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

In the matter of:

H&R Block Inc.,
a corporation,

HRB Digital LLC,
a limited liability company, and

HRB Tax Group, Inc.,
a corporation,

Respondents.

Docket No. 9427

COMPLAINT COUNSEL'S PRETRIAL BRIEF

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I. Introduction

For years, H&R Block has advertised that consumers can use its Do-It-Yourself (“DIY”) Products to file their taxes for free. But many – if not most – cannot. [REDACTED]

[REDACTED]¹ The promise of a free return draws consumers to its DIY Products, but many later discover they do not qualify to use the free product (“Free Online”).

After deceptive ads drive potential customers to its website and consumers begin completing their tax returns, H&R Block unfairly imposes substantial hurdles to consumers seeking to move from more expensive to less expensive DIY Products, i.e., “downgrade.” While HRB allows users to seamlessly upgrade to more expensive products, it actively dissuades consumers from downgrading by (1) requiring them to contact customer service by phone or chat to request a downgrade (“CSC requirement”), and (2) deleting all previously entered data and requiring consumers to start over in the less expensive product (“deletion requirement”) (collectively, “downgrading practices”).

H&R Block’s downgrading practices likely cause substantial injury to consumers who downgrade (“downgraders”) by requiring them to spend time contacting customer service and reentering their information; they also injure consumers who pay for more expensive products to avoid the injury inflicted by the downgrading requirements (“would-be downgraders”). This substantial injury is neither reasonably avoidable by consumers nor outweighed by any countervailing benefits of the practices to consumers or competition.

The evidence will show that H&R Block violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by misrepresenting that consumers can file their taxes for free using its DIY Products when many – if not most – cannot and imposing two unfair downgrading practices: the CSC and deletion requirements. Pursuant to Section 5(b) of

¹ PX110, CC-001058.

the FTC Act, 15 U.S.C. § 45(b), Complaint Counsel request entry of the proposed cease and desist order to prevent H&R Block from continuing these practices.

II. Background

A. Respondents

Respondents H&R Block, Inc., and HRB Tax Group, Inc., are Missouri corporations, and Respondent HRB Digital LLC is a Delaware limited liability company (collectively, “HRB”). HRB has had annual revenues of \$3.5-3.6 billion since 2022.² In addition to operating brick-and-mortar tax preparation offices, HRB advertises and sells online tax preparation products.

B. DIY Products

All three Complaint counts relate to HRB’s DIY products:³ Free Online, Deluxe, Premium, and Self-Employed.⁴ The paid products include additional features, like storing tax information and live tech support, but the main differences among them are the tax forms available to file in each.⁵ Free Online offers the fewest forms and Self-Employed offers the most.

C. Deception

1. HRB Misrepresents that Consumers Can File Their Taxes for Free

HRB has emphasized “free” messaging in advertisements since at least 2016,⁶ despite persistent complaints about its lack of price transparency.⁷ HRB disseminates

² H&R Block, Inc., Annual Reports, *available at* <https://investors.hrblock.com/financial-information/annual-reports>.

³ Complaint ¶¶7, 9.

⁴ Complaint ¶12, Answer ¶12.

⁵ See Complaint ¶13; Answer ¶13; PX210, 13:18-14:6.

⁶ See PX091 at CC-000764; PX047, CC-000105.

⁷ PX053; PX049, CC-000150; PX210, 20:15-19; PX199.

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free advertisements using TV,⁸ social media,⁹ display ads,¹⁰ email marketing,¹¹ search engine optimization,¹² and its own website.¹³

a. Television and Video Ads

Since at least 2018, HRB has run numerous campaigns advertising that consumers can file their taxes for free. For example:

- 2018's "DIY File Free" and "More Zero," which aired before and after the Super Bowl, and during the Olympics' Opening Ceremony,¹⁴ [REDACTED]
[REDACTED]¹⁵
- 2018's "Heist," featuring actor Jon Hamm ("H&R Block MoreZero lets you file online for free even if you itemize deductions"),¹⁶ [REDACTED]
[REDACTED]
[REDACTED]¹⁷
- 2021's "Block Has Your Back" advertised "We make it easy for you! You need to get your taxes right, but we know that money is tight. (file free) You can file online for free, max refund guarantee. File online for free. Block has your

⁸ PX208, 21:16-20; PX049, CC-000110-11.

⁹ PX208, 22:9-12. *See also* PX233-PX236, PX241 (Mar. 2022); PX355 (Apr. 2022); PX261-PX268 (Jan. 2023); PX237-PX238 (Mar. 2022); PX324-PX330 (Feb. 2023); PX345-346 (Apr. 2024); PX242-PX243 (Mar. 2022); PX276-PX304 (Feb. 2023); PX220-223, PX232, PX239 (Mar. 2022); PX131, PX333-PX334, PX336-339 (Jan. 2024); and PX270-PX275 (Feb. 2023).

¹⁰ PX208, 20:25-21:6; PX049, CC-000115.

¹¹ PX208, 25:11-14; PX049, CC-000126-32.

¹² *See* PX212-PX214 (2019), PX216 (2021), PX218 (2022), PX244-PX245 (2022), PX248-PX250 (2022), PX254-PX255 (2022), PX257-PX258 (2022/2023); PX344 (2024); PX208, 25:22-25; PX049, CC-000140.

¹³ PX208, 22:2-8; PX134; PX136.

