@wilmerhale.com
(212) 230-8800

Shelby Martin
Wilmer Cutler Pickering Hale & Dorr LLP
1225 Seventeenth Street, Suite 2600
Denver, CO 80202
Shelby.Martin@wilmerhale.com
(720) 274-3135

Katherine Mackey
Wilmer Cutler Pickering Hale & Dorr LLP
60 State Street
Boston, MA 02109
Katherine.Mackey@wilmerhale.com
(617) 526-6000

Howard M. Shapiro
Jonathan E. Paikin
Jennifer Milici
Derek A. Woodman
Vinecia Perkins
Andres Salinas
Jocelyn Berteaud
Benjamin Chapin
Margaret (Molly) Dillaway
Reade Jacob
Wilmer Cutler Pickering Hale & Dorr LLP
2100 Pennsylvania Avenue NW
Washington, DC 20037
Howard.Shapiro@wilmerhale.com
Jonathan.Paikin@wilmerhale.com
Jennifer.Milici@wilmerhale.com
Derek.Woodman@wilmerhale.com
Vinecia.Perkins@wilmerhale.com
Andres.Salinas@wilmerhale.com
Joss.Berteaud@wilmerhale.com
Benjamin.Chapin@wilmerhale.com
Molly.Dillaway@wilmerhale.com
Reade.Jacob@wilmerhale.com
(202) 663-6000

Jonathan D. Leibowitz
6313 Kenhowe Drive
Bethesda, MD 20817
jondleibowitz@gmail.com
(202) 577-5342

Attorneys for Respondent, Intuit Inc.

/s/ James Evans
James Evans