

12/10/2021

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

TURBOTAX FREE FILING CASES

JCCP No. 5067

PEOPLE OF THE STATE OF CALIFORNIA,
acting by and through Santa Clara County
Counsel James R. Williams,

Included Action Case No. 19CV354178

Plaintiff,

**THE PARTIES' JOINT STIPULATION
AND ~~PROPOSED~~ ORDER
CONCERNING THE SEALING OF THE
JOINT BRIEFING STATEMENT ON
PEOPLE'S MOTION TO COMPEL AND
RELATED DOCUMENTS**

v.

INTUIT INC., and DOES 1-50, inclusive,

Defendants.

Assigned for All Purposes to

The Hon. Maren Nelson

Dept.: 17

Complaint filed: September 9, 2019

Trial Date: None Set

Electronically Received 12/03/2021 01:00 PM

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1 Consistent with the Court’s guidance at the November 15, 2021 hearing on the Motion to
2 Compel Responses to the People’s Request for Production No. 2 and Special Interrogatory No. 11
3 (the “Motion”) in Case No. 19CV354178, the Parties have conferred regarding the sealing of the
4 Joint Briefing Statement on the Motion and the related documents filed with the Motion. *See* Nov.
5 15, 2021 Hearing Tr. at 9:18-21; 9:22-10:3. Attached as Exhibits A to E to this Joint Stipulation and
6 Proposed Order are versions of the Joint Briefing Statement on the Motion and related documents in
7 which only information asserted by Intuit to be trade-secret information is sealed, and which may be
8 filed on the public docket for Case No. 19CV354178. *See id.* at 9:28-10:3.

9
10 DATED: December 3, 2021

Respectfully submitted,

11 OFFICE OF THE COUNTY COUNSEL
12 COUNTY OF SANTA CLARA
13 JAMES R. WILLIAMS, COUNTY COUNSEL

14 By: /s/ Rachel A. Neil
15 RACHEL A. NEIL
16 Fellow

17 Attorneys for Plaintiff,
18 PEOPLE OF THE STATE OF CALIFORNIA

19 DATED: December 3, 2021

WILMER CUTLER PICKERING HALE AND
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21 By: /s/ David Gringer
22 DAVID GRINGER


23 Attorneys for Defendant,
24 INTUIT INC.

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~~PROPOSED~~ ORDER

IT IS SO ORDERED.

DATED: ~~FGF-EGGF~~



Hon. Maren Nelson, Judge

**Exhibit A to the Parties' Joint
Stipulation and [Proposed] Order
Concerning the Sealing of the Joint
Briefing Statement on People's Motion
to Compel and Related Documents**

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*Exempt from Filing Fees
Pursuant to Govt. Code § 6103*

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **COUNTY OF LOS ANGELES**

15 TURBOTAX FREE FILING CASES

JCCP No. 5067

16 PEOPLE OF THE STATE OF CALIFORNIA,
17 acting by and through Santa Clara County
18 Counsel James R. Williams,

Included Action Case No. 19CV354178

19 Plaintiff,

**JOINT BRIEFING STATEMENT ON
PEOPLE’S MOTION TO COMPEL
RESPONSES TO PEOPLE’S REQUEST
FOR PRODUCTION NO. 2 AND
PEOPLE’S SPECIAL INTERROGATORY
NO. 11**

20 v.

21 INTUIT INC., and DOES 1-50, inclusive,

Assigned for All Purposes to
The Hon. Maren Nelson

22 Defendants.

Dept.: 17
Hearing Date: November 12, 2021
Hearing Time: 10:00 a.m.
Complaint filed: September 9, 2019
Trial Date: None Set

1 **I. People’s Opening Statement**

2 Plaintiff the People of the State of California, acting by and through the Santa Clara County
3 Counsel, (“the People”) moves to compel responses to the People’s Request for Production (“RFP”)
4 No. 2 and Special Interrogatory No. 11 in Case No. 19CV354178. In RFP No. 2, the People seek
5 interrogatory responses that Intuit provided to the FTC that are relevant to the People’s claim. In
6 Special Interrogatory No. 11, the People seek the amount of money Intuit received from consumers
7 who began in the TurboTax Free Edition product and paid to upgrade to another TurboTax product
8 after they were told by Intuit they were required to do so. Intuit has refused to provide documents in
9 response to RFP No. 2 and has refused to provide any information in response to Interrogatory No.
10 11 regarding consumers outside of California. The Court held an informal discovery conference
11 regarding these requests (among others) on June 1, 2021. (Declaration of Rachel A. Neil (“Neil
12 Decl.”) ¶ 3.) As described below, following the IDC, the People presented Intuit with additional
13 authority and explanation demonstrating why these requests seek relevant and discoverable material.
14 Intuit has continued to rest on its objections. The parties submit the motion, opposition, and reply as
15 a joint briefing statement pursuant to the July 31, 2020 Stipulation and Order re Discovery Motions.

16 **A. People’s RFP No. 2**

17 RFP No. 2 requests the documents and information that Intuit “produced to the FTC in
18 connection with the FTC’s investigation of INTUIT” that relate to the “advertising, marketing,
19 design, user experience, upgrade requirements, or monetization for” TurboTax Free Edition and
20 TurboTax’s paid products. (Neil Decl., Ex. 3.) The FTC investigation was initiated in May 2019 to
21 evaluate whether Intuit has engaged in “deceptive or unfair acts or practices with respect to the
22 marketing or advertising of online tax preparation products” in violation of the FTC Act. (Neil
23 Decl., Ex. 6 at 1-2.)

24 Intuit refused to provide documents in response to RFP No. 2, arguing that it is overbroad,
25 unduly burdensome, and implicates confidentiality concerns. (Neil Decl., Ex. 7 at 2.) To eliminate
26 any burden concern, the People have limited their request to just the “responsive interrogatory
27 responses (together with the corresponding interrogatory requests from the FTC) produced to the
28 FTC” in connection with its investigation. (*Id.*) Intuit has nevertheless refused to respond.

1 As explained below, Intuit’s FTC interrogatory responses deal with topics that are relevant to
2 the People’s case, making them presumptively discoverable. And while Intuit has contended that its
3 interrogatory responses are shielded from discovery by confidentiality statutes and regulations that
4 govern the FTC, case law rejects the notion that such provisions empower investigated entities, like
5 Intuit, to suppress documents arising from an investigation in subsequent civil litigation.

6 **i. Relevance**

7 Intuit’s FTC interrogatory responses are relevant and therefore presumptively discoverable.
8 The right to civil discovery is broad and extends to relevant matter that is “reasonably calculated to
9 lead to the discovery of admissible evidence.” (Cal. Code Civ. Proc. § 2017.010 [A “party may
10 obtain discovery regarding any matter, not privileged, that is relevant to the subject matter” of the
11 case].) Information is relevant if it “might reasonably assist a party in evaluating the case” or “might
12 reasonably lead to admissible evidence.” (*Lopez v. Watchtower Bible & Tract Society of N.Y., Inc.*
13 (2016) 246 Cal.App.4th 566, 591.) “These rules are applied liberally in favor of discovery.” (*Id.*)

14 The People’s narrowed request seeks the interrogatory responses that Intuit produced to the
15 FTC relating to the “advertising, marketing, design, user experience, upgrade requirements, or
16 monetization for” TurboTax products, along with the corresponding FTC requests. By Intuit’s own
17 admission, the FTC’s investigation closely tracks subject matter that is core to the People’s claim.
18 According to Intuit’s Petition to Quash the FTC’s Civil Investigative Demand, that “investigation
19 has focused on . . . whether marketing for Intuit’s commercial products ‘misdirects’ customers
20 otherwise eligible for the IRS Free File program to TurboTax.” (Neil Decl., Ex. 5 at 1.) This is a
21 key allegation in the People’s case, which focuses on Intuit’s misleading marketing of the TurboTax
22 commercial product and obfuscation of the TurboTax Free File product. (*See* Compl. ¶¶73-75.)
23 Intuit has also represented to this Court that the FTC’s investigation resembles “the Santa Clara
24 County case in terms of scope.” (Neil Decl., Ex. 9 at 8:21-22.) Intuit’s statements under oath
25 regarding topics relevant to the People’s action, in the context of an FTC case that closely resembles
26 the People’s case, are plainly relevant and may help resolve factual disputes in this case. (*See*
27 *Munoz v. PHH Corp.* (E.D. Cal. 2013) No. 1:08-CV-0759-AWI-BAM, 2013 WL 684388, at *4, 6
28 [finding documents produced to a government agency were relevant because the agency was

1 “investigating the same alleged wrongful conduct” alleged by plaintiffs].) Intuit has not contended
2 and cannot credibly contend that these documents do not contain relevant information. (*See* Neil
3 Decl. ¶ 8, Ex. 7 at 2.)

4 At the end of the meet and confer process, Intuit asked the People what facts they have not
5 been able to obtain through prior interrogatories and will not be able to obtain in discovery because
6 of Intuit’s position regarding RFP No. 2. (Neil Decl., Ex. 10.) As the People explained, that the
7 People might be able to serve additional discovery that would obtain the same facts is not a basis to
8 withhold documents. In any event, Intuit’s sworn statements on relevant topics are unique evidence
9 that cannot be obtained through other discovery. (*Id.*) Intuit’s FTC interrogatory responses are also
10 relevant for impeachment if they are different than Intuit’s statements to the People. (*Id.*)

11 **ii. The Confidentiality Statutes and Regulations Upon Which Intuit**
12 **Relies Do Not Shield Intuit from Discovery**

13 Unable to dispute that its interrogatory responses contain relevant material, Intuit contends
14 that it nonetheless need not produce them due to public policy justifications arising from statutes and
15 regulations that limit the FTC’s ability to publicly disclose sensitive business information or allow
16 the FTC to withhold information in response to a FOIA request. But under California law, courts are
17 prohibited from creating new evidentiary privileges based on public policy. (Rutter Grp., Cal.
18 Practice Guide: Civil Trials & Evidence CH 8E–A, Privileges [“Courts have no power to ‘create’ an
19 evidentiary privilege as a matter of ‘judicial policy’” (formatting modified)].) Instead, the California
20 Code of Evidence limits parties to the privileges provided by statute. (Cal. Code Evid. § 911 [“No
21 person has a privilege to refuse to disclose any matter or to refuse to produce any writing” “[e]xcept
22 as otherwise provided by statute”]; *see also Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373
23 [“Courts may not add to the statutory privileges except as required by state or federal constitutional
24 law.”].) Intuit concedes that no privilege applies to its FTC interrogatory responses. (Neil Decl.
25 ¶ 13, Ex. 12 at 2.) It cannot refuse to produce the documents based on public policy where no
26 privilege exists. (Cal. Code Evid. § 911; *Roberts*, 5 Cal.4th at 373.)

27 Moreover, even setting aside that infirmity, Intuit’s policy argument has been roundly
28 rejected by courts. As an initial matter, Intuit has argued that, because 16 C.F.R. § 4.10(a)(8) allows

1 the FTC to decline to produce material obtained during an investigation in response to a FOIA
2 request, the People should be barred as a matter of policy from obtaining such materials from Intuit
3 through civil discovery. (Neil Decl., Exs. 12, 13.) But courts have repeatedly held that exemptions
4 to FOIA do not provide a basis for a party to refuse to produce materials in discovery. (*See Vinzant*
5 *v. United States*, No. 06-cv-10561 (E.D. La. 2010) 2010 WL 2674609, at *9 & n.10 [parties may not
6 “employ FOIA exemptions as discovery exemptions”]; *Millennium Mktg. Grp. LLC v. United States*
7 (S.D. Tex. 2006) 238 F.R.D. 460, 462-63 [“Although FOIA and civil discovery both involve the
8 disclosure of information, FOIA and discovery disclosures serve two different purposes” and
9 “operate under two different designs”].)