¹⁴ PX049, CC-000110-11.

¹⁵ PX145.

¹⁶ PX225.

¹⁷ PX049, CC-000110.

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back”¹⁸ with fewer than 3 seconds of disclosures in small, white font at the bottom of the screen.

- 2022’s “Help is Here,” including the “Simple Things” commercial, which told audiences: “The best part about doing things yourself – It’s free. Like doing your own taxes with H&R Block Free Online. Where more people can file free than with Turbo Tax. Help is here.”¹⁹ Ad agency reports prepared for HRB found [REDACTED]
[REDACTED]²⁰
- 2022’s 6-second, five-frame YouTube ad, which emphasized in bright green text that consumers can, “File for nada.”, “File for zip.”, “File for zilch.”, “File for free.”, “H&R Block Help is here.”,²¹ each statement “disclaimed” by small, inconspicuous, grey or black font towards the bottom of the screen, “Simple returns only when filing with H&R Block Free Online.”
- 2023’s 15-second “It’s Tax Season Football Ad” invited consumers to “Do your own taxes online with H&R Block” and later emphasized “Simple returns file free” in large white letters, with smaller inconspicuous white text on a moving background reading “Not all taxpayers qualify. See hrblock.com for details,” displayed for ~3 seconds.²²
- 2024’s “It’s Better With Block” included a 30-second ad titled “Breakroom Free File,”²³ which included this dialogue:

WOMAN: Hey, what’s up there?

MAN: Oh, I switched to H&R Block. Doing my own taxes online. Kinda winning taxes. I was able to file free, and it was so easy to do on my own. So long TurboTax.

¹⁸ PX298.

¹⁹ PX126.

²⁰ PX127, CC-001249.

²¹ PX220.

²² PX306.

²³ PX130.

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WOMAN: Wow! I gotta make the switch.

MAN: You really should.

VOICEOVER: Tired of TurboTax? You could file free and easily do your own taxes online with H&R Block. It's Better With Block.

An April 2024 report indicated that, of all HRB ads, this ad was the [REDACTED]

[REDACTED].²⁴

b. Website

When consumers who see HRB's TV and video advertisements visit HRB's website, hrblock.com, they encounter additional deceptive "free" claims. HRB's website advertises Free Online on a product-specific webpage²⁵ and an "Online Taxes" page where the DIY Products are described in limited detail side-by-side.²⁶ While Free Online is not free for all – or possibly even most – filers, it is marketed with either no disclaimer or limited descriptions of the tax situations covered,²⁷ or the phrase "simple returns." A 2018 presentation to HRB's Board of Directors noted that [REDACTED]

[REDACTED]²⁸ Despite this, HRB continued to heavily invest in free ads, spending [REDACTED]²⁹

2. Effects of HRB's Marketing

Complaint Counsel's survey expert, Sarah Butler, evaluated whether consumers were deceived by HRB's advertising. Butler used survey design best practices, minimizing possibility of bias, demand artifacts, and other survey "noise," including

²⁴ PX 159, CC-001728.

²⁵ See, e.g., PX139 (Apr. 2022); PX703, CC-004123 (Mar. 2022).

²⁶ See, e.g., PX215 (Sept. 2020), PX380 (Mar. 2021), PX135 (Mar. 2022), PX260 (Jan. 2023), PX342 (Feb. 2024).

²⁷ See, e.g., PX342; PX139.

²⁸ PX085, CC-000598.

²⁹ PX087, p.7.

guessing and pre-existing beliefs.³⁰ In March 2024, Butler surveyed 1,725 U.S. consumers who would consider filing their 2023 taxes online, employing experimental design and randomly assigning respondents to two groups – one viewing HRB’s 30-second “It’s Better with Block: Breakroom” (Commercial Group) and one viewing HRB’s homepage and a second webpage (linked to the homepage by a “Learn More” button) (Website Group). Each group was further divided into Test/Control subgroups. The Tests viewed the actual commercial or webpages, and the Controls viewed versions with the allegedly misrepresentative statements removed and, for the webpages, clarifying information added, to isolate the impact of HRB’s representations about “free” from other possible explanations.³¹ The Controls were asked the same questions as the Tests. Because Butler sought to evaluate whether consumers *incorrectly* believed they could use HRB to file free online, she specifically identified respondents with tax situations that made them ineligible for Free Online.³²

Butler will testify that ineligible “consumers generally believe that they could file their taxes for free using H&R Block’s Free Online product.”³³ Butler’s Commercial Group survey results show 69.8% of ineligible Test respondents believed they could file with Free Online, compared with 52.2% of ineligible Control respondents.³⁴ Similarly, the Website Group results show 69.0% of ineligible Test respondents believed they could file with Free Online compared with 53.1% of ineligible Control respondents.³⁵ The differences between deception rates for the Tests and Controls are statistically significant and yield net rates of 17.6 and 15.9 percentage points of ineligible consumers incorrectly believing, based on a single exposure to alleged misrepresentations in HRB’s advertising, that they could use Free Online.³⁶

³⁰ PX704, ¶13.

³¹ PX704, ¶14.

³² PX704 ¶15.

³³ PX704, ¶17.

³⁴ PX704, ¶76, Table 8.

³⁵ PX704, ¶86, Table 11.

³⁶ PX704, ¶¶17, 93.

