

**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.

Docket No. 9408

**RESPONDENT INTUIT INC.'S REPLY IN SUPPORT OF APPLICATION
FOR A STAY PENDING REVIEW BY THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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February 8, 2024

GLOSSARY OF ABBREVIATIONS

Abbreviation	Meaning
ALJ	Administrative Law Judge
App.	Intuit Stay Application
CC	Complaint Counsel
ID	Initial Decision
Op.	Opinion of the Commission
Opp.	Complaint Counsel's Opposition to Intuit's Stay Application
RPF	Respondent's Proposed Findings of Fact
RRF	Respondent's Replies to Complaint Counsel's Proposed Findings of Fact
TY	Tax Year

CC's opposition is remarkable for the extent to which it addresses issues (and makes claims) wholly unrelated to the Commission's order. Most prominently, CC pervasively discuss IRS Free File and Direct File, programs so tangential to this case that neither is *ever named* in the 93-page decision or the order that CC are purportedly defending. The facts actually relevant here show that a stay is warranted.

I. INTUIT'S APPEAL WILL LIKELY SUCCEED

A. This Proceeding Is Unconstitutional

1. CC never argue that the ALJ's tenure protections are constitutional (App.3-4). Instead, they posit (Opp.1-2) that this constitutional flaw should be excused because the commissioners reviewed the ALJ's decision de novo and, under *Collins v. Yellen*, 141 S.Ct. 1761 (2021), Intuit proved no harm. Both arguments fail.

Lucia v. SEC, 138 S.Ct. 2044 (2018), shows that de novo commissioner review is irrelevant. There, the Court held that an unconstitutionally appointed ALJ required vacatur despite the SEC commissioners' de novo review, because the proceeding was already tainted by the ALJ's involvement. *See id.* at 2050. The same is true here.

As for *Collins*, no binding precedent has applied its prejudice rule in administrative adjudications. And the Fifth Circuit is unlikely to do so, because prejudice need not be shown for errors that "affect[] the framework within which the trial proceeds." *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017). That is the situation here.

2. CC wrongly argue (Opp.2) that Intuit's private-rights argument is "untimely" and that "this matter involves 'public rights.'" Intuit raised the argument to both the ALJ and the Commission, as required, 16 C.F.R. §3.51(b). And the Commission's holding that this case concerns public rights because it involves a government charge (Op.79) reflects the same

“question-begging” rejected in *Jarkesy v. SEC*, 34 F.4th 446, 457 (5th Cir. 2022) (subsequent history omitted).

B. The Deception Holding Is Fatally Flawed

CC’s merits arguments likewise fail. Merely repeating the Commission’s reasoning cannot defeat a stay because “the Commission need not ‘harbor doubt about its decision ... to grant the stay,’” *Daniel Chapter One*, 149 F.T.C. 1589, 1592 (2010). Instead, a party “may satisfy the ‘merits’ factor if [its] argument on at least one claim is ‘substantial.’” *Id.* Intuit easily clears that bar.

Indeed, nothing in CC’s opposition rebuts any of Intuit’s four substantial claims of error. First, CC cite no authority supporting the Commission’s “particularly strong” legal standard (Op.45), nor reconcile that standard with FTC guidance, App.6. Second, CC’s only evidence that the Commission did not wrongly analyze Intuit’s ads piecemeal is a Commission footnote *admitting* that the Commission “excerpted selected portions” of ads and considered “other elements” only “after discussing” those “most problematic components.” Op.38 n.17. Third, CC (like the Commission) never acknowledge cases and FTC guidance that should have informed the reasonable-consumer inquiry here, App.6-7. Finally, CC do not justify—with logic or case law—the Commission’s unprecedented application of the deceptive-door-opener/first-contact theory. The novel extension of that brick-and-mortar theory to the internet threatens to upend e-commerce and alone justifies a stay.

C. The Order Cannot Stand

CC nowhere meaningfully respond to Intuit’s arguments that the cease-and-desist order is unjustified, merely citing to the Commission’s opinion (including the errors Intuit identified). CC’s only actual argument—that the Commission appropriately deemed the violations

“egregious,” Opp.4—fails because the Commission neither rejected the ALJ’s contrary finding nor offered any basis for doing so, *see* ID.221.

II. THE REMAINING FACTORS FAVOR INTUIT

A. Equities

CC are wrong that the equities support denying a stay.