10 Intuit has also argued that 15 U.S.C. § 57b-2(c)(1) and 15 U.S.C. § 46(f) shield Intuit from
11 discovery. Nothing in these provisions exempts investigated entities from responding to discovery.
12 Instead, they allow an entity to mark information that it produces to the FTC as confidential and
13 limit the FTC’s ability to disclose that information to the public. (15 U.S.C. § 46(f) [“[T]he
14 Commission shall not have any authority to make public any trade secret or any commercial or
15 financial information . . . which is privileged or confidential” except in limited circumstances]; *id.*
16 § 57b-2(c)(1) [materials “shall be considered confidential when so marked by the person supplying
17 [them]”].) The FTC may, however, disclose materials marked as confidential if it determines they
18 are “not a trade secret or commercial or financial information.” (15 U.S.C. § 57b-2(c)(2).) These
19 provisions simply prevent the FTC from disclosing “competitively sensitive information” such as
20 “trade secrets in the nature of formulas, patterns, devices, and processes of manufacture, [or] names
21 of customers” to the public. (*See* 16 C.F.R. § 4.10(a)(2) [citing 15 U.S.C. § 46(f)].) They provide
22 no basis for Intuit’s refusal to respond, particularly given the protective order entered in this case.

23 Indeed, courts have granted motions to compel production of documents related to FTC
24 investigations notwithstanding these confidentiality obligations. For example, in *Concord Boat*
25 *Corp. v. Brunswick Corp.*, the court rejected the argument that FTC transcripts should not be
26 produced because they were made “during the course of a confidential [FTC] investigation.”
27 (*Concord Boat Corp. v. Brunswick Corp.* (E.D. Ark. 1997) No. 95-781, 1997 WL 34854479, at *7.)
28 Because there was “no applicable privilege to prevent their disclosure,” the court held the transcripts

1 were not “immune from discovery.” (*Id.*) In other words, materials arising from an FTC
2 investigation may be obtained through civil discovery, subject to the usual discovery standards. (*See*
3 *id.*; *see also ConsumerInfo.com Inc. v. One Technologies LP* (C.D. Cal. 2010) No. 09-3783, 2010
4 WL 11507581, at *2-3 [compelling production of “documents related to the Federal Trade
5 Commission’s prior investigation” including “deposition transcripts, declarations, or affidavits, and
6 communications between ConsumerInfo and the FTC”].)

7 Courts have also rejected similar arguments in analogous contexts. For example, a court
8 rejected the argument that Civil Investigative Demand depositions taken during DOJ investigations
9 are immune from discovery because they are exempt from FOIA requests and subject to limitations
10 on disclosure by the government. (*See In re Passenger Comput. Rsrv. Sys. Antitrust Litig.* (C.D. Cal
11 1996) 116 F.R.D. 390, 393.) As the court explained in that case, “Congress could have created . . . a
12 privilege” allowing defendants to withhold this information, but “it did not do so.” (*Id.*) Courts
13 have applied similar reasoning to SEC proceedings, rejecting the notion that a statute deeming SEC
14 documents and transcripts “non-public” creates a “privilege or other policy consideration that
15 protects” such documents from discovery. (*Production of Regulatory Investigation Documents in*
16 *FINRA Arb.*, 26 No., 3 PIABA B.J. 413, 414-16 (2019); *see also id.* n.10 [collecting cases]; *Kirkland*
17 *v. Superior Court* (2002) 95 Cal.App.4th 92, 99 “[C]ourts have refused to imbue [SEC] transcripts
18 and documents with a patina of confidentiality that would trigger an exemption from” discovery.];
19 *Baxter v. A.R. Baron & Co.* (S.D.N.Y. 1996) No. 94CIV.3913, 1996 WL 709624, at *1-2.)

20 Unable to meaningfully distinguish this authority, Intuit nevertheless has argued that its FTC
21 interrogatory responses present an exception to the rule because they allegedly contain counsel’s
22 thinking and strategy. (Neil Decl., Ex. 13 at 2-3.) But the sole case Intuit cited during the parties’
23 meet and confer in support of this position was a portion of *Concord Boat Corp.* discussing
24 withholding *attorney work product* documents. (*Concord Boat Corp.*, 1997 WL 34854479, at *6.)
25 Intuit has conceded that it is not asserting attorney work product privilege with respect to its FTC
26 interrogatory responses. (Neil Decl. ¶ 13, Ex. 12 at 2.) And *Concord Boat Corp.* expressly rejected
27 the actual argument made by Intuit, which is that non-privileged documents “made during the course
28 of a confidential investigation” can be shielded from disclosure. *Concord Boat Corp.*, 1997 WL

1 34854479, at *7.) Moreover, multiple courts have held that interrogatory responses made in
2 confidential investigations *are not* privileged and are therefore discoverable. (*See, e.g., In re*
3 *NASDAQ Market-Makers Antitrust Litigation* (S.D.N.Y. 1996) 929 F. Supp. 723, 726-27
4 [compelling the production of Civil Investigatory Demand interrogatories and responses]; *In re*
5 *Domestic Air Transp. Antitrust Litigation* (N.D. Ga. 1992) 141 F.R.D. 556, 560-61 [same].)¹

6 **iii. Burden**

7 It is not oppressive for Intuit to produce interrogatory responses that it has already produced
8 to the FTC. (*W. Pico Furniture Co. of L.A. v. Superior Court* (1961) 56 Cal.2d 407, 417-18
9 [explaining that, to refuse to respond to a discovery request based on burden, a party must show that
10 the work required is oppressive].) To date, Intuit’s only argument regarding burden is that
11 responding to the People’s request would require it to “parse the FTC’s interrogatories . . . to identify
12 what is relevant to the County Counsel’s case” and to “alter its responses to” exclude information
13 Intuit deems irrelevant. (Neil Decl., Ex. 1 at 9-10.) As an initial matter, this type of conclusory
14 statement which at most speaks to a minimal burden is insufficient to justify a failure to respond.
15 Moreover, it is incorrect. As with any request for production, Intuit should produce any responsive
16 *documents*. (Cal. Civ. Proc. Code § 2031.010 [“A party may demand that any other party produce
17 . . . a document” in its possession, custody, or control.] Individually altering the FTC interrogatory
18 responses to exclude purportedly irrelevant portions of one or more responses is neither required nor
19 appropriate, and therefore cannot be cited as a source of burden.

20 **B. People’s Interrogatory No. 11**

21 Interrogatory No. 11 requests the total monetary sum Intuit received from customers who
22 accessed Intuit’s commercial free product but filed with a paid product after seeing a required
23 upgrade message. (Neil Decl., Ex. 4.) Intuit has refused to respond with respect to non-California
24

25 ¹ During the meet and confer process, Intuit also suggested that the official information privilege
26 supports its position regarding RFP No. 2. (Neil Decl., Ex. 15.) The official information privilege
27 applies only when asserted by a public entity. (Cal. Evid. Code § 1040; *see also id.* assembly
28 committee on judiciary cmt. [“Section 1040 permits the official information privilege to be invoked
by the public entity Since the privilege is granted to enable the government to protect its
secrets, no reason exists for permitting the privilege to be exercised by persons who are not
concerned with the public interest”].)

1 consumers on relevance grounds. (Neil Decl., Ex. 8 at 2.) After the June 1, 2021 IDC, Intuit also
2 advanced the argument that responding to Interrogatory No. 11 was unduly burdensome. (Neil
3 Decl., Exs. 12, 13.) To resolve this concern, the People narrowed the request to exclude tax years
4 2014 and 2015, which Intuit asserted were most burdensome. (Neil Decl., Ex. 14 at 1.) Intuit
5 nonetheless continued to refuse to respond on relevance grounds. (Neil Decl., Ex. 15 at 1.)

6 **i. Relevance**

7 As part of their False Advertising Law (“FAL”) claim, the People allege that Intuit
8 disseminated widespread advertising that guaranteed that consumers could prepare and file their
9 taxes for free using the TurboTax Free Edition yet knew and intended that it would require many of
10 the people who attempted to use the TurboTax Free Edition to pay to upgrade to another TurboTax
11 product before fully preparing and filing their taxes. (*See, e.g.*, Compl. ¶¶ 72-76.) To establish that
12 this conduct violates the FAL, the People must demonstrate either that (1) Intuit’s free advertising
13 was untrue or misleading and Intuit knew or should have known that it was untrue or misleading; or
14 (2) Intuit disseminated its free advertising with the intent not to provide tax preparation and filing for
15 free for users of the TurboTax Free Edition. (Cal. Bus. & Prof. Code § 17500).

16 The money Intuit received from consumers who started in the TurboTax Free Edition and
17 then paid to upgrade to another TurboTax product after seeing a required upgrade message easily
18 clears the low bar for relevance. It both pertains to the subject matter of the case and is reasonably
19 calculated to lead to discovery of admissible evidence. Indeed, it goes to the heart of Intuit’s
20 knowledge and intent and helps explain an important part of Intuit’s conduct: that Intuit knew and
21 intended that its advertising would mislead numerous people into falsely believing they could file for
22 free using the TurboTax Free Edition and maintained this deception because it provided Intuit with
23 critical revenue. Intuit defends itself by claiming it believed its advertising was clear and
24 nondeceptive about who could or could not prepare their taxes and file for free using the TurboTax
25 Free Edition. But if, as the People contend, Intuit received hundreds of millions of dollars from
26 people who sought to use TurboTax Free Edition but were forced to pay to upgrade and Intuit
27 tracked this revenue, that evidences that Intuit knew its free advertising was misleading ineligible
28 consumers.

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1 In objecting to Interrogatory No. 11, Intuit has not argued that the money it received from
2 paid upgrades is not relevant. However, it asserts that any relevance is limited to money it received
3 from California consumers. (Neil Decl., Ex. 15 at 1.) This misses the point. Intuit has admitted that
4 it used the same advertising across the country. (Neil Decl. ¶ 8, Ex. 7 at 2-3.) Examining California
5 data alone would therefore give an incomplete, and potentially distorted, picture of Intuit’s
6 knowledge and intent with respect to its “Free” advertising campaign. Intuit’s document production
7 unsurprisingly (given its national advertising scheme) reveals that Intuit analyzed and relied on
8 nationwide data and revenue, rather than state data and revenue, to calibrate its messaging and
9 determine product eligibility. For example, in one document Intuit discusses [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED] (Neil Decl., Ex. 16 at 4, 22.) In another, Intuit [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 (Neil Decl., Ex. 17 at 3-4, 7.) Given Intuit’s national marketing approach and the national scope of
16 the documents it has produced, Intuit’s knowledge that its marketing was misleading is best analyzed
17 through national data. The data requested in Interrogatory No. 11 is therefore critical to “assist [the
18 People] in [accurately] evaluating the case.” *Lopez*, 246 Cal.App.4th at 591.)

ii. Burden

19 The People do not understand Intuit to be currently relying on a burden argument with
20 respect to Interrogatory No. 11. In response to Intuit’s prior burden objection, the People narrowed
21 its request to exclude data from Tax Years 2014 and 2015, which Intuit stated would be burdensome
22 to produce. (Neil Decl., Ex. 14.) The sole reason Intuit gave for rejecting this *narrowed* request was
23 relevance. (Neil Decl., Ex. 15 [declining “to provide the nationwide data sought in [the narrowed
24 request] because the only possible relevance of this data would be to calculate restitution and any
25 restitution [is] limited to California consumers”].) In any event, the People’s narrowed request
26 adequately balances the relevance and burden interests.
27
28

1 **II. Intuit’s Statement in Opposition**

2 **A. The County Counsel Is Not Entitled to Nonpublic Information Intuit Provided**
3 **the FTC.**

4 The County Counsel seeks to compel the production of nonpublic, investigative materials
5 (the “FTC Interrogatories”), that Intuit disclosed to the FTC with the promise that its responses, like
6 the fact of the investigation itself, would be private. That request should be rejected; the right to
7 civil discovery in California is not boundless, and courts must deny discovery upon a determination
8 that the “intrusiveness of that discovery clearly outweighs the likelihood that the information sought
9 will lead to the discovery of admissible evidence,” Cal. Civ. Proc. Code § 2017.020. That balance
10 tips in the nonmovant’s favor where a request for information is “not narrowly tailored, request[s]
11 confidential information and appear[s] to be a broad ‘fishing expedition’ [for] irrelevant
12 information.” *In re Ex Parte Application of Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1043 (N.D. Cal.
13 2016). As explained below, that is the situation here, so the County Counsel’s motion to compel
14 should be denied.