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HRB's survey expert, Dr. Itamar Simonson, attempts to rebut Butler's testimony and conducted his own surveys. However, Simonson's August 2024 surveys do not identify respondents who are ineligible for Free Online; therefore, responses to questions about whether respondents would qualify for Free Online provide no information about whether respondents are misled.³⁷ Despite Simonson's

[REDACTED],³⁸ Simonson provides no control for this key question and, therefore, cannot prove or disprove deception.³⁹

3. HRB's Ineffective "Disclaimers"

HRB purports to disclaim its free offer by limiting it to "simple returns." Sometimes, this "disclaimer" is prominently placed. For example, in the 2023 "It's Tax Season Football Ad," the words "Simple Returns File Free" were displayed in large font. As shown in the screenshot below,⁴⁰ however, the more-direct clarification that "Not all taxpayers qualify," was barely visible, written in tiny, light-colored font.

³⁷ PX718, ¶¶63-65.

³⁸ Deposition of Itamar Simonson, Ph.D. ("Simonson Deposition"), 66:9-11.

³⁹ PX718, ¶¶55-59.

⁴⁰ PX306.



What constitutes a “simple return” is never explained in ads, and the qualifications change year-to-year. For example, in 2018, Free Online permitted users to file 1040EZ, 1040A, and 1040 tax forms with Schedule A for itemized deductions. In 2019, after the IRS discontinued forms 1040EZ and 1040A, HRB redefined “simple returns,” removing itemized deductions and shrinking the population who qualify for Free Online.

Butler’s survey asked respondents ineligible for Free Online who recalled seeing anything about a “simple return,” whether they believed they had a “simple return.”⁴¹ Results for Control Group respondents (for whom the language “simple return” was removed) show that 46.3% and 58.8% recalled messaging related to “simple return” in the commercial and webpages, respectively.⁴² Butler observes that such responses suggest it is unlikely that this term clarifies for consumers who is eligible to use Free Online.⁴³ Butler further opines that “‘simple returns’ and filing for free were not necessarily contiguous concepts,” such that “some respondents may believe they can

⁴¹ PX704, ¶¶78, 89-90.

⁴² PX704, ¶78, Table 9 and ¶89, Table 12.

⁴³ PX704, ¶79.

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file for free, [but] may not think their return is simple and vice versa.”⁴⁴ Simonson’s survey data similarly suggest that respondents did not have a clear and consistent understanding of the phrase “simple return.”⁴⁵

[REDACTED]
[REDACTED]⁴⁷ When asked for his understanding of what HRB means by “simple return,” Simonson⁴⁸ demurred, stating [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]⁴⁹ though eventually stating, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]⁵⁰ But Kenneth Hines, the former IRS employee whom HRB will call as an expert to opine on this phrase, also struggled to define “simple returns,” offering, [REDACTED]

[REDACTED]⁵¹

D. Unfairness

1. Customer Service Contact (“CSC”) Requirement

HRB’s customers can request to downgrade three ways:⁵² (1) chatting with a chatbot [REDACTED]⁵³ and waiting for a live

⁴⁴ PX704, ¶¶80, 90; PX718, ¶59.

⁴⁵ *Id.*

⁴⁶ PX208, 161:17-20; 178:3-23.

⁴⁷ PX208, 160:6-11; 222:16-23.

⁴⁸ Simonson Deposition, 15:6-9 [REDACTED]

⁴⁹ *Id.*, 262:15-21.

⁵⁰ *Id.*, 264:2-5.

⁵¹ Deposition of Kenneth Hines, M.A., 40:2-4.

⁵² PX197, CC-001981-84.

⁵³ PX205, 13:25-14:1; PX210, 60:19-61:2.

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agent to join, (2) calling HRB's customer service and using an Interactive Voice Response ("IVR") system,⁵⁴ and (3) calling HRB's customer service and speaking with a live agent.⁵⁵

a. The CSC Requirement is Unavoidable

[REDACTED]⁵⁶
The complaint, however, plainly challenges the IVR system as part of the CSC requirement.⁵⁷ The IVR system cannot consistently authenticate users' accounts, requiring them to wait for a live agent to assist them.⁵⁸ [REDACTED]

[REDACTED]⁵⁹ additionally burdening consumers seeking to downgrade. Consumers *cannot* avoid the CSC requirement except by accurately predicting which DIY product they need before they begin and making no mistakes along the way. As explained further in Section II.D.2.c, such an expectation of perfection is unrealistic.

b. The CSC Requirement Costs Consumers Time

An FTC investigator conducted multiple undercover contacts requesting to downgrade: three calls and two chats in 2022, one call in 2023, and a call and a chat in 2024. While the investigator downgraded quickly twice with IVR,⁶⁰ she was unable to connect to customer service three times (including once when the IVR system could not

⁵⁴ PX205, 13:25-14:1.

⁵⁵ *Id.*

⁵⁶ RX0246, ¶42.

⁵⁷ *See* Complaint, ¶¶16, 18, and 21.

⁵⁸ *See* Complaint, ¶21; RX0123, 245:1-8.

⁵⁹ *See, e.g.*, PX199, p.109 ([REDACTED]).

⁶⁰ PX662 & PX652 (Apr. 14, 2023 IVR Call); PX663 & PX487 (Feb. 7, 2024 Call).

