

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

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

In the matter of:

Intuit Inc.,
a corporation,

Respondent.

Docket No. 9408

**COMPLAINT COUNSEL’S ANSWER TO RESPONDENT INTUIT INC.’S
APPLICATION FOR A STAY PENDING REVIEW**

To paraphrase Ben Franklin, nothing is certain except death, taxes, and – in recent years – millions of Americans paying for TurboTax when they should have been able to do their taxes for free. The Commission found that Intuit has long lied to consumers about TurboTax being free before coercing them into paid upgrades. Now, on the eve of having to straighten up and fly right – thanks to the Commission’s Final Order – Intuit is trying everything it can to squeeze in another year of ill-gotten gains. Intuit has offered nothing new in its Application. Intuit is not likely to succeed on the merits on appeal; granting a stay will only further injure consumers, honest competition, and the public interest. The Commission should deny the Application.

I. Intuit’s Appeal is Unlikely to Succeed

A. Constitutionality

Skirting the Fifth Circuit’s recent affirmation of the FTC’s constitutionality in *Illumina, Inc. v. FTC*, 88 F.4th 1036 (5th Cir. 2023), Intuit focuses on the ALJ’s insulation from presidential removal, citing *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022). But that has no bearing on the validity of the Order because: (1) the Commissioners, who are constitutionally appointed, *Illumina*, 88 F.4th at 1046–47, made de novo findings, and (2) the ALJ was “properly appointed” when he issued his decision. *Collins v. Yellen*, 141

S. Ct. 1761, 1787–88 & n.23 (2021) (“[s]ettled precedent” holds that “the unlawfulness of [a] removal provision does not strip [an officer] of the power to undertake the other responsibilities of [their] office”). *Jarkesy* acknowledged this, and “d[id] not decide whether vacating would be the appropriate remedy based on this error alone.” 34 F.4th at 463 n.17. Later, when *Collins* returned to the Fifth Circuit, the Court reaffirmed that “a party challenging agency action must show [both unconstitutionality and] that the unconstitutional provision caused (or would cause) them harm.” *Collins v. Dep’t of Treasury*, 83 F.4th 970, 982 (5th Cir. 2023) (cleaned up). The Fifth Circuit reaffirmed “three requisites for proving harm: (1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by [the actor, which requires] showing that but for the removal restriction, [the President] would have removed [the actor] and that the [agency] would have acted differently as to the challenged actions.” *Id.* (cleaned up). Intuit has not, and cannot, point to a single fact supporting any of these elements. Between *Illumina* and *Collins*, Intuit’s appeal to the Fifth Circuit on ALJ removal grounds has little chance of success.

Intuit next makes unfounded and baseless bias accusations against the Commission and the Chair, which boil down to little more than complaining that Intuit lost on the merits. The Commission has already rejected Intuit’s bias allegations. Op. 72–74.

Finally, Intuit’s untimely “private rights” argument fails again because, as the Commission has already explained, this matter involves “public rights.” Op. 79–80.

B. Intuit Deceived Consumers

The Commission applied well-established legal precedent in finding Intuit’s ads deceptive. Intuit is unlikely to succeed in convincing an appellate court of the contrary. In its Application, Intuit merely retreads arguments it previously raised before the ALJ

and in its appeal to the Commission. “[R]epeating arguments the Commission rejected before does not provide the Commission with sufficient reason to question its prior decision or any of the bases for it, and Respondents’ renewal of its legal arguments, without more, is insufficient to justify granting a stay.” *In re Daniel Chapter One*, 2010 FTC LEXIS 23, *5 (March 10, 2010) (cleaned up); *see also In re LabMD Inc.*, 2016 FTC LEXIS 180, *2-3 (Sept. 29, 2016).

The Commission thoroughly considered and rejected Intuit’s various claims about contrary FTC guidance or precedent in reaching its decision. First, Intuit claims that the Commission inappropriately applied heightened standards to Intuit’s “free” claims. But the Commission simply considered the claims at issue and the substantial evidence of their effect. Op. 45-46. Second, contrary to Intuit’s claim that the Commission reviewed the ads “piecemeal,” the Commission’s “conclusions ... are based on a review of each ad in its entirety.” Op. 38. n.17. Third, while Intuit claims that the Commission didn’t consider ads from the perspective of consumers acting reasonably in the circumstances, the Commission conducted an appropriate facial analysis of the ads, Op. 37-38, and correctly considered the extrinsic evidence regarding misimpressions.¹ *See, e.g.*, Op. 39-46, 52-65. Fourth, the Commission has already rejected Intuit’s argument that the first-contact rule should not be applied in ecommerce. Op. 47-50.

Intuit failed to establish likelihood of success on appeal, and “raise[s] no serious or substantial questions on the merits; disagreement does not establish a likelihood of success on appeal.” *Daniel Chapter One*, 2010 FTC Lexis *5.