15 The FTC’s investigation of Intuit is not public.² And the FTC Act provides that documents
16 and information that are (1) given to the agency through compulsory process and (2) marked as
17 confidential—like the FTC Interrogatories—“shall not be disclosed,” except in limited
18 circumstances not present here. 15 U.S.C. § 57b-2(c)(1). This policy is also enshrined in the FTC’s
19 regulations, which prevent the public from obtaining such documents and information through a
20 public records request. *See* 16 C.F.R. § 4.10(a)(8). Although framed as a restraint on the
21 government’s ability to disclose these materials, these statutes and regulations embody a “strong
22 policy of nondisclosure,” *Baldrige v. Shapiro*, 455 U.S. 345, 361 (1982) (holding that a similar
23 policy of nondisclosure in the Census Act shielded information from civil discovery too). And, as
24 this Court has observed, requiring disclosure of these materials would raise public-policy concerns,
25 *see* Neil Decl., Ex. 2 (June 1, 2021 IDC Tr. at 30:12-31:3), by undermining the confidentiality

26 _____
27 ² *See A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and*
28 *Rulemaking Authority*, FTC.Gov (revised May 2021), https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority#N_2 (“The existence of an FTC investigation is ordinarily nonpublic information.”).

1 protections of documents produced to the FTC, thereby discouraging parties that the FTC is
2 investigating from candid communications with the agency.³

3 The County Counsel nakedly asserts (*supra* at 4-5) that “exemptions to FOIA do not provide
4 a basis for a party to refuse to produce materials in discovery.” But neither of the cases he cites in
5 support—*Vinzant v. United States*, 2010 WL 2674609 (E.D. La. 2010), and *Millennium Marketing*
6 *Group LLC v. United States*, 238 F.R.D. 460 (S.D. Tex. 2006)—holds that a FOIA confidentiality
7 designation is categorically irrelevant to whether materials should be produced in discovery. Indeed,
8 while the *Vinzant* court declined to create a categorical discovery *exemption* rooted in FOIA, it
9 endorsed the proposition “that ‘the courts must accord the proper weight to the policies underlying’”
10 the FOIA exemptions and discovery rules and must “‘compare them with the factors supporting
11 discovery in a particular lawsuit.’” 2010 WL 2674609, at *9 (quoting *Friedman v. Bache Halsev*
12 *Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984)). Similarly, the *Millennium* court merely
13 stated that “an exemption available under FOIA does not *necessarily* preclude discovery” and held
14 that the defendant had not met its burden to withhold discovery under either FOIA or the Federal
15 Rules. 238 F.R.D. at 462 (emphasis added). And of course, neither case could overrule the express
16 holding of the U.S. Supreme Court that such confidentiality provisions embody a “strong policy of
17 nondisclosure,” *Baldrige*, 455 U.S. at 361, which militates against discovery.

18 That policy of nondisclosure carries particular weight here because the responses at issue
19 contain attorney advocacy. Gringer Decl. ¶ 8. Disclosure of this advocacy now would prematurely
20 reveal to the County Counsel aspects of Intuit’s litigation strategy in this case. That differentiates
21

22 ³ California recognizes a similar protection in its official-information privilege, which applies where,
23 as here, disclosure is forbidden by an act of Congress. Cal. Evid. Code § 1040(b)(1). While the
24 government holds this privilege, allowing civil litigants the ability to overcome that privilege simply
25 by seeking the same information from the entity providing information to the government would
26 undermine the very principles it serves to protect. *See De Soto v. Sears Roebuck & Co.*, 2004 WL
27 5762675 (Cal. Super. Ct. Apr. 22, 2004). Moreover, even where disclosure is not expressly
28 forbidden by an act of Congress (such that the privilege is not directly applicable), California law
requires courts, before ordering production of information disclosed in confidence to a public
agency, to weigh the necessity for preserving the confidentiality of the information against the
necessity for disclosure in the interest of justice, before ordering production of information disclosed
in confidence to a public agency. Cal. Evid. Code § 1040(b)(2). For the reasons given in the text,
that balance favors preserving the confidentiality of the information sought.

1 these facts from *Concord Boat Corp. v. Brunswick Corp.*, 1997 WL 34854479 (E.D. Ark. 1997), on
2 which the County Counsel relies (*supra* at 6). In fact, the court there explained that purely factual
3 information is materially different from advocacy materials, precisely because the latter provide an
4 unfair preview of one party’s litigation strategy to the other side. 1997 WL 34854479, at *6. And
5 applying that logic, the court *denied* plaintiffs’ motion to compel the production of material
6 submitted to the FTC because disclosure would give “an early insight into defense counsels’
7 thinking and potential strategy, with the potential of using that to their opponent’s disadvantage.” *Id.*
8 This reasoning applies fully here, because the FTC Interrogatories advocate Intuit’s positions,
9 including positions informed by the work of experts on contested issues in this case. Again,
10 disclosure would give the County Counsel premature insight into defense counsel’s thinking and
11 strategy. Gringer Decl. ¶ 8. Of course, the County Counsel may obtain any *facts* contained in the
12 FTC interrogatories—as he already has—including through the more than 35 interrogatories he has
13 already served.

14 The remaining cases the County Counsel cites (*supra* at 4, 6-7) are likewise unhelpful to his
15 position. Most of them do not involve FTC confidentiality statutes, FTC regulations, or documents
16 that contain attorney advocacy and strategy as well as expert work. More, specifically, *Munoz v.*
17 *PHH Corp.*, 2013 WL 684388 (E.D. Cal. Feb. 22, 2013), analyzed requests for documents produced
18 in overlapping CFPB proceeding without considering any confidentiality provisions afforded
19 documents produced to the CFPB, *see id.* at *1. Two other cases interpreted SEC confidentiality
20 regulations in the context of requests for deposition transcripts and documents. *See Baxter v. A. R.*
21 *Baron & Co.*, 1996 WL 709624, *2 (S.D.N.Y. Dec. 10, 1996); *Kirkland v. Superior Court*, 115 Cal.
22 Rpt. 2d 279, 280-81 (Cal. Ct. App. 2002). Finally, *In re Air Passenger Computer Reservation*
23 *System Antitrust Litigation*, 116 F.R.D. 390 (C.D. Cal. 1986), involved a request for production of
24 deposition transcripts from the DOJ.

25 The only two cases the County Counsel cites that may have involved documents containing
26 attorney advocacy are *In re NASDAQ Market-Makers Antitrust Litigation*, 929 F. Supp. 723
27 (S.D.N.Y. 1996); and *In re Domestic Air Transport Antitrust Litigation*, 141 F.R.D. 556 (N.D. Ga.
28 1992). Neither case concerned the FTC. *See In re NASDAQ*, 929 F. Supp. at 725-26; *In re*

1 *Domestic*, 141 F.R.D. at 560. And in the only case the County Counsel cites that did involve the
2 FTC, the court did not consider the FTC’s confidentiality protections in ordering the production of
3 the documents in question. *See generally ConsumerInfo.com Inc. v. One Technologies LP*, 2010 WL
4 11507581 (C.D. Cal. May 4, 2010).

5 **i. Relevance**

6 The County Counsel argues that the FTC Interrogatories are relevant because they “may help
7 to resolve [unspecified] factual disputes” and provide material for “impeachment.” *Supra* at 3-4.
8 That is not only too vague to support his motion, but also inconsistent with his own refusal to
9 produce documents that Intuit sought as possibly containing *his* prior inconsistent statements.
10 Gringer Decl., Ex. A (Jan. 7, 2021 Ltr. at 3); Ex. B (Jan. 11, 2021 Ltr. at 3). Moreover, the County
11 Counsel provides no reason to believe that Intuit said anything to the FTC that is inconsistent with
12 anything it has said in this case. For good reason. Gringer Decl. ¶ 9. Lastly, the County Counsel’s
13 unexplained assertion that “Intuit’s sworn statements on relevant topics are unique evidence that
14 cannot be obtained through other discovery,” *supra* at 4, cannot hold water. The County Counsel
15 has, and will continue to have, the ability to obtain sworn testimony and interrogatory responses in
16 this case. Intuit has stated repeatedly, and reiterates again here, that it will not withhold information
17 or refuse to answer any interrogatories because of overlap with the FTC’s investigation or the
18 information that Intuit provided. Neil Decl., Ex. 8 (Jan. 30, 2021 Ltr. at 2); Ex. 13 (July 9, 2021 Ltr.
19 at 3). Intuit asks only that the County Counsel formulate his own discovery tailored to this case.

20 **ii. Burden**

21 With regard to burden, the County Counsel attempts to have it both ways, claiming on the
22 one hand that his request cannot be burdensome because Intuit can simply reproduce the entirety of
23 the responses it has already drafted, *supra* at 7, while maintaining on the other hand that the request
24 seeks only “responsive interrogatory responses” along with the corresponding requests, *supra* at 2.
25 If the County Counsel seeks the entirety of the FTC Interrogatories, he *is* seeking irrelevant
26 materials, because the FTC’s investigation is not coextensive with the County Counsel’s case.
27 Gringer Decl. ¶ 5. If, on the other hand, the County Counsel is seeking only responsive FTC
28 Interrogatories, Intuit must review all responses for relevance and exclude or redact those that are

1 not responsive. The burden of doing so would not be minimal, as the County Counsel suggests,
2 *supra* at 7. In any event, courts routinely reject such “cloned” discovery requests as “not generally
3 proper,” “even if the subject matter of [the] cases seem to overlap.” *Ludlow v. Flowers Foods, Inc.*,
4 2019 WL 6252926, at *18 (S.D. Cal. Nov. 22, 2019).

5 Finally, allowing the County Counsel to conduct discovery in this manner would enable him
6 to evade the limitations on interrogatories that the parties are in the process of negotiating with each
7 other (and with the involvement of the Court). Because the parties have not agreed on a limit, the
8 County Counsel may still consider what interrogatories he believes he needs answered and include
9 that number as part of his proposal. This should obviate the need to seek the FTC Interrogatories
10 altogether. The Court correctly suggested that County Counsel should follow this approach. Neil
11 Decl. Ex. 2 (June 1, 2021 IDC Tr. at 31:7-12).

12 **B. RFP No. 11 Seeks Irrelevant Data That Is Unduly Burdensome To Collect and**
13 **Produce.**

14 As the Court has recognized, production of Intuit’s data showing the total amount of money
15 received by Intuit from consumers who upgraded to a TurboTax paid product each year from 2016 to
16 2019 (the “Nationwide Financial Data”) is not justified if “the relevance of [the data] is so marginal”
17 that it is outweighed by the burden associated with its production. *See* Neil Decl., Ex. 2 (June 1,
18 2021 IDC Tr. at 19:7-16). And indeed, requiring Intuit to produce the data would impose a burden
19 on Intuit that “clearly outweighs the likelihood that the information ... will lead to the discovery of
20 admissible evidence,” Code Civ. Proc., § 2017.020, and thus the Court should decline to compel its
21 production.