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authenticate the account),⁶¹ and for another three attempts was only able to downgrade after a protracted wait (18-33 minutes).⁶²

The investigator's experiences mirror those of consumers who have consistently complained about [REDACTED]

[REDACTED]⁶³ In discovery, [REDACTED]

[REDACTED]⁶⁴ [REDACTED]

[REDACTED]⁶⁵ [REDACTED]

[REDACTED]

[REDACTED]⁶⁶ Complaint Counsel's public economics expert Dr.

Youssef Benzarti estimates the opportunity cost for the [REDACTED] downgraders [REDACTED]

[REDACTED] adjusting the estimate to account for

[REDACTED] consumers' dislike of working on taxes,

[REDACTED]⁶⁷

c. The CSC Requirement Drives Revenue

HRB briefly experimented with allowing consumers to downgrade without requiring a phone call (to IVR or live agent) or chat with a live agent, but the experiment was discontinued [REDACTED]

[REDACTED]

[REDACTED]⁶⁸ and in 2020, HRB's DIY tax team recognized a need to [REDACTED]

⁶¹ PX659 & 753 (Apr. 11, 2022 Call); PX660 & PX755 (Apr. 13, 2022 Call-1); PX661 & PX756 (Apr. 13 2022 Call-2).

⁶² See PX752 & PX479 at ~28:00 (Apr. 11, 2022 Chat); PX754 & PX480 at ~1:00 (Apr. 13, 2022 Chat); PX497 & PX488 at ~19:00 (Feb. 7, 2024 Call).

⁶³ PX174, CC-001866

⁶⁴ PX664, ¶130. See also PX077, CC-000504.

⁶⁵ PX664, ¶132.

⁶⁶ PX077, CC-000504.

⁶⁷ PX664, ¶135-136.

⁶⁸ PX742, CC-006192.

[REDACTED] ⁷⁹ [REDACTED]
[REDACTED] ⁸⁰ [REDACTED]

Two weeks later, Watts stated she was [REDACTED]
[REDACTED]

[REDACTED] ⁸¹ [REDACTED]
[REDACTED]

[REDACTED] ⁸² [REDACTED]

[REDACTED]

d. The CSC Requirement Offers No Benefits

HRB's consumer behavior expert, Dr. Punam Keller, claims [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ⁸³ This ignores the reality of
downgraders' customer service interactions, which are often frustrating, cursory, and
confusing.

⁷⁹ PX209, 55:7-8.

⁸⁰ PX106, CC-001030.

⁸¹ PX102, CC-001023-24.

⁸² PX111, CC-001069.

⁸³ RX0238, ¶38.

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[REDACTED]

[REDACTED]⁸⁴ so any tax counseling benefit they provide is inherently limited. Additionally, [REDACTED]

[REDACTED]⁸⁵ and if they do, [REDACTED]

[REDACTED]⁸⁶ Moreover, from 2018 to 2024, [REDACTED]

[REDACTED]⁸⁷ If the CSC requirement was truly educational, [REDACTED]

Keller acknowledges [REDACTED]

[REDACTED]⁸⁸ Yet, Keller fails to draw the obvious conclusion: consumers with varying needs should not be *required* to contact customer service to downgrade when only some will find it helpful, and many consider it burdensome.⁸⁹

2. Deletion Requirement

After consumers request a downgrade, they are informed that HRB will delete their previously entered information and they must start over in the downgraded product. The deletion requirement injures consumers by costing them time or money: they must spend time reentering their information or pay for the more expensive product.

a. The Deletion Requirement Costs Consumers Time

HRB has known for years that the deletion requirement frustrates downgraders, often costing them hours of work. For example, after speaking with a downgrader, one customer service agent wrote, “Client states that she was upgraded without her permission and does not want downgrade to lose the information she worked all day

⁸⁴ PX110, CC-001055-56.

⁸⁵ PX069, CC-000215.

⁸⁶ PX078, CC-000526 (February 2021); CC-000530 (February 2021).

⁸⁷ PX042, “[REDACTED]”.

⁸⁸ RX0238, §III.D.

⁸⁹ See also PX721, §VI.b-c.

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on.”⁹⁰ HRB has also received this feedback from its own employees. For example, in response to HRB’s 2018 “ [REDACTED] ” one employee wrote:

[REDACTED]

[REDACTED]⁹² Benzarti

evaluated the lost time harm the deletion requirement inflicted on those downgraders.

[REDACTED]⁹³

[REDACTED]

[REDACTED]⁹⁴ [REDACTED]

[REDACTED]

[REDACTED]⁹⁵ Benzarti used his academic

research on consumer dislike of preparing taxes⁹⁶ [REDACTED]

[REDACTED]⁹⁷) to estimate the total harm caused by HRB’s deletion requirement. [REDACTED]

[REDACTED]

[REDACTED]⁹⁸

b. Consumers Overpay to Avoid the Deletion Requirement

⁹⁰ PX523, CC-003649.

⁹¹ PX072, CC-000387; *See also* CC-000392.

⁹² PX664, ¶13; PX671.

⁹³ PX671.

⁹⁴ PX664, ¶21-27.

⁹⁵ *Id.* §V.

⁹⁶ *Id.* §VI.

⁹⁷ RX0238, ¶16.

⁹⁸ PX721, ¶30.