First, Nick Soukas’s declaration does not show that Intuit’s current (TY2023) ads violate the order, Opp.4. As the Commission recognized, Intuit’s current website (and current ads) “display[] upfront the notation ‘~37% of filers qualify,’ which ... satisf[ies] the requirements of Final Order I.B.1.” Op.90. Intuit’s current ads similarly comply with the order’s other requirements. What Mr. Soukas explained (¶27) is that if the Commission nonetheless wrongly deemed Intuit’s current ads non-compliant, “it would be very difficult and costly to fundamentally alter [Intuit’s] advertising and [business] strategy.” *See also id.* ¶26.¹

Second, CC’s monetary-harm theory is untenable. The theory (Opp.6-7) is that some consumers who choose a paid TurboTax product are eligible to file for free via a free IRS program. That theory has *nothing* to do with the Commission’s deception holding, which concerned Intuit’s commercial marketing (i.e., not the product it once donated to the IRS Free File program), *see* RPF¶876. In fact, neither the ALJ’s decision nor the Commission’s ever mentions “Free File,” let alone suggests that it has *any* bearing on this case. CC’s focus on harms beyond this proceeding underscores their inability to defend the Commission’s actual decision.

¹ CC’s attempt to discredit Mr. Soukas (Opp.4 n.3) fails. When he was deposed, he held a different position (VP and Growth Leader for Business Management and Strategy) than he does now (Senior VP of Marketing). Soukas Decl. ¶2. It is thus unremarkable that he is now more familiar with Intuit’s marketing.

In any event, CC's evidence of harm is insubstantial. CC cite (Opp.5 n.4) only (1) a sentence in Judge Breyer's decision from an irrelevant class-action lawsuit that actually lamented the *dearth* of harm evidence offered there (GX877 at 14; *see also* RRF¶¶929-932), and (2) hearsay news articles outside the record (and later proven wrong), RRF¶676. CC also incorrectly—and without support—assert that consumers were harmed by using paid TurboTax products when they might have been eligible for IRS Free File. Opp.5-6 & nn.5-9. But the *evidence* here shows that consumers choose paid TurboTax products over free government programs because they trust TurboTax and value its features. RPF¶759; RRF¶¶45-46.

CC's harm argument also rests on the flawed premise that more consumers can file for free with IRS Direct File than with TurboTax. In reality, far *fewer* consumers can use Direct File—only taxpayers in 12 states who have “simple tax needs”²—than can use Intuit's, RPF¶¶113-114, 127. Nor does IRS Free File support CC's argument; fewer than 3 million consumers use that program annually.³

Third, CC are wrong that a stay would mean consumers will waste time and have to input sensitive personal information. Opp.6-7. As the Commission recognized (Op.30), TurboTax.com's Product & Pricing webpage—which “lists each TurboTax product, its price, and examples of tax situations” covered—“is shown to all consumers before they start preparing their taxes.” Thus, consumers need not enter personal information or spend significant time before learning TurboTax products' qualifications. RPF¶¶449-450. CC suggest (Opp.7) that consumers are harmed by *other* TurboTax offers, but there is nothing deceptive about those offers, which were not part of this case.

² IRS, *Direct File*, <https://www.irs.gov/about-irs/strategic-plan/direct-file>.

³ National Taxpayer Advocate Annual Report (2023), <https://www.taxpayeradvocate.irs.gov/reports/2023-annual-report-to-congress/full-report/>.

Fourth, CC falsely suggest (Opp.7) that Intuit has a competitive advantage. All major players in the tax-preparation market advertise free claims like Intuit's. RPF¶¶141, 453-454, 482. Intuit would thus be the *only* market participant unable to use a "simple returns" disclosure. That competitive *disadvantage supports* issuing a stay.

B. Public Interest And Irreparable Harm

CC are wrong (Opp.7-8) that the public interest outweighs Intuit's irreparable harm or otherwise supports denying a stay. CC's response to Intuit's irreparable-harm arguments (App.7-9) is to focus on a single quote from a press release. But the fact that Intuit can avoid significant business impacts (Opp.8) reflects only that Intuit is able to mitigate some of the worst impacts of the order, not that the order is warranted (or lawful). And it can do even that only after considerable effort and expense.

CONCLUSION

The Commission should stay its order pending appeal.

February 8, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

On February 8, 2024, I caused the foregoing document to be filed electronically using the FTC's E-Filing system, which will send notification of such filing to:

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