22 The County Counsel offers no plausible theory for why *nationwide* data is relevant to this
23 California-only case. *See* Code Civ. Proc., § 2017.020. He seeks to connect the data to Intuit’s
24 scienter by arguing that, if “Intuit received hundreds of millions of dollars from people who sought
25 to use TurboTax Free Edition but were forced to pay to upgrade and Intuit tracked this revenue,”
26 then Intuit must have known that its “free” advertising was misleading consumers who were not
27 eligible to file for free. This argument rests primarily on the inaccurate assertion—first raised in the
28 County Counsel’s Complaint (¶ 7)—that most consumers who start in Free Edition cannot file for

1 free. Intuit has already produced data showing that the majority of California TurboTax users who
2 start in Free Edition are able to file their taxes for free. Gringer Decl., Ex. C (Def.’s Resps. and
3 Objs. To Pl.’s Special Interrogs. (Set 1) at 13-14; 16-18).

4 The County Counsel’s relevance argument also makes no sense. On its website, Intuit offers
5 both a free product and paid products. The free product is available to taxpayers with simple tax
6 returns. Gringer Decl., Ex. C (Def.’s Resps. and Objs. To Pl.’s Special Interrogs. (Set 1) at 46). The
7 paid product is available to taxpayers with more complex returns. There is no penalty for starting in
8 the free product, and doing so but then moving to a paid product does not increase the time it takes
9 to prepare one’s taxes. To upgrade to a paid product after starting in Free Edition, a consumer
10 presented with an upgrade prompt only needs to click a button on the TurboTax website. Gringer
11 Decl., Ex. D (TurboTax TY 2018 Screenshots). There is thus no reason (certainly the County
12 Counsel supplies none) for any consumer, even one who suspected he or she would need to pay, *not*
13 *to start* in Free Edition.⁴ Perhaps more importantly, there is no reason to believe that any, let alone
14 all, of the consumers who started in Free Edition and paid to upgrade, saw the advertisements that
15 the County Counsel contends to be false. In other words, the data sought says nothing about either
16 deception or scienter.

17 Even assuming *arguendo* that the information sought could shed light on Intuit’s scienter, the
18 County Counsel has not persuasively explained why either the equivalent data about California
19 consumers that Intuit has already produced, or the data for consumers whose state of residence is not
20 captured by TurboTax, which Intuit has offered to produce, Gringer Decl., Ex. E (Mar. 8, 2021 Ltr.
21 at 3); Ex. F (Apr. 1, 2021 Ltr. at 1), is insufficient for this purpose, especially where the Complaint
22 asserts only California-law claims on behalf of only California consumers, *see* Compl. ¶¶ 11, 71-80.
23 The County Counsel merely points to two random documents analyzing Intuit’s nationwide
24 performance, and asserts that, because Intuit took a nationwide approach to marketing, this approach
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⁴ Melanie Pinola, *The Best Online Tax Filing Software*, Wirecutter (Feb. 11, 2021),
<https://www.nytimes.com/wirecutter/reviews/best-tax-software/> (explaining that “most people
should start with ... Free Edition,” even those who may need to upgrade to a paid product).

1 can be understood only through nationwide data. *Supra* at 9.⁵ This argument is entirely conclusory.
2 The County Counsel does not explain why the information he seeks will show anything; the data at
3 issue has nothing to do with consumer comprehension of the nationwide advertising, nor will it shed
4 any light on the documents cited. The County Counsel has other tools at his disposal—including
5 depositions—to understand and contextualize information in the documents Intuit has produced.

6 The County Counsel is also wrong that Intuit has withdrawn its burden argument. *Supra* at 9.
7 To the contrary, in the letter the County Counsel cites in arguing otherwise, Intuit *reiterated* its
8 burden argument, explaining that the County Counsel’s narrowed proposal for nationwide data,
9 including data responsive to Interrogatory No. 11, “only marginally reduces the burden on Intuit of
10 collecting, compiling, and analyzing the requested data.” Neil Decl., Ex. 15 (Aug. 17, 2021 Ltr. at
11 1). As Intuit has explained, this burden far outweighs its purported relevance. *E.g.*, Neil Decl., Ex.
12 13 (July 9, 2021 Ltr. at 1).

13 As explained in the declaration of Michael Bordonaro, generating Nationwide Financial Data
14 in a production-ready form would impose a meaningful burden on Intuit. The process requires
15 technical and data-analytics expertise and takes significant time and resources, requiring the use of
16 an outside consulting firm. Bordonaro Decl. ¶ 8. The process also involves multiple steps,
17 including identifying the relevant variables, writing code to extract the variables and data from the
18 datasets, analyzing the extracted data, merging the extracted consumer data with data contained in a
19 separate financial database, performing quality control, and preparing the final product for delivery.
20 *Id.* ¶¶ 10-20. All this takes at least 36 hours, spread over several days—and because of difficulties
21 that often arise in a process of this complexity, it can easily take twice that long, even without
22 considering attorney time or the foundational work that has been done over the past two years to
23 even make this process possible. *Id.* ¶¶ 21-23. Again, that burden far outweighs any minimal
24 relevance the Nationwide Financial Data has. The motion to compel should therefore be denied.

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28 ⁵ These documents do demonstrate that Free Edition is a bona fide free product that tens of millions
of taxpayers have used to file their taxes for free.

1 **III. People’s Reply Statement**

2 **A. People’s RFP No. 2: Relevance**

3 Intuit does not argue that documents containing Intuit’s FTC interrogatory responses about
4 the “advertising, marketing, design, user experience, upgrade requirements, or monetization for”
5 TurboTax products are irrelevant. (*See supra* at 13.) Nor can Intuit plausibly do so, given its
6 concessions that the topics listed in RFP No. 2 are relevant and that the FTC’s investigation tracks
7 the People’s claims. (*See* Neil Decl. ¶ 8, Ex. 7 at 2, Ex. 9 at 8:21-22.) Instead, Intuit insists that the
8 People must meet a heightened discovery standard by, for example, proving before reviewing the
9 documents that they contradict other statements made by Intuit. This argument is divorced from the
10 relevance standard. The documents contain Intuit’s statements regarding topics and allegations at
11 issues in the case. That easily clears the low bar for relevance. (*Lopez*, 246 Cal.App.4th at 591.)⁶

12 **B. People’s RFP No. 2: Intuit’s Public Policy Argument Regarding Confidentiality**

13 Intuit also does not dispute that it is not relying on privilege to justify its refusal to respond to
14 RFP No. 2. Rather, Intuit continues to argue that it need not produce the requested documents on
15 public policy grounds. Yet it fails to grapple with California law that prohibits courts from creating
16 discovery exemptions based on public policy. (*See supra* at 4.) It also fails to cite any cases holding
17 that non-privileged documents produced to a public agency may be withheld by the producing party
18 in subsequent civil discovery; and cannot meaningfully distinguish the many cases holding that such
19 material *is* discoverable, including binding California case law. (*Kirkland*, 95 Cal.App.4th at 99.)

20 Unable to rebut this authority, Intuit raises a new argument never discussed during the meet
21 and confer: that the “intrusiveness of [the People’s request] clearly outweighs the likelihood that the
22 information sought will lead to the discovery of admissible evidence.” (*Supra* at 10 [citing Cal.
23 Code Civ. Proc. § 2017.020].) Intuit does not explain why its sworn statements on concededly
24 relevant topics are unlikely to be admissible. Nor can it do so; these documents are likely admissible
25 both for the truth of the matter asserted and for impeachment. (Cal. Evid. Code §§ 780, 1220.)

26 _____
27 ⁶ Intuit claims the People’s objections to Intuit’s requests for production of “all briefs filed, experts
28 reports served, and depositions taken by SCCC [since 2010] in cases involving false advertising, the UCL, or the CLRA” are inconsistent with the position here. But the People there simply noted that Intuit failed to explain the relevance of documents from unrelated cases. (Gringer Decl., Ex. B at 3.)

1 Intuit also fails to cite any case law holding that the discovery of relevant material supplied to the
2 government is intrusive under section 2017.020.⁷ The likelihood that the documents will lead to the
3 discovery of admissible evidence thus outweighs any claimed intrusiveness.

4 Intuit also argues that FTC proceedings are subject to sweeping confidentiality protections
5 that should exempt documents arising from such proceedings from discovery as a matter of public
6 policy. But the cited FTC statutes only protect documents from disclosure by the FTC if they are
7 marked by *Intuit* as containing sensitive business information, such as trade secrets. (*Supra* at 5; *see*
8 *also* 15 U.S.C. §§ 46(f), 57b-2(c)(1); 16 C.F.R. § 4.10(a)(2).) Given the protective order entered in
9 this case, these provisions provide no public policy basis for withholding these materials. And while
10 Intuit contends that the existence of an FTC investigation is “ordinarily nonpublic,” the source Intuit
11 cites clarifies that the FTC may disclose an investigation if the “public interest warrants it.” (*Supra*
12 at 10 n.2.) In any event, the FTC investigation of Intuit is no secret; it was revealed in 2020 because
13 of Intuit’s Petition to Quash the FTC’s Civil Investigative Demand. (*See* 16 C.F.R. § 2.10(d).)

14 The cases cited by Intuit do not, moreover, support its public policy position. Intuit argues
15 that non-privileged attorney advocacy in interrogatory responses is afforded special protection. But
16 it cites to *Concord Boat Corp.*, which only withheld privileged materials and held that documents
17 must be released where “no applicable privilege [prevents] disclosure.” (*Concord Boat Corp.*, 1997
18 WL 34854479, at *7.) Intuit cannot obtain the benefit of a privilege it concedes does not apply.
19 (*Rutter Grp.*, Cal. Prac. Guide Civ. Trials & Ev. Ch. 8E-A, Privileges [California law bars “courts
20 from modifying [statutory] privileges”].) And it fails in any event to distinguish the cases ordering
21 production of interrogatory responses. (*See supra* at 7.) Any discovery response can reflect attorney
22 advocacy; but absent an applicable privilege such advocacy is not afforded special protection.

23 Next, Intuit turns to a Supreme Court case which held that the Census Act prohibited “all
24 disclosure of raw census data” by the Census Bureau.⁸ (*Baldrige v. Shapiro* (1982) 455 U.S. 345,
25 360-61.) Unlike here, the provision at issue in *Baldrige* expressly prohibited the “production of

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27 ⁷ Intuit cites *In re Ex Parte Application of Qualcomm* (N.D. Cal. 2016) 162 F.Supp.3d 1029, but that
case analyzes a federal statute authorizing discovery in support of actions in foreign tribunals.

28 ⁸ While *Baldrige* held that the *Census Bureau* was barred from disclosing census data, it says
nothing about creating independent privileges for third parties.

1 Census information in judicial proceedings.” (*Zambrano v. I.N.S.* (9th Cir. 1992) 972 F.2d 1122,
2 1126, *vacated on other grounds*, 509 U.S. 918 (1993); *see also* 13 U.S.C. § 9(a).)⁹

3 Next, Intuit argues that federal cases that refused to treat FOIA exemptions as a basis for
4 denying discovery still left open the *possibility* that the policies underlying such exemptions could
5 weigh into their analysis. (*Supra* at 11). While federal courts are empowered to craft or modify
6 discovery exemptions as a matter of common law, California law rejects that approach. (Rutter
7 Grp., Cal. Prac. Guide Civ. Trials & Ev. Ch. 8E-A, Privileges [federal “privileges are generally a
8 question of ‘the common law’”]; *Dickerson v. Superior Ct.* (1982) 135 Cal.App.3d 93, 99.) Even if
9 a policy-based approach were appropriate, Intuit has not explained why an exemption that permits
10 (but does not require) the FTC to withhold material in response to FOIA requests supports a
11 discovery exemption for Intuit, given that FOIA and discovery serve different purposes.