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HRB knows that many consumers overpay to avoid the deletion requirement. Consumers have told HRB's customer service representatives so repeatedly. Call notes⁹⁹ from customer service representatives tell the story plainly:

- "Client wanted to downgrade[.] Once advised client that she had to start over, client didn't want to downgrade."¹⁰⁰
- "Called wanting to downgrade from premium to free until I explained his return would be wiped clean."¹⁰¹
- "[C]lient requested to downgrade to online free but decided against it because he doesn't want to have to re-enter all his info[.]"¹⁰²

HRB also heard this feedback from employees. For example, in March 2018, HRB's Director of International Tax emailed another executive and described "a pretty poor experience" he had attempting to downgrade after being prompted to upgrade unnecessarily.¹⁰³ He concluded, "I just paid the premium fee and moved on, I don't have time to reenter everything. I suppose that is what we want, but it seems customer unfriendly."¹⁰⁴

c. The Deletion Requirement is Unavoidable

Because HRB does not disclose the downgrading practices before consumers begin entering their tax information or before consumers upgrade,¹⁰⁵ many are unaware of the deletion requirement until they attempt to downgrade. For example, when an agent informed one consumer that she would lose her previously entered information if she downgraded, the consumer replied, "...This is like getting a ransomware

⁹⁹ See e.g., PX523, CC-003667, CC-003670, CC-003671, and CC-003675.

¹⁰⁰ PX523, CC-003655.

¹⁰¹ PX523, CC-003662.

¹⁰² PX523, CC-003669.

¹⁰³ PX203, CC-002065.

¹⁰⁴ *Id.*

¹⁰⁵ See e.g., PX381 at ~0:08 (TS2021 Deluxe upgrade prompt for HSAs); PX402 at ~0:22 (TS2022 mobile Deluxe upgrade prompt for HSAs); PX439 at ~1:03 (TS2023 Self-Employed upgrade prompt)

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message.”¹⁰⁶ As this consumer discovered, there are only two ways to avoid the deletion requirement: select the DIY product at the outset and make no mistakes preparing the return, or acquiesce and pay for the more expensive product. Neither of these methods of avoidance is realistic.

Consumers repeatedly make this point in complaints.¹⁰⁷ For example, one consumer trying to downgrade to Free Online after accepting what he mistakenly thought was a free upgrade, reported:

When I called customer service they told me the only option I had was to spend three hours redoing my taxes and start over. [. . .] I felt that the price I was charged was deceptive and done on purpose and set up in a manner to make you either have to pay the price that they determined or make you restart your entire taxes over.¹⁰⁸

Another consumer similarly complained:

When you realize that you do not in fact have any needs which would have required the upgrade and you wish to return to free, H&R block states that this is simply impossible and that in order to return to free you must delete all of the work you have accomplished thus far and start over, even though your information was already manually entered and does not contain any of the upgraded services. [. . .] [T]hey have designed this system in a way such that you will give in to the higher fees.”¹⁰⁹

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰⁶ PX523, CC-003712-13.

¹⁰⁷ *E.g.*, PX794, CC-008535 (“I suspect that [HRB] is intentionally designing their software to strongly push, almost compel, the user to purchase higher tier services. The application has a feature where if the user upgrades to a higher tier service they cannot downgrade back to the free file version without losing all of the data they have input.”), CC-008675.

¹⁰⁸ PX791, CC-007472.

¹⁰⁹ PX791, CC-007500.

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[REDACTED]

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[REDACTED]

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HRB knows consumers are often confused about which products cover which tax situations. Nevertheless, HRB continues to make it difficult for consumers to “accurately compare and choose a tax filing product.”¹¹² HRB provides vague and limited descriptions of “tax situations” when advertising the DIY Products on its website and hides more detailed information about the products in collapsed tables or buried beneath multiple links.¹¹³

d. The Deletion Requirement Offers No Benefits

HRB’s experts contend the deletion requirement is necessary to safeguard consumer privacy and prevent “abusive” filings wherein consumers understate their tax liabilities. In his expert report, Hines states:

[T]he requirement that data be cleared and the user start over when the customer chooses to downgrade is a helpful and reasonable way of reducing the incidence of fraud ... because it impedes efforts by a taxpayer to submit an abusive return – that is, a return that . . . improperly reports their tax liabilities.¹¹⁴

This conclusion falls apart under the slightest scrutiny. Despite HRB’s suggestion that it acts as a private enforcer for the IRS, the do-it-yourself nature of the DIY Products means HRB cannot prevent a determined consumer from understating their income.

Take, [REDACTED]

[REDACTED]¹¹⁵ As Keller

¹¹⁰ PX162, CC-001758-59.

¹¹¹ *Id.*, CC-001759.

¹¹² PX703, ¶47-49. *See also* PX018 p.3 [REDACTED]

¹¹³ *See* PX703, ¶42-46; PX018 p.3.

¹¹⁴ RX0243 p.17.

¹¹⁵ RX0238, ¶25.b.

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notes, [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

¹¹⁶

Hines and [REDACTED] also tout the “privacy benefits” of the deletion requirement. Complaint Counsel’s user experience expert, Dr. Harry Brignull, notes this argument is “incoherent ... because the data wiping is only temporary.”¹¹⁷ Downgraders must reenter their information after the downgrade, negating any possible privacy benefit. Clearly, these nonsensical justifications were retrofitted to recast the deletion requirement as driven by something other than revenue and they should not be credited.