¹ And if Intuit disagrees with the Commission’s findings of fact, on appeal “the Commission’s factual findings must be accepted if they are supported by relevant evidence sufficient so that a reasonable mind might agree with the conclusions.” *Daniel Chapter One* (citing *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986)). According to Section 5(c) of the FTC Act, 15 U.S.C. § 45(c), for purposes of an appeal “(t)he findings of the Commission as to the facts, if supported by evidence, shall be conclusive.”

C. The Order is Necessary and Appropriate

Intuit's short argument on the Order rehashes arguments the Commission has rejected, which lack any likelihood of success on appeal. A cognizable danger of recurrent violation exists based upon the established facts and applicable law. Op. 80–84. Intuit's Tax Year ("TY") 2022 ads were not free of deception. Op. 82–83.² The state settlement is not a cure-all. Op. 83–84. The Order doesn't unconstitutionally compel speech. Op. 89–90. Covering products beyond TurboTax is appropriate fencing-in. Op. 89. Intuit's only new argument quibbles with the Commission's use of the word "egregious" in the sentence: "The character of the past violations is egregious." Op. 81. Intuit calls that conclusion "untenable" because the ALJ credited certain self-serving testimony by Intuit's executives – but the Commission reviewed the facts de novo, Op. 35–36, and was thus free to reevaluate the testimony. It's also unclear how Intuit's executives' testimony undermines the Commission's conclusion about the character of Intuit's deceptive acts.

II. Equities Weigh in Favor of Consumers and Competition

In issuing the Order, the Commission correctly found that "[t]he facts here point strongly to the need for a cease-and-desist order." Op. 81. And the "Order is designed to prevent Respondent [Intuit] from making" the kinds of misrepresentations regarding "free" offers alleged in the Complaint. Op. 86. Yet Intuit's Application and the attached declaration of Nick Soukas, Intuit's SVP of Marketing, show that Intuit's current advertising doesn't comply with the Order's requirements and that it has no intention of voluntarily complying if a stay is granted. *See* Soukas Decl. ¶27 (claiming that complying with the Order "would be very difficult and costly" and require "fundamentally alter[ing]" its ongoing Tax Year 2023 advertising).³ A stay would grant

² The Application refers to Intuit's "current ads" without specifying whether it means TY22 or TY23 ads. Because Intuit's TY23 ads are not in the record, its TY22 ads are the most "current" in this case.

³ At the same time, the Commission should be skeptical of Soukas's claimed "deep familiarity" with Intuit's advertising. Decl. ¶3. In contrast with his new declaration,
(continued)

Intuit license to deceive for yet another tax season (and beyond) to the detriment of consumers and competition.

A. Stay Will Injure Consumers and Competition

If a stay is granted, Intuit's deception would continue to harm consumers and competition, including: (1) monetary harm; (2) wasted time; (3) privacy harm; and (4) injury to honest participants in the tax preparation market.

1. Monetary Harm

Many consumers will likely suffer significant pecuniary harm if Intuit is permitted to continue its deceptive "free" advertising for TurboTax. The monetary harm to consumers from Intuit's past deception is conservatively estimated to exceed a billion dollars.⁴ Historically, [REDACTED] consumers converted to a paid version of TurboTax even though they were eligible for truly free tax preparation alternatives.⁵

when Soukas was deposed, he lacked familiarity with, or claimed to not remember, basic facts about Intuit's "free" advertising campaign. *Compare, e.g.*, Jan. 30, 2024 Soukas Decl. ¶25 (describing paid search and SEO) *with* GX144 (Nov. 22, 2022 Soukas Dep.) at 22:08-21 and 67:14-18 (unable to remember what media channels Intuit uses); Decl. ¶17 (describing Intuit marketing research on "simple tax returns") *with* GX144 at 22:08-21 and 67:14-18 (unable to remember same); Decl. ¶27 (describing timing of Intuit's advertising season) *with* GX144 at 28:15-20 (unable to remember same); *see also, e.g.*, GX144 at 43:3-50:14 (exhibiting a general lack of familiarity with Intuit's advertising practices).

⁴ In denying a class settlement with Intuit due to "inadequate compensation," Judge Breyer observed that "[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." GX877. *See also* [FTC Orders Maker of TurboTax to Cease "Deceptive" Advertising](#), PROPUBLICA ("Huge sums of money are at stake: In a single year, tax prep companies led by Intuit generated \$1 billion in revenue from customers who should have been able to file for free, according to one analysis."); [TurboTax and Others Charged at Least 14 Million Americans for Tax Prep That Should Have Been Free, Audit Finds](#), PROPUBLICA ("More than 14 million taxpayers paid for tax prep software last year that they could have gotten for free, according to a scathing audit released Wednesday by the Treasury Inspector General for Tax Administration. That amounts to roughly a billion dollars in revenue for TurboTax maker Intuit, H&R Block, and other tax software companies...").

⁵ GX80 (CID Response), at CC-00000850 (in TY18, [REDACTED] consumers who qualified for the Free File Program paid Intuit over [REDACTED] for tax preparation services); GX284, at CC-00005981 (in 2018, [REDACTED] of customers not using its Free File Product were eligible to do so, and such customers were worth [REDACTED] in revenue). *See also supra* note 4.