12 **C. People’s RFP No. 2: Burden**

13 Intuit attempts to argue burden where none exists. The People’s position is simple; they have
14 narrowed RFP No. 2 to request documents that contain Intuit’s FTC interrogatory responses
15 addressing the subjects specified in RFP No. 2. This narrowed request in no way requires Intuit to
16 conduct a line-by-line redaction. If a document has responsive information, it should be produced.

17 **D. People’s Special Interrogatory No. 11: Relevance and Burden**

18 Intuit’s opposition raises a burden argument regarding the People’s narrowed request under
19 Interrogatory No. 11 that was not raised during the meet and confer. (Neil Decl., Ex. 14 at 1 [People
20 request Intuit provide burden estimates if Intuit rejects the People’s burden compromise]; Ex. 15 at 1
21 [Intuit accepts the compromise but argues Interrogatory No. 11 is irrelevant].) Furthermore, Intuit
22 appears to track the requested data, or data that is very similar. (*See, e.g.*, Neil Decl., Ex. 16 at 22
23 [Required upgrades “generated an additional \$147M [Year Over Year] due to the FreeDux group”].)
24 At a minimum, Intuit’s documents suggest similar data could easily be provided, which Intuit should
25 have raised as part of a good faith meet and confer if it intended to rely on a burden objection.

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28 ⁹ Intuit also relies on the official information privilege, but that privilege may only be exercised by a public entity and cannot be exercised by a private company to withhold information from a public entity that is pursuing law enforcement proceedings against it. (*See supra* at 7 n.1.)

1 In any event, the relevance of the People’s request outweighs the stated burden. Intuit does
2 not dispute that it uses national marketing or that its strategy and analysis overwhelmingly rely on
3 national data. Under these circumstances, examining only state data would give an incomplete and
4 distorted picture of *Intuit’s knowledge and intent* with respect to the monetization of customers who
5 began in “Free.” This data goes to the heart of the People’s claims, which allege Intuit obtained
6 hundreds of millions of dollars from consumers who were presented misleading Free marketing, and
7 that this profit motive permeated Intuit’s strategy and decision-making. Intuit responds by offering
8 disputed and unsupported facts and arguing that they show that the consumers in question may not
9 have been misled by Intuit’s advertisements. This argument, which focuses on the false and
10 misleading prong of the FAL rather than the scienter prong, misconstrues the People’s position.

11 The People allege Intuit engaged in false advertising by marketing tax filing software titled
12 “Free,” describing the service using terms like “free guaranteed” or “File for \$0,” and then requiring
13 those who attempt to use the service to pay. This is false advertising because the advertising (a) was
14 deceptive and Intuit knew or should have known it was deceptive, and (b) was part of a plan not to
15 sell tax filing services at the advertised price—free. Intuit’s claim that consumers who were required
16 to upgrade may not have relied on its free advertising is disputed¹⁰ and irrelevant. (*People v.*
17 *Orange Cty. Charit. Servs.* (1999) 73 Cal.App. 4th 1054, 1075-76 [false advertising claims do not
18 require actual deception or reliance].) Regardless, if Intuit earned millions of dollars by charging
19 people who attempted to use Free Edition, that is strong evidence that Intuit knew describing Free
20 Edition as, for example, “guaranteed free” was deceptive and that Intuit intended that deception.

21 Finally, Intuit argues that the People’s claims only implicate California consumers. As
22 explained above, national data is relevant to Intuit’s knowledge and intent regardless of whether the
23 claims are so limited. But in any event, this is not a “California-only case,” as Intuit claims. The
24 FAL prohibits spreading false or misleading statements “from this state before the public in any
25 state” and provides that “[a]ny violation” is subject to a fine. (Cal. Bus. & Prof. Code § 17500.)

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28 ¹⁰ For example, Intuit asserts there is no reason to believe consumers who started in Free Edition and
paid to upgrade saw the advertisements, but its documents describe a strategy of promoting
“Absolute Zero GUARANTEED” across each entrance to its platform. (Neil Decl., Ex. 18 at 12.)

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DATED: October 20, 2021

Respectfully submitted,

OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
JAMES R. WILLIAMS, COUNTY COUNSEL

By: /s/ Rachel A. Neil
RACHEL A. NEIL
Fellow

Attorneys for Plaintiff,
PEOPLE OF THE STATE OF CALIFORNIA

DATED: October 20, 2021

WILMER CUTLER PICKERING HALE AND
DORR LLP

By: /s/ David Gringer
DAVID GRINGER

Attorneys for Defendant,
INTUIT INC.

2507882

**Exhibit B to the Parties' Joint
Stipulation and [Proposed] Order
Concerning the Sealing of the Joint
Briefing Statement on People's Motion
to Compel and Related Documents**

1 JAMES R. WILLIAMS, County Counsel (S.B. #271253)
AARON BLOOM, Deputy County Counsel (S.B. #281079)
2 SUSAN P. GREENBERG, Deputy County Counsel (S.B. #318055)
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6 Attorneys for Plaintiff
7 PEOPLE OF THE STATE OF CALIFORNIA

*Exempt from Filing Fees
Pursuant to Govt. Code § 6103*

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF LOS ANGELES**

11
12 **TURBOTAX FREE FILING CASES**

JCCP No. 5067

13 PEOPLE OF THE STATE OF CALIFORNIA,
acting by and through Santa Clara County
14 Counsel James R. Williams,

Included Action Case No. 19CV354178

15 Plaintiff,

**NOTICE OF PEOPLE'S MOTION AND
MOTION TO COMPEL RESPONSES TO
PEOPLE'S REQUEST FOR
16 PRODUCTION NO. 2 AND PEOPLE'S
SPECIAL INTERROGATORY NO. 11**

16 v.

17 INTUIT INC., and DOES 1-50, inclusive,

Assigned for All Purposes to
The Hon. Maren Nelson

18 Defendants.

Dept.: 17
Hearing Date: November 12, 2021
Hearing Time: 10:00 a.m.
Complaint filed: September 9, 2019
Trial Date: None Set

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE THAT on November 12, 2021 at 10:00 a.m., or as soon thereafter
3 as the matter may be heard, in Department 17 of the Los Angeles Superior Court, Plaintiff the
4 People of the State of California, acting by and through the Santa Clara County Counsel, (the
5 “People”), will and hereby do move for an order compelling Defendant Intuit, Inc. (“Intuit”) to
6 produce further responses to the People’s Request for Production No. 2 and People’s Special
7 Interrogatory No. 11. Specifically, the People move for an order compelling Intuit to: (a) provide
8 the information called for in Special Interrogatory No. 11 and, (b) produce documents containing
9 Intuit’s interrogatory responses (together with the corresponding interrogatory requests from the
10 FTC) that Intuit produced to the FTC and that are responsive to Request for Production No. 2. This
11 motion is filed and briefed pursuant to the Court’s July 31, 2020 Stipulation and Order re Discovery
12 Motions. The Court held an informal discovery conference on these requests on June 1, 2021.

13 This motion is brought pursuant to Code of Civil Procedure sections 2030.300 and 2031.300
14 and is brought on the ground that Intuit has provided incomplete information in response to Special
15 Interrogatory No. 11 and has refused to produce documents in response to Request for Production
16 No. 2, and that Intuit’s objections have been waived or otherwise lack merit.

17 This motion is based on this Notice of Motion, the concurrently-filed Joint Briefing
18 Statement on the People’s Motion, the Declaration of Rachel A. Neil (and accompanying exhibits),
19 the pleadings and papers on file herein, and any other evidence and argument as may be presented at
20 or before the hearing on the People’s motion.

21 DATED: October 20, 2021

Respectfully submitted,

22 JAMES R. WILLIAMS
23 County Counsel

24 By: /s/ Rachel A. Neil

25 RACHEL A. NEIL
26 Fellow

27 Attorneys for Plaintiff
28 PEOPLE OF THE STATE OF CALIFORNIA

2506890

**Exhibit C to the Parties' Joint
Stipulation and [Proposed] Order
Concerning the Sealing of the Joint
Briefing Statement on People's Motion
to Compel and Related Documents**

1 JAMES R. WILLIAMS, County Counsel (S.B. #271253)
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7 PEOPLE OF THE STATE OF CALIFORNIA

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8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF LOS ANGELES**

11
12 TURBOTAX FREE FILING CASES

JCCP No. 5067

13 PEOPLE OF THE STATE OF CALIFORNIA,
acting by and through Santa Clara County
14 Counsel James R. Williams,

Included Action Case No. 19CV354178

15 Plaintiff,

**DECLARATION OF RACHEL A. NEIL
IN SUPPORT OF PEOPLE'S MOTION
TO COMPEL RESPONSES TO
PEOPLE'S REQUEST FOR
16 PRODUCTION NO. 2 AND PEOPLE'S
SPECIAL INTERROGATORY NO. 11**

16 v.

17 INTUIT INC., and DOES 1-50, inclusive,

Assigned for All Purposes to
The Hon. Maren Nelson

18 Defendants.

19 Dept.: 17
Hearing Date: November 12, 2021
20 Hearing Time: 10:00 a.m.
Complaint filed: September 9, 2019
21 Trial Date: None Set

22 I, Rachel A. Neil, declare as follows:

23 1. I am an attorney licensed to practice in the state of California. I am a Fellow in the
24 Santa Clara County Counsel's Office, counsel for the People of the State of California, acting by and
25 through Santa Clara County Counsel James R. Williams, (the "People") in this matter. I make this
26 declaration in support of the People's Motion to Compel Responses to People's Request for
27 Production No. 2 and People's Special Interrogatory No.11.

28 2. I know the facts herein stated of my own personal knowledge and if called upon to do

1 I, Rachel A. Neil, declare as follows:

2 1. I am an attorney licensed to practice in the state of California. I am a Fellow in the
3 Santa Clara County Counsel’s Office, counsel for the People of the State of California, acting by and
4 through Santa Clara County Counsel James R. Williams, (the “People”) in this matter. I make this
5 declaration in support of the People’s Motion to Compel Responses to People’s Request for
6 Production No. 2 and People’s Special Interrogatory No.11.

7 2. I know the facts herein stated of my own personal knowledge and if called upon to do
8 so, I could competently testify to them under oath.

9 3. On June 1, 2021, the Court held an informal discovery conference (“IDC”) regarding
10 People’s Request for Production (“RFP”) No. 2 and People’s Special Interrogatory No. 11, among
11 other issues. A true and correct copy of the public version of the parties’ joint statement for the June
12 1, 2021 IDC is attached hereto as **Exhibit 1**. A true and correct copy of the transcript of that IDC is
13 attached hereto as **Exhibit 2**.

14 4. Attached hereto as **Exhibit 3** is a true and correct copy of the People’s first set of
15 Requests for Production of Documents, which was served on Intuit on October 6, 2020.

16 5. Attached hereto as **Exhibit 4** is a true and correct copy of the People’s first set of
17 Special Interrogatories, which was served on Intuit on October 6, 2020.

18 6. Attached hereto as **Exhibit 5** is a true and correct copy of the public version of Intuit’s
19 Petition to Quash in Part the Federal Trade Commission’s May 19, 2020 Civil Investigative
20 Demand.

21 7. Attached hereto as **Exhibit 6** is a true and correct copy of the Federal Trade
22 Commission (“FTC”) order denying Intuit’s Petition to Quash in Part the May 19, 2020 Civil
23 Investigative Demand.

24 8. Attached hereto as **Exhibit 7** is a true and correct copy of a discovery correspondence
25 sent by the People to Intuit on January 15, 2021 memorializing the parties’ January 12, 2021 meet
26 and confer call. During the parties’ January 12, 2021 meet and confer call, Intuit stated that it does
27 not contend that the topics listed in RFP No. 2 are irrelevant. Intuit also conceded during the call
28 that California consumers did not see different TurboTax advertising than the rest of the nation.

1 9. Attached hereto as **Exhibit 8** is a true and correct copy of a discovery correspondence
2 that the People received from Intuit on January 30, 2021.