III. Argument

E. Deception

The preponderance of the evidence will show HRB’s “free” advertising for its DIY products is undeniably deceptive, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), satisfying each element of deception: (1) “a representation ... that is likely to mislead” (2) “the reasonable consumer,” and (3) “the representation ... must be material.” FTC Statement on Deception, 103 F.T.C. 110, 176-82 (1984) (“Deception Statement”).

1. HRB’s Free Advertising is Likely to Mislead Consumers

HRB has made its “free” representation repeatedly and continuously through widely disseminated, multi-year, multi-channel advertising campaigns.¹¹⁸ “In cases of express claims, the representation itself establishes the meaning.” Deception Statement, at 176. As described *supra* in Part II.C.1., HRB proliferated “free” claims on TV, social media, its website, in online search results, and in other forms of advertising. The

¹¹⁶ RX0238, ¶ 25.b.

¹¹⁷ PX717, §3.3.

¹¹⁸ See *supra* §II.C.1.a-b.

representation and meaning are clear: consumers can file their taxes for free using HRB's DIY products.

Even if "free" were considered an implied claim, the meaning of HRB's ads can be determined "through an examination of the representation itself." Deception 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, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992) ("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"). 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. Stefanichik*, 559 F.3d 924, 928 (9th Cir. 2009) (internal quotations omitted). The meaning and net impression of HRB's "free" ads is clear because in many ads HRB repeats the message. For example: "File for nada.", "File for zip.", "File for zilch.", "File for free."¹¹⁹ No extrinsic evidence is needed to discern the unmistakable "free" message conveyed by such ads. *See Fleetcor*, , 620 F.Supp.3d at 1289, 1295; *In the Matter of Telebrands*, 140 F.T.C. 278, 290 (Sept. 19, 2005); *In the Matter of Novartis Corp.*, 127 F.T.C. 580, 680 (May 13, 1999); *see also* Deception Statement at 176.

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," *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965), *see also Fleetcor*, 620 F.Supp.3d at 1295, survey evidence also supports the Complaint. As described *supra* in Part II.C.1., the results from Butler's survey show that ineligible consumers "generally believe that they could file their taxes for free using H&R Block's Free Online product."¹²⁰ These findings are corroborated by numerous complaints the

¹¹⁹ PX220.

¹²⁰ PX704, ¶17.

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Commission received about HRB's "free" claims¹²¹ and [REDACTED]

[REDACTED]¹²²

A representation is likely to mislead consumers if the express or implied message conveyed is false or lacks a reasonable basis. *See Fleetcor*, 620 F.Supp.3d at 1289, 1300; *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994). Representing to consumers that they can file their taxes for free using Free Online is false and lacks a reasonable basis for most people, because many, if not most, have tax situations that are not covered by Free Online.¹²³

HRB will argue that its marketing is not deceptive because many taxpayers file for free with Free Online. But the fact that a claim is true for some does not render it free of deception. "A material practice that misleads a significant minority of reasonable consumers is deceptive." Deception Statement, p.177 n.20. [REDACTED]

[REDACTED]¹²⁴ Furthermore, survey evidence showed that between a net rate of 15.9 and 17.6 percentage points of consumers *are* misled.¹²⁵

2. HRB's "Free" Representation is Misleading to the Reasonable Consumer

HRB's "free" representations are likely to mislead consumers acting reasonably under the circumstances. "The test is whether the consumer's interpretation or reaction is reasonable." Deception Statement, p.177. Here, common sense and the preponderance of the evidence shows reasonable consumers take HRB at its word when it inundated them with claims like, "File for nada.", "File for zip.", "File for zilch.", "File for free."¹²⁶ If more were needed: "Advertising capable of being interpreted in a misleading way

¹²¹ *E.g.*, PX794, CC-008359, CC-008371, CC-008391, CC-008399, CC-008467, CC-008507, CC-008607, CC-008611, CC-008635, CC-008656, CC-008675, CC-008679.

¹²² PX127, CC-001249; PX159, CC-001742-43.

¹²³ PX704, ¶15.

¹²⁴ PX110, CC-001058.

¹²⁵ PX704, ¶17.

¹²⁶ PX220.

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should be construed against the advertiser.” *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975).¹²⁷

3. HRB’s “Free” Claims are Material

HRB’s representation that consumers can file their taxes for free using the DIY products is material. “A ‘material’ misrepresentation or practice is one which is likely to affect a consumer’s choice of or conduct regarding a product.” Deception Statement, p.182. The Commission has long established that a “free” offer “is a promotional device frequently used to attract customers” that “has often been found to be a useful and valuable marketing tool.” Guide Concerning Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251.1(a)(1); *see also In re Book-of-the-Month Club*, 48 F.T.C. 1297, 1312 (1952), *as modified*, 50 F.T.C. 778.¹²⁸ It is hard to imagine a more salient and motivating claim about a product or service than that it is free.¹²⁹ Finally, two additional presumptions weigh in favor of materiality. First, “the Commission presumes that express claims are material.” Deception Statement, p.182. As discussed above, virtually all HRB’s “free” claims are express claims. Second, “when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.” *Id.* That is the case here, because: (1) HRB knew consumers took away one overarching message from its “free” advertising: “...free,”¹³⁰ and (2) HRB made its “free” claims persistently, *see In re Kraft, Inc.*, 114 F.T.C. 40, 137 (1991) (“We find it reasonable to infer from Kraft’s persistence in using the challenged ad copy ... and in making only minor modifications, that Kraft believed this copy contributed to consumer purchases of Kraft Singles.”), *aff’d*, 970 F.2d 311 (7th Cir. 1992).