Between 2017 and 2019, Intuit grossed more than [REDACTED] from more than [REDACTED] consumers eligible to use the Free File version of TurboTax, which Intuit offered as part of the IRS's Free File Program.⁶ This includes more than [REDACTED] active-duty service members, who needlessly paid Intuit more than [REDACTED].⁷ Approximately 70% of taxpayers (about 100 million) are eligible for Free File.⁸

Intuit knew that [REDACTED] [REDACTED].⁹ If the Order is stayed, millions of consumers likely will suffer the same fate—being lured to TurboTax based on deceptive “free” claims and paying for tax filing when they could have filed for free elsewhere, including the IRS's new Direct File program.¹⁰

2. Time Waste and Privacy Intrusion

If the Order is stayed, many consumers will waste considerable time navigating to the TurboTax website and entering sensitive personal and financial information into TurboTax, only to learn that it is not “free” for them.¹¹ Many then [REDACTED].¹² Wasted time has a pecuniary value.¹³ Many also suffer a privacy harm by providing

⁶ GX98 (CID Response), at CC-00001006-07.

⁷ *Id.*

⁸ [Free File Alliance](#) (last visited Feb. 1, 2024); [Eighth MOU on Free File](#) (Oct. 31, 2018).

⁹ *See supra* notes 4 and 5.

¹⁰ [IRS Direct File](#) (last visited Feb. 1, 2024).

¹¹ The median elapsed time between when consumers began returns in Free Edition and when they received an upgrade screen informing them they are ineligible and will need to upgrade to a paid product was [REDACTED] in TY20 and [REDACTED] in TY21. GX631. For consumers for whom the upgrade screen was triggered by deductions and credits, those median times increase to [REDACTED] in TY20 and [REDACTED] in TY21. *Id.* *See also, e.g.* GX297. at CC-00006425 [REDACTED]

¹² *See, e.g.* GX296. at CC-00006385 [REDACTED]

[REDACTED] The number of impacted consumers is likely tremendous; in TY21 alone, 17.6 million people logged in to TurboTax but abandoned before completing their taxes, “match[ing] a paradigmatic scenario of deception.” Op. 59–60.

¹³ *See e.g.*, Matthew Jones, Bruce Kobayashi & Jason O’Connor, [Economics at the FTC: Non-price Merger Effects and Deceptive Automobile Ads](#), 53 REV. IND. ORGAN. 593 (Dec.

(continued)

Intuit with sensitive information they wouldn't have entered if they'd known that TurboTax was not "free" for them.¹⁴ Consumers entering the Intuit ecosystem based on the express, repeated promise of receiving free tax preparation end up receiving unwanted offers for other Intuit-affiliated services.¹⁵

3. Injury to Competition

Finally, Intuit's deception harms honest participants in the tax preparation services industry. Where, as here, a deceptive ad campaign draws attention to a product or service, it necessarily lures consumers away from honest competitors.¹⁶ Intuit's deception also makes it harder for consumers to understand and rely upon other ads in the marketplace, disincentivizing TurboTax customers from searching for alternatives.¹⁷

B. Public Interest Outweighs Intuit's Inconvenience

The equities weigh in favor of denying the Application. In balancing "the hardships of the public interest against private interest, the public interest should receive greater weight." *FTC v. Affordable Media*, 179 F.3d 1228, 1236 (9th Cir. 1999). The public interest here is compelling — halting deceptive and injurious conduct, especially with an April 15 IRS deadline looming. Intuit, by contrast, has no legitimate interest in

2018) (valuing harm to consumers for wasted time and effort due to a deceptive door opener).

¹⁴ GX301 (Shiller Dec.), ¶54 & GX240 (showing that it took pages of data entry to reach a hard stop in TY19).

¹⁵ See, e.g., GX240 (seeking consent for Intuit to use tax information for purposes other than tax filling), GX301, ¶51 & GX285 at CC-00005985 (Intuit uses consumer data to "[e]valuate your eligibility for financial or other marketing offers, products and services").

¹⁶ *FTC Deception Policy Statement*, 103 F.T.C. 110, 174 & n.58 (1984); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771, n.9 (1999); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922); see GX743 at 21 (expert opining that, through deception, Intuit "can benefit not only because it unfairly acquires consumers, but also because it makes it harder for its competitors to acquire consumers").

¹⁷ GX743 at 21-22.

continuing to deceive consumers. Moreover, Intuit recently stated that it “expects no significant impact to its business” to result from the Order.¹⁸

Respectfully submitted,

Dated: February 5, 2024

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¹⁸ Intuit Blog, [Intuit Responds to U.S. Federal Trade Commission's Flawed Decision](#), Jan. 22, 2024 [Updated Jan. 26, 2024] (“Intuit expects no significant impact to its business.”).

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2024, I electronically filed the foregoing Complaint Counsel's Answer to Respondent Intuit Inc.'s Application for a Stay Pending Review electronically using the FTC's E-Filing system, and I caused the foregoing document to be sent via email to:

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