3 10. Attached hereto as **Exhibit 9** is a true and correct copy of the transcript of the Further
4 Status Conference and Informal Discovery Conference held on October 22, 2020.

5 11. Attached hereto as **Exhibit 10** is a true and correct copy of an email correspondence
6 that took place on August 25 and 26, 2021 between Intuit and the People regarding RFP No. 2 and
7 Interrogatory No. 11.

8 12. Attached hereto as **Exhibit 11** is a true and correct copy of the discovery correspondence
9 the People sent to Intuit on June 21, 2021.

10 13. Attached hereto as **Exhibit 12** is a true and correct copy of the People's June 25, 2021
11 letter to Intuit memorializing the parties' discussion during the parties' June 23, 2021 meet and
12 confer call. During the June 23, 2021 meet and confer call, Intuit conceded that it is not asserting
13 any privilege with respect to its responses to the FTC's interrogatory demands.

14 14. Attached hereto as **Exhibit 13** is a true and correct copy of a letter the People received
15 from Intuit on July 9, 2021.

16 15. Attached hereto as **Exhibit 14** is a true and correct copy of a discovery correspondence
17 that the People sent to Intuit on July 22, 2021.

18 16. Attached hereto as **Exhibit 15** is a true and correct copy of a letter the People received
19 from Intuit on August 17, 2021.

20 17. Attached hereto as **Exhibit 16** is a true and correct excerpt of a PowerPoint produced by
21 Intuit pursuant to discovery, which begins at Bates Number INTUIT-FFA-LACA-000475511. Due
22 to the length of this document, the People have attached only the relevant excerpt.

23 18. Attached hereto as **Exhibit 17** is a true and correct copy of a PowerPoint produced by
24 Intuit pursuant to discovery, which begins at Bates Number INTUIT-FFA-LACA-000521230.

25 19. Attached hereto as **Exhibit 18** is a true and correct copy of a PowerPoint produced by
26 Intuit pursuant to discovery, which begins at Bates Number INTUIT-FFA-LACA-000199875.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 20, 2021 in San José, California.

2506893

DocuSigned by:
Rachel Neil
E0430060496944E
RACHEL A. NEIL

EXHIBIT 1

1 JAMES R. WILLIAMS, County Counsel (S.B. #271253)
 AARON BLOOM, Deputy County Counsel (S.B. #281079)
 2 SUSAN P. GREENBERG, Deputy County Counsel (S.B. #318055)
 ZOE FRIEDLAND, Deputy County Counsel (S.B. #319986)
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7 Attorneys for Plaintiff
 PEOPLE OF THE STATE OF CALIFORNIA
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Exempt from Filing Fees Pursuant
to Govt. Code § 6103

SUPERIOR COURT OF CALIFORNIA
 COUNTY OF LOS ANGELES

13 TURBOTAX FREE FILING CASES
 14 PEOPLE OF THE STATE OF CALIFORNIA,
 acting by and through Santa Clara County
 15 Counsel James R. Williams,
 16
 Plaintiff,
 17
 v.
 18 INTUIT INC., and DOES 1-50, inclusive,
 19
 Defendants.

No. JCCP5067
 Included Action Case No. 19CV354178
**THE PARTIES' JOINT INFORMAL
 DISCOVERY CONFERENCE
 STATEMENT**
 Assigned for All Purposes to
 The Hon. Maren Nelson
 Dept.: 17
 IDC Date: June 1, 2021
 IDC Time: 1:45 p.m.
 Complaint filed: September 9, 2019
 Trial Date: None Set

1 In advance of the informal discovery conference (“IDC”) in this matter set for June 1, 2021
2 at 1:45 p.m., Plaintiff the People of the State of California, acting by and through the Santa Clara
3 County Counsel, (“the People”) and Defendant Intuit Inc. (“Intuit”) (collectively, “the parties”)
4 hereby submit the following Joint IDC Statement regarding two categories of discovery disputes.
5 The discovery requests discussed herein were propounded by the People, acting through the Santa
6 Clara County Counsel (“SCCC”) (not through the Los Angeles City Attorney’s Office).

7 **1. People’s Interrogatory Nos. 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25**

8 **a. SCCC’s Position**

9 As part of its false advertising claim, the People allege that Intuit drew taxpayers to
10 TurboTax’s revenue-producing products with false and misleading advertising that they could use
11 TurboTax Free Edition (Intuit’s commercial free product) to prepare and file their taxes for free.
12 Interrogatory Nos. 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25 seek data regarding the total number of people
13 who: accessed Intuit’s commercial free product; filed with Intuit’s commercial free product;
14 accessed Intuit’s commercial free product and were presented a message requiring them to upgrade
15 to a different TurboTax product; and accessed Intuit’s commercial free product but filed with a paid
16 product after receiving a required upgrade message. *See Exhibit A.* These requests also seek data
17 regarding the total monetary sum Intuit received from customers who accessed Intuit’s commercial
18 free product but filed with a paid product after receiving a required upgrade message and the number
19 of people who were presented with a required upgrade message but filed with Intuit’s commercial
20 free product anyway. *See id.* While Intuit agreed to respond to interrogatories seeking data relating
21 to California consumers, it contends that all information regarding consumers outside of California is
22 not reasonably calculated to lead to the discovery of admissible evidence.¹

23 Contrary to Intuit’s position, these requests are relevant to the People’s case. *See Lopez v.*
24 *Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 591 (explaining
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27 ¹ Intuit also objected to these requests as overbroad and unduly burdensome, but the People do not
28 understand Intuit to be standing on that objection given their failure to articulate any burden during
the months-long meet and confer process.

1 that information is relevant for discovery purposes if it “might reasonably assist a party in evaluating
2 the case” or if “it might reasonably lead to admissible evidence”). To state a claim for false
3 advertising, the People must show that: (1) the statements in the advertising are untrue or
4 misleading; and (2) Intuit knew, or by the exercise of reasonable care should have known, that the
5 statements were untrue or misleading. *People v. Lynam* (1967) 253 Cal.App.2d 959, 965. The
6 interrogatories at issue here go to the heart of these elements. For instance, data about how many
7 people accessed Intuit’s commercial free product but ultimately were unable to file their taxes for
8 free will show that consumers were misled by Intuit’s practices, and that, based on data in Intuit’s
9 possession, Intuit knew or should have known that its marketing practices were actively misleading
10 customers, regardless of whether they were in California or elsewhere. Similarly, data about how
11 much money Intuit earned from people who accessed Intuit’s commercial free product but were then
12 required by Intuit to pay to file their taxes is relevant to show that Intuit knew its advertising was
13 misleading yet had a financial incentive to maintain the deception.

14 Importantly, Intuit has on multiple occasions cited alleged national data regarding the
15 number of taxpayers who filed for free using Intuit’s commercial free product in its own pleadings,
16 and so cannot in good faith claim that the People are not entitled to contextualize that data with
17 related information. For example, to attempt to paint itself in a flattering light, Intuit has represented
18 to the Court that, in 2019, approximately 12 million people nationally filed their taxes for free using
19 a commercial TurboTax product, Joint Initial Status Conference Statement at 9, 11, and that “28
20 percent . . . of taxpayers eligible to use Free Edition prepared and filed their federal and state tax
21 returns using TurboTax Free Edition in 2019,” Intuit’s Separate Statement of Undisputed Material
22 Facts in Support of Motion for Summary Adjudication at 21. But Intuit’s statements obscure an
23 important part of the story: that Intuit’s misleading advertising led many people to access its
24 commercial free product under an erroneous belief they could use it to file for free. And that Intuit
25 earned substantial money from subsequently requiring those individuals to upgrade to a different
26 TurboTax product. Indeed, the data Intuit has produced for California residents demonstrates that
27 ██████████ of people who accessed Intuit’s commercial free product in tax year 2019 ultimately
28 paid Intuit to file their taxes after being presented with a required upgrade message, and another

1 [REDACTED] did not file their taxes using Free Edition or any other TurboTax product. Exhibit
2 A. Additionally, Intuit’s document production makes clear that it tracked data on a nationwide basis,
3 and the People are entitled to receive data that contextualizes these documents. The People’s
4 interrogatories seek information that will provide this additional context for Intuit’s statements and
5 document productions, including: (a) how many total people who accessed Intuit’s commercial free
6 product were presented with a required upgrade message; and (b) how many people accessed Intuit’s
7 commercial free product, but filed with a paid product after receiving a required upgrade message.
8 Because Intuit has admitted that it uses the same basic advertising across the country, *see* Exhibit C,
9 Letter from R. Neil to D. Gringer, January 15, 2021, understanding the full scope of this national
10 data is plainly relevant to the People’s claims.

11 Finally, national data is particularly relevant given Intuit’s representation that the state data it
12 provided is “underinclusive” because some customers do not “proceed far enough into the product
13 for Intuit to determine their state of residence.” Exhibit A at 12, n.2, 14, n.3. This caveat applies to
14 data showing how many California residents accessed Intuit’s commercial free product, which
15 means that at least some California consumers who accessed but ultimately abandoned that product
16 before filing their taxes will only be captured in national data.² *See id.* Intuit’s inability to produce
17 requested state-specific data about this important topic presents yet another reason why national data
18 is relevant.

19 **b. Intuit’s Position**

20 Interrogatory Nos. 1, 3, 4, 7, 9, 11, 13, and 23-25 seek production of nationwide data. Intuit
21 has already provided equivalent data for California customers, but this case is limited to California
22 and nationwide data is irrelevant to the County Counsel’s claim. Nonetheless, Intuit has not
23 foreclosed that it might be reasonable to provide nationwide data in response to one or more
24

25 _____
26 ² Intuit’s claim that it offered to produce data “regarding those customers for whom Intuit has no
27 state of residence” is misleading. In fact, Intuit offered to produce this data “to the extent it is not
28 unduly burdensome . . . and only if the County Counsel will agree to stipulate that such
supplementation would fully resolve the dispute with regard to these requests.” Exhibit D, Letter
from M. Benedetto to R. Neil, April 1, 2021.

1 interrogatories. In this context, Intuit has invited the County Counsel to explain, on a request-by-
2 request basis, why particular data are relevant to his claims. He has refused, and still refuses in his
3 statement, instead asserting broad arguments that are insufficient to support his requests. None of
4 the County Counsel’s arguments are availing.

5 First, the County Counsel offers the conclusory assertion that data regarding non-California
6 residents are relevant to show that “Intuit knew or should have known that its marketing practices
7 were actively misleading customers” or that “consumers were misled.” But simply restating the
8 elements of a false advertising claim and representing that the nationwide data he seeks “will show”
9 each element does not meet the County Counsel’s burden. For instance, the County Counsel asserts
10 that nationwide data about “how many people accessed Intuit’s commercial free product but were
11 unable to file their taxes for free” and “how much money Intuit earned” from such customers will
12 show Intuit “knew or should have known” that its marketing practices were misleading. But he
13 offers no explanation *how* the data he requests—whether nationwide or California-based—has any
14 bearing on what Intuit knew or should have known about its marketing practices. Similarly, the
15 County Counsel asserts that nationwide data on the number of customers who began their taxes in
16 TurboTax Free Edition and ultimately did not use that product to file their taxes “will show that
17 consumers were misled by Intuit’s practices.” But, again, he simply concludes that to be true,
18 without explanation. However, even assuming, *arguendo*, that Intuit’s consumer data could show
19 either of these points, California is the largest state in the United States, and data regarding
20 California consumers would be sufficient to support this argument if it could be made at all. The
21 County Counsel provides no justification for why he needs nationwide data to prove his California-
22 based claim.