¹²⁷ Deception Statement, p.178.

¹²⁸ Compare *In re Book-of-the-Month Club*, 48 F.T.C. at 1312 with PX085, CC-000598 [REDACTED]

¹²⁹ Claims that Free Online is “free” are claims about its *cost*; claims about the cost of a product pertain to a central characteristic, and therefore are presumptively material. Deception Statement, p.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); *FTC v. Johnson*, 96 F. Supp. 3d 1110, 1121, 1142 (D. Nev. 2015).

¹³⁰ *See, e.g.*, PX127, CC-001249.

4. HRB's "Simple Returns" Disclaimer is Ineffective

HRB's video advertisements purported to qualify the "free" offer using the phrase "simple returns." As set forth in Part II.C.3, HRB's "simple returns" disclaimers are usually small, faint print shown briefly at the bottom of the screen at the end of commercials. Under black letter law, however, HRB's "simple returns" "disclaimers" are too small, faint, and short-lived to alter the reasonable consumer's interpretation of HRB's representations. *See* Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosure in Television Advertising (Oct. 21, 1970) (hereinafter "TV Ad Policy Statement"), §I.B, §I.C; §I.E.¹³¹

Even if consumers could find and read HRB's "disclaimer," it would also require them to understand the term "simple returns" – which they do not. The phrase "simple returns" is subject to HRB's redefinition nearly every year. *See supra* Part II.B. Though extrinsic evidence is not needed (*Colgate-Palmolive*, 380 U.S. at 391–92; *Kraft*, 970 F.2d at 319; Deception Statement, p.176) as discussed *supra* Part III.C.3, Butler opines the term "simple return" has no clear or consistent meaning and is unlikely to provide clarity on who can use Free Online.¹³² Thus, HRB's illegible and inscrutable "simple returns" "disclaimers" fail to correct the misimpression HRB's ads leave with consumers.

5. HRB's Ineffective Website and Online Disclaimers

As described *supra* Part II.D.2.c., HRB's website "disclaimers" have usually been a hyperlink on some permutation of the words "simple returns" in small print. HRB will argue its website contained sufficient eligibility disclosures for Free Online, and because consumers must visit the website to use Free Online, consumers could not be deceived by HRB's free advertising. This argument rehashes one made by Intuit, which the Commission rejected earlier this year: "Customers should not be told by an ad that, if they go to a website, they will receive a free product, only to learn once they are on

¹³¹*See also* *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (fine print disclaimer no defense if net impression is still misleading); *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1214, 1220–21 (D. Nev. 2011), *vacated in part on other grounds*, 763 F.3d 1094 (9th Cir. 2014).

¹³² PX704, ¶79; PX718, ¶59.

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the website that it is not free for them.” *In the Matter of Intuit Inc.*, Docket No. 9408, Opinion of the Commission p.48 (F.T.C. Jan. 22, 2024). “Misleading door openers,” like HRB’s, are illegal. *Resort Car Rental*, 518 F.2d at 964; *see also* Guide Concerning Use of the Word “Free” and Similar Representations 16 C.F.R. § 251.1(c).

Likewise, HRB’s purported website “disclaimers” appearing behind hyperlinks are inadequate to correct the deceptive net impression made by HRB’s website.¹³³

F. Unfairness

Section 5(n) of the FTC Act sets forth a three-prong test for unfairness. 15 U.S.C. § 45(n). An act or practice is unfair if it (1) causes or is likely to cause substantial injury to consumers that is neither (2) reasonably avoidable by the consumer nor (3) outweighed by countervailing benefits to consumers or competition. *Id.* The evidence will show that both the CSC and deletion requirements are unfair practices under Section 5.

1. HRB’s Downgrading Requirements Cause Substantial Injury

“To establish substantial injury under Section 5 of the FTC Act, the FTC must show that ‘consumers were injured by a practice for which they did not bargain.’” *FTC v. Neovi, Inc.*, 598 F.Supp.2d 1104, 1115 (S.D. Cal. 2008), *aff’d*, 604 F.3d 1150 (9th Cir. 2010) (quoting *FTC v. J.K. Publ’ns, Inc.*, 99 F.Supp.2d 1176, 1201 (C.D. Cal. 2000)). Such injury “need not be monetary to qualify.” *Neovi*, 598 F.Supp.2d at 1115 (citing *FTC v. Accusearch, Inc.*, No. 06–CV–105–D, 2007 WL 4356786 at *18 (D. Wyo. 2007)). Moreover, injury may be substantial “even if it causes a small harm to a large class of people.” *Neovi*, 598 F.Supp.2d at 1115 (quoting *J.K. Publ’ns*, 99 F.Supp.2d at 1201).

Consumers who use HRB’s DIY Products seek to complete their tax returns independently. They “do not bargain” for being required to interact with customer service. To the contrary, as acknowledged by HRB’s former VP of DIY Tax, DIY

¹³³ *See* .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013), p.10, <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>.