23 Second, the County Counsel asserted that Intuit has in its own pleadings relied upon
24 nationwide data and that the County Counsel needs the nationwide data to understand documents
25 produced by Intuit that reference such data. However, in both instances that the County Counsel
26 cites in his section of this statement, Intuit has already produced the underlying data. In any event,
27 the demurrer where the information was cited was overruled, so the County Counsel has no need for
28 the data to rebut the point Intuit made. To the extent that the County Counsel requires nationwide

1 data to understand particular documents that Intuit has already produced, Intuit has already stated
2 that it would evaluate and fairly consider such requests on a case-by-case basis. But the County
3 Counsel has, even in his statement, refused to point to even one document where nationwide data
4 would help him understand context. The County Counsel also has other tools at his disposal to
5 understand and contextualize information in documents that Intuit has produced including, but not
6 limited to, taking depositions of the custodians of such documents.

7 Finally, the County Counsel has said that he requires nationwide data because some
8 customers do not proceed far enough into the TurboTax product for Intuit to capture their state of
9 residence. After receiving this explanation, to resolve the County Counsel’s purported concern,
10 Intuit offered to produce data regarding those customers for whom Intuit has no state of residence.
11 That offer still stands, and the County Counsel’s unwillingness to accept it demonstrates that this
12 stated rationale is illusory.

13 Notably, the County Counsel also uses the IDC process to argue the merits of his claim.
14 Even if that were appropriate, the data he offers show that ██████████ of consumers who used
15 TurboTax Free Edition did not upgrade and file their taxes using a paid TurboTax product. That fact
16 directly contradicts the allegation, in both the County Counsel’s and City Attorney’s complaints, that
17 “[t]he ‘vast majority of people’ who begin using Free Edition ‘will not pay \$0.’ Compl. ¶ 54; see
18 also LACA Compl. ¶ 68 (same). Moreover, the figures offered by the County Counsel say nothing
19 about whether customers who ultimately filed their taxes using a paid TurboTax product or who
20 decided to file their taxes using a method other than TurboTax were deceived.

21 **2. People’s Request for Production No. 2**

22 **a. SCCC’s Position**

23 People’s RFP No. 2 seeks all documents and information that Intuit “produced to the FTC in
24 connection with the FTC’s investigation of INTUIT, File No. 1923119” that relate to the
25 “advertising, marketing, design, user experience, upgrade requirements, or monetization for”
26 TurboTax Free Edition and TurboTax’s paid tax preparation services. Exhibit B. Intuit stated on a
27 January 12, 2021 meet and confer call that it does not contend that the topics identified in RFP No. 2
28 are irrelevant. Exhibit C. Instead, Intuit justified its refusal to produce the documents requested in

1 RFP No. 2 by asserting that the request is overbroad, unduly burdensome, and implicates
2 confidentiality concerns. *Id.* Although the People disagree with these objections, in an effort to
3 compromise, the People substantially narrowed their request to only “responsive interrogatory
4 responses (together with the corresponding interrogatory requests from the FTC) produced to the
5 FTC in connection with its investigation of Intuit.” *Id.* Intuit maintains its objections despite this
6 significantly narrowed request. Exhibit E, Letter from M. Benedetto to R. Neil, January 30, 2021.

7 The discovery sought is particularly appropriate given Intuit’s own insistence that the FTC’s
8 investigation resembles “the Santa Clara County case in terms of scope,” Exhibit F, Transcript,
9 October 22, 2020. *See Munoz v. PHH Corp.*, No. 1:08-CV-0759-AWI-BAM, 2013 WL 684388, at
10 *3, *6 (E.D. Cal. Feb. 22, 2013) (granting plaintiffs’ motion to compel documents produced to the
11 Consumer Financial Protection Bureau in connection with its investigation of defendants even
12 though the documents included information from a time period preceding plaintiffs’ claims). And
13 the targeted and narrowed nature of the request at issue here makes it very different from the “cloned
14 discovery” cases cited by Intuit. *See, e.g., Ludlow v. Flowers Foods, Inc.*, 2019 WL 6252926, at *18
15 (S.D. Cal. Nov. 22, 2019) (finding that the propounding party could not establish relevance because
16 it was not in a position to narrow its request from the 363,294 pages the defendant had produced in a
17 related securities case). Intuit’s claim that responding to the People’s request would require it to
18 “parse the FTC’s interrogatories . . . to identify what is relevant to the County Counsel’s case” is
19 untrue. The People have served a request for production. Intuit does not dispute that the
20 interrogatory responses exist and contain relevant, responsive material. As a result, they should be
21 produced as with any document containing relevant, responsive material—no parsing is required.
22 Unlike the Court’s previous ruling on a related issue, which concerned the Los Angeles City
23 Attorney’s mandate to focus exclusively on discovery related to the Motion for Summary
24 Adjudication, here the discovery requests are subject to the typical discovery standard under the
25 California Rules of Civil Procedure. *See* CCP § 2017.010 (any nonprivileged information “relevant
26 to the subject matter involved in the pending action,” is discoverable).

27 Finally, the protective order in this case obviates Intuit’s confidentiality concerns. *See*
28 *Munoz*, 2013 WL 684388, at *5 (holding that the protective order was “sufficient to address

1 concerns as to the disclosure and use of any confidential information.”). The statute Intuit cites, 15
2 U.S.C. § 57b-2(c)(1), simply prevents the FTC from disclosing information it obtains during an
3 investigation that the party under investigation marks as confidential. It does not prevent an entity
4 under FTC investigation from disclosing relevant information in the course of civil discovery.
5 While Intuit may prefer not to disclose information related to the FTC’s investigation of its practices,
6 it has failed to articulate any objection that shields this relevant information from discovery.

7 **b. Intuit’s Position**

8 RFP No. 2 revives the City Attorney’s efforts to freeride on the FTC’s investigation by
9 seeking documents and information that Intuit previously produced to the FTC in connection with
10 the FTC’s investigation of Intuit. As the Court will recall, it rejected the City Attorney’s request for
11 such discovery in connection with Intuit’s Motion for Summary Adjudication and should do the
12 same here. Intuit had objected to the City Attorney’s request because “[a]sking for all documents
13 produced in another matter is not generally proper.” Parties’ Joint FSC & IDC Report at 8-9 (Oct.
14 15, 2020) (quoting *Ludlow v. Flowers Foods, Inc.*, 2019 WL 6252926, at *18 (S.D. Cal. Nov. 22,
15 2019)). The Court agreed with Intuit, explaining that it “is not appropriate to serve a request for
16 production [that] . . . is overly broad, and then say, but we’ll negotiate it down.” Oct. 26, 2020 Hr’g
17 Tr. at 12:8-16.

18 Courts routinely reject requests for cloned discovery like RFP No. 2 because they are
19 presumptively overbroad “even if the subject matter of [the] cases seem to overlap.” *Ludlow*, 2019
20 WL 6252926, at *18. Instead, a “[p]laintiff must make proper discovery requests, identifying the
21 specific categories of documents sought, in order to obtain them” *King Cnty. v. Merrill Lynch*
22 *& Co.*, 2011 WL 3438491, at *3 (W.D. Wash. Aug. 5, 2011). Requests seeking “a carte blanche
23 production of all documents from [related] cases” are particularly improper where, as here, the
24 related case “involve[s] [a] different (longer and earlier) time period[.]” than the case at hand. *Chen*
25 *v. Ampco Sys. Parking*, 2009 WL 2496729, at *2 (S.D. Cal. Aug. 14, 2009).³

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28 ³ The County Counsel’s RFPs define the “COVERED PERIOD” to begin on September 6, 2015, but does not actually incorporate such limitations into his Requests. *See* SCCC Reqs. for Produc. of Docs. (Set 1) at 2 (Oct. 6, 2020). Intuit has provided material to the FTC dating back to 2013.

1 Moreover, as Intuit has previously explained, both in the context of the City Attorney’s
2 request, *see* Parties’ Joint FSC & IDC Report at 9 (Oct. 15, 2020), and in communications with the
3 County Counsel, *see, e.g.*, Ex. E, Letter from M. Benedetto to R. Neil at 1-2, Jan. 30, 2021, the scope
4 of the FTC’s investigation is broader than the County Counsel’s lawsuit and thus the Request calls
5 for information that is irrelevant to this case. The County Counsel’s purported limitation seeking
6 only information “that relate[s] to the advertising, marketing, design, user experience, upgrade
7 requirements, or monetization” of TurboTax Free Edition and its paid products is so overbroad as to
8 be meaningless. TurboTax’s only commercial products are Free Edition and its “paid” products, and
9 “the advertising, marketing, design, user experience, upgrade requirements, or monetization” of such
10 products could reach the entirety of Intuit’s commercial business. Far from conceding that these
11 topics are all relevant to the County Counsel’s action, Intuit explained during the parties’ January 12,
12 2021 meet and confer that the request is facially overbroad and the County Counsel has not
13 discharged his burden to identify the specific categories of documents that are relevant to his claim
14 and discoverable. The County Counsel attempts to overcome the fact that the FTC’s investigation is
15 broader than his case by claiming that Intuit has “insist[ed] that the FTC’s investigation resembles
16 ‘the Santa Clara County case in terms of scope,’” purportedly citing a transcript from October 22,
17 2020. The FTC investigation does “resemble[.]” the Santa Clara County case, but for the reasons
18 discussed, they are not the same or even close.

19 RFP No. 2 is also overly burdensome. Even if limited to the relevant subject matter and
20 period of the County Counsel’s complaint, it would require Intuit to review every document it
21 produced to the FTC and independently assess its relevance to the County Counsel’s claims.
22 “[C]ompelling a responding party to do duplicate searches—one for responsive documents in their
23 custody and control and one for all documents in their custody and control that were previously
24 produced in other litigation,” as the County Counsel seeks to require Intuit do here, “is definitionally
25 unduly burdensome, as it would consume resources without providing any additional benefit to the
26 propounding party.” *Ludlow*, 2019 WL 6252926, at *18; *see also Chen*, 2009 WL 2496729, at *2
27 (production of all discovery from related cases would be unduly burdensome where “Defendant
28 contends that to the extent Plaintiff has requested documents relevant to this action and appropriate

1 for production at this stage of the proceedings, [Defendant] has already produced them”).

2 In addition, the FTC’s investigation is nonpublic. The documents and information produced
3 by Intuit to the FTC “shall be considered confidential . . . and shall not be disclosed,” except in
4 limited circumstances not present here. 15 U.S.C. § 57b-2(c)(1); *see also id.* § 46(f) (with limited
5 exceptions, “the Commission shall not have any authority to make public any trade secret or any
6 commercial or financial information which is obtained from any person and which is privileged or
7 confidential”). Nor may the general public obtain such documents and information through a public
8 records request. *See* 16 C.F.R. § 4.10(a)(8). Yet, the County Counsel seeks to obtain documents and
9 information concerning the FTC’s investigation that it could not obtain from the FTC directly. The
10 Court should not permit the County Counsel to make an end run around those prohibitions by
11 obtaining the same materials from Intuit in civil discovery without independently establishing their
12 relevance to his case. The existence of a protective order in this case is irrelevant because Intuit has
13 an absolute right to keep the information of the investigation confidential from the County Counsel.
14 That rule exists for the very reason the County Counsel wants the information—to use the fact of an
15 investigation as evidence of wrongdoing, which is deeply improper.

16 There is an easy solution to this dispute: the County Counsel should simply request the
17 relevant documents and information he believes he needs to prosecute his case. Intuit will not refuse
18 to provide the County Counsel with any relevant document or fact merely because it was provided to
19 the FTC. Indeed, Intuit has already produced tens of thousands of documents where there is overlap
20 between the County Counsel’s case and the FTC’s investigation.