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customers specifically [REDACTED]¹³⁴ Neither do consumers bargain for HRB's deletion of their data when they seek to change products before payment. The injuries inflicted by the downgrading requirements are not expected features of the DIY Products, a fact evidenced by numerous complaints filed by consumers with HRB over many years. While injury need not be monetary, *Neovi*, 598 F.Supp.2d at 1115, Benzarti's analysis shows the injury to downgraders is substantial, [REDACTED]¹³⁵ and [REDACTED]¹³⁶ HRB's downgrading requirements clearly cause substantial injury.

2. The Injuries Caused by the Downgrading Requirements are Not Reasonably Avoidable

Substantial injury is not reasonably avoidable if consumers cannot make a "free and informed choice that would have enabled them to avoid the unfair practice[.]" *Id.* (quoting *J.K. Publ'ns*, 99 F.Supp.2d at 1201). *See also FTC v. Windward Mktg., Inc.*, No. Civ. A 1:96-CV-615F, 1997 WL 33642380, at *11 (N.D. Ga. Sept. 30, 1997); and *In the matter of Orkin Exterminating Co.*, 108 F.T.C. 263, 1986 WL 722153 at *80 (1986), *aff'd*, *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (11th Cir. 1988).

As described above and as Brignull will testify, HRB makes it difficult for consumers to determine which product covers their tax situations.¹³⁷ Additionally, HRB does not advertise its downgrading requirements before consumers select a product. Thus, any argument that downgrading is avoidable is either an argument that consumers should pay for more expensive products than they want or need or that they should be punished if they do not make optimal product selections on the first try. These positions are unrealistic and unsupported. Consumers may reasonably decide

¹³⁴ PX210, 65:5.

¹³⁵ PX721, ¶30.

¹³⁶ *Id.*, ¶1.

¹³⁷ PX703, ¶¶35-49.

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to change products as they prepare their returns; in fact, HRB anticipates this need for consumers who decide to use a more expensive product, [REDACTED]

[REDACTED]¹³⁸

In stark contrast to the seamless process for upgrading, consumers seeking to downgrade cannot avoid the downgrading requirements. HRB neither allows consumers to downgrade without contacting customer service nor downgrade without starting over.

3. The Downgrading Requirements Provide No Countervailing Benefits

“The cost-benefit prong of the unfairness test is ‘easily satisfied where a practice produces clear adverse consequences for consumers that are not accompanied by an increase in services or benefits to consumers or by benefits to competition.’” *FTC v. Fleetcor Technologies, Inc.*, 620 F.Supp.3d 1268, 1337 (N.D. Ga. 2022) (quoting *FTC v. Amazon.com*, 2016 WL 10654030 at *11 (W.D. Wash. 2016)). [REDACTED]

[REDACTED]¹³⁹ the relevant benefits in the third prong’s cost-benefit analysis are those directly associated with the allegedly unfair conduct. FTC Policy Statement on Unfairness, 104 F.T.C. 949, 1070 (1984) (“[the injury] must not be outweighed by any countervailing benefits to consumers or competition *that the practice produces.*” (emphasis added)). See also *Accusearch*, 2007 WL 4356786 at *8 (disregarding Defendants’ offer of generalized benefits because [they] were unrelated to the “specific conduct at issue”). Therefore, any benefits HRB offers that are not from the downgrading requirements must be disregarded as a matter of law. The other benefits HRB claims, privacy and fraud prevention, should also be disregarded because they are nonsensical. *Supra* Section II.D.2.d.

¹³⁸ PX110, CC-001053.

¹³⁹ E.g., RX0246, ¶17.

G. The Requested Remedy is Reasonable

HRB can eliminate its CSC and deletion requirements. As discussed above, the company previously introduced a chatbot as an alternative to forcing downgraders to call (an IVR or live agent) or chat with a live agent. Both Rick Watts, Complaint Counsel's technology expert, and Ron Schnell for HRB, will opine that [REDACTED]

[REDACTED]

[REDACTED]¹⁴⁰

Watts also will testify that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁴¹

Schnell [REDACTED]

[REDACTED]¹⁴² [REDACTED]

[REDACTED]

[REDACTED] Were he wearing the hat of a court-appointed monitor rather than a retained expert, however, Schnell might view Respondents' protestations more skeptically.¹⁴³

Given the harm to consumers and lack of countervailing benefits attributable to these requirements, it would be reasonable to order Respondents to modify their software to remove them.

¹⁴⁰ See, e.g., PX716, ¶24; RX0277, ¶70.

¹⁴¹ See, e.g., PX719, ¶¶13-14, 38.1.

¹⁴² See RX0277, ¶72.

¹⁴³ "The monitor will need to pay particular attention to a company assertion that implementing a compliance feature in a particular way will 'take too long.' This objection may mask the company's disinclination to commit the resources needed to implement the compliance feature." Ron Schnell, et al., *Antitrust Enforcement and Big Tech: After the Remedy Is Ordered*, 1 STANFORD COMPUTATIONAL ANTITRUST 65, 79-80 (2021), <https://law.stanford.edu/wp-content/uploads/2021/06/himes-nieh-schnell-computational-antitrust.pdf>.

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Respectfully submitted,

Dated: October 16, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2024, I electronically filed the foregoing, Complaint Counsel's Pretrial Brief, electronically using the FTC's E-Filing system, and I caused the foregoing document to be sent via email to:

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EXHIBIT A
SIMONSON DEPOSITION
EXCERPTS

FILED UNDER SEAL

EXHIBIT B
HINES DEPOSITION
EXCERPTS

FILED UNDER SEAL