21 The County Counsel has also indicated that he would accept only production of “responsive
22 interrogatory responses (together with the corresponding requests from the FTC) produced to the
23 FTC in connection with its investigation of Intuit.” Ex. C, Letter from R. Neil to D. Gringer at 2,
24 Jan. 15, 2021. This does not resolve Intuit’s objections. As noted, the scope and time period
25 covered by the FTC’s investigation go beyond the County Counsel’s case. Even if limited to the
26 time period and issues in the County Counsel’s complaint, the (still) cloned discovery request would
27 reveal subject matters of a nonpublic investigation and is unduly burdensome because responding
28 would require Intuit to parse the FTC’s interrogatories and Intuit’s responses to identify what is

1 relevant to the County Counsel's case. In some instances, limiting the production of Intuit's
2 responses to relevant information would be impossible without Intuit having to alter its responses to
3 cover the more limited scope and time period reflected in the County Counsel's complaint.
4 Moreover, allowing the County Counsel to simply serve an RFP for interrogatory responses
5 provided in another matter would effectively allow the County Counsel to evade the CCP's limit on
6 the number of special interrogatories a party may serve in a lawsuit. *See* CCP § 2030.030(a)
7 (limiting the number of interrogatories a party may serve). As with the County Counsel's RFPs,
8 Intuit will not refuse to respond to any appropriately targeted interrogatory on the ground that it has
9 already responded to a similar one posed by the FTC.

10 Respectfully submitted,

11 Dated: May 24, 2021

12 OFFICE OF THE COUNTY COUNSEL
13 COUNTY OF SANTA CLARA
14 JAMES R. WILLIAMS, COUNTY COUNSEL

15 By: /s/ Zoe Friedland
16 ZOE FRIEDLAND
17 Attorneys for Plaintiff,
18 PEOPLE OF THE STATE OF CALIFORNIA

19 WILMER CUTLER PICKERING HALE AND DORR
20 LLP

21 By: /s/ Matthew Benedetto
22 MATTHEW BENEDETTO
23 Attorneys for Defendant,
24 INTUIT INC.

25
26
27
28
29 2416388

1 **PROOF OF SERVICE**

2
3 I, Camie Bowling, declare:

4 I am now and at all times herein mentioned have been over the age of eighteen years,
5 employed in Santa Clara County, California, and not a party to the within action or cause; that my
6 business address is 70 West Hedding Street, East Wing, 9th Floor, San José, California 95110-1770.

7 On **May 24, 2021**, I electronically served copies of the following:

8 **THE PARTIES' JOINT INFORMAL DISCOVERY CONFERENCE**
9 **STATEMENT**

10 **DECLARATION OF ZOE E. FRIEDLAND IN SUPPORT OF THE**
11 **PARTIES' JOINT INFORMAL DISCOVERY CONFERENCE**
12 **STATEMENT**

13 to the interested parties in this action by **E-Service**. Based on a court order and an agreement of the
14 parties to accept service via **CASE ANYWHERE**, I caused the document(s) described above to be
15 sent to the persons at the e-mail addresses listed on the attached Service List. I did not receive,
16 within a reasonable time after the transmission, any electronic message or other indication that the
17 transmission was unsuccessful.

18 I declare under penalty of perjury under the laws of the State of California that the foregoing
19 is true and correct, and that this declaration was executed on **May 24, 2021**.

20 */s/ Camie Bowling* _____

21 Camie Bowling

Electronic Service List

Case: **TurboTax Free Filing Cases**
Case Info: **JCCP 5067, Los Angeles Superior Court**

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EXHIBIT 2

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

DEPARTMENT 17 HON. MAREN NELSON, JUDGE

TURBOTAX FREE FILING CASES)
)
PEOPLE OF THE STATE OF CALIFORNIA,)
ACTING BY AND THROUGH SANTA CLARA)
COUNTY COUNSEL JAMES R. WILLIAMS,)
)
PLAINTIFF(S),)
VS.) NO. JCCP5067
) INCLUDED ACTION
) CASE NO: 19CV354178
INTUIT INC., AND DOES 1-50,)
INCLUSIVE,)
)
DEFENDANT(S))
_____) JOB NO. 10082617

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(PROCEEDINGS HELD REMOTELY VIA TELECONFERENCE)
TUESDAY, JUNE 1, 2021

APPEARANCES VIA TELECONFERENCE:

FOR THE PLAINTIFF(S):

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BY: AARON BLOOM, ESQ.
BY: SUSAN P. GREENBERG, ESQ.
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(CONTINUED ON FOLLOWING PAGE)

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CCRR NO. 194
OFFICIAL REPORTER PRO TEMPORE

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APPEARANCES VIA TELECONFERENCE (CONTINUED):

FOR THE DEFENDANT(S):

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INDEX
TUESDAY, JUNE 1, 2021

INDEX OF WITNESSES
(NONE)

EXHIBITS
(NONE)

1 CASE NO: JCCP 5067
2 CASE NAME: PEOPLE VS. INTUIT,
3 LOS ANGELES, CA TUESDAY, JUNE 1, 2021
4 DEPARTMENT 17 MAREN NELSON, JUDGE
5 REPORTER: DONNA E. BOULGER, CSR NO. 6162
6 TIME: AFTERNOON SESSION
7

8 (THE FOLLOWING PROCEEDINGS WERE
9 HELD VIA TELECONFERENCE, WITH THE COURT
10 REPORTER IN A REMOTE LOCATION, SEPARATE
11 AND APART FROM THE ATTORNEYS AND THE
12 JUDGE.

13 THE PROCEEDINGS WERE TRANSCRIBED TO
14 THE BEST ABILITY OF THE COURT REPORTER
15 TO HEAR AND UNDERSTAND THE PROCEEDINGS.)
16

17 THE COURT: ALL RIGHT. IN TURBOTAX FREE FILING
18 CASES, I JUST HEARD THE JUDICIAL ASSISTANT TAKE ROLL, SO
19 I WON'T DO THAT AGAIN.

20 I WOULD ASK THE FOLLOWING, BOTH SANTA CLARA
21 COUNTY COUNSEL AND COUNSEL FOR TURBO TAX, AND THAT IS
22 THE COURT ORDINARILY DOES NOT PERMIT A COURT REPORTER
23 FOR AN IDC. IF THE PARTIES HAVE STIPULATED TO THE USE
24 OF A COURT REPORTER, I'LL PERMIT IT, BUT IF THERE'S BEEN
25 NO SUCH STIPULATION, I'M GOING TO EXCUSE THE COURT
26 REPORTER BECAUSE WHAT A COURT SAYS AT AN IDC IS IN THE
27 NATURE OF INFORMAL GUIDANCE, IT IS NOT BINDING ON THE
28 COURT.

1 LET ME HEAR FOR COUNSEL FOR THE PLAINTIFF
2 FIRST.

3 MS. FRIEDLAND: HI, YOUR HONOR. THIS IS ZOE
4 FRIEDLAND ON BEHALF OF SANTA CLARA COUNTY.

5 WE'RE OKAY WHETHER THERE'S A COURT REPORTER OR
6 NOT. IF YOUR HONOR WOULD PREFER THERE NOT BE A COURT
7 REPORTER, THAT'S OKAY WITH US.

8 THE COURT: WAS THERE A STIPULATION TENDERED BY
9 THE PARTY THAT ASKED FOR THE COURT REPORTER, WHICH I
10 THINK IS TURBOTAX OR INTUIT?

11 MR. BENEDETTO: YOUR HONOR, THIS IS MATTHEW
12 BENEDETTO. I DON'T BELIEVE THERE WAS A FORMAL
13 STIPULATION. IT -- WE HAVE HAD -- WE ARE FINE
14 PROCEEDING WITHOUT A COURT REPORTER, IF THAT IS THE
15 COURT'S PREFERENCE.

16 THE COURT: I DON'T HAVE A STRONG PREFERENCE
17 ONE WAY OR THE OTHER, BUT I WILL -- I THINK -- AND I
18 COULD BE CORRECTED, THE INITIAL STATUS CONFERENCE ORDER
19 RATHER SPECIFICALLY SAYS THAT A COURT REPORTER IS
20 ORDINARILY NOT USED AT AN IDC. BUT IF THE PARTIES HAVE
21 NO OBJECTION, I'M FINE WITH IT.

22 MS. FRIEDLAND: WE HAVE NO OBJECTION. I DON'T
23 BELIEVE THERE WAS A FORMAL STIPULATION, BUT WE HAVE NO
24 OBJECTION, IF YOUR HONOR IS OKAY WITH IT.

25 THE COURT: I'M OKAY WITH IT. I TAKE IT
26 INTUIT'S THE PARTY THAT ASKED FOR THE COURT REPORTER,
27 MR. BENEDETTO?

28 MR. BENEDETTO: YES, YOUR HONOR.

1 THE COURT: ALL RIGHT. WELL, I'LL SIGN THE
2 ORDER FOR THE COURT REPORTER.

3 AS THE JUDICIAL ASSISTANT INDICATED, PLEASE
4 SPEAK SLOWLY. AS FREQUENTLY, WE DON'T HAVE VIDEO, SO
5 IT'S PARTICULARLY IMPORTANT THAT YOU DO THAT.

6 I DO HAVE YOUR IDC STATEMENT. AND THE FIRST
7 QUESTION I HAVE IS WHETHER THE PARTIES HAVE FULLY MET
8 AND CONFERRED ON THIS. AND THE REASON I ASK THAT IS
9 THAT THERE SEEMS TO BE A PROPOSAL AS TO THE FIRST ISSUE
10 ABOUT DATA BY INTUIT, THAT WHERE CUSTOMERS HAVE NO STATE
11 OF RESIDENCE INDICATED, THAT THEY WOULD PRODUCE THAT
12 DATA.

13 I DON'T KNOW IF THAT HAS BEEN FULLY WORKED
14 THROUGH BY THE PARTIES OR NOT. LET ME ASK COUNSEL FOR
15 INTUIT FIRST. THAT'S YOUR PROPOSAL?

16 MR. BENEDETTO: THIS IS MATTHEW BENEDETTO FOR
17 INTUIT.

18 YES, YOUR HONOR. THAT IS OUR PROPOSAL. I
19 WOULD -- WE BELIEVE THAT WE HAVE MADE PROPOSALS THAT ARE
20 REASONABLE. WE HAVE OFFERED TO MEET AND CONFER AS TO
21 SPECIFIC REQUESTS. WE HAVE SAID WE WOULD ENTERTAIN
22 SPECIFIC REQUESTS IF -- IF THE COUNTY COUNSEL COULD
23 ARTICULATE A REASONED BASIS FOR THEM. BUT THE COUNTY
24 COUNSEL BELIEVED THAT THE PARTIES WERE AT AN IMPASSE AND
25 SO MOVED TO THIS PROCESS.

26 YOU KNOW, WE -- WE FEEL LIKE WE HAD WORKED WELL
27 IN THE PAST, CERTAINLY WITH THE CITY ATTORNEY AND WITH
28 THE COUNTY COUNSEL, AND THAT FURTHER NEGOTIATIONS COULD

1 BE PRODUCTIVE.

2 THE COURT: WELL, ORDINARILY, WE DON'T CONDUCT
3 AN IDC UNTIL THEY'VE BEEN EXHAUSTED.

4 LET ME HEAR FROM COUNTY COUNSEL, PLEASE.

5 MS. FRIEDLAND: THANK YOU, YOUR HONOR.

6 WE DO BELIEVE THAT WE HAVE EXHAUSTED THESE
7 ISSUES AND THOROUGHLY MET AND CONFERRED AND REACHED AN
8 IMPASSE. SO AS TO YOUR HONOR'S QUESTION SPECIFICALLY
9 ABOUT THIS PROPOSAL FROM INTUIT ABOUT PEOPLE WHO DO NOT
10 HAVE A STATE OF RESIDENCE BECAUSE THEY HAVEN'T PROCEEDED
11 FAR ENOUGH INTO THE PRODUCT, THAT'S ONLY ONE SMALL
12 SUBSET OF THE INFORMATION THE PEOPLE ARE SEEKING IN
13 THESE INTERROGATORIES.

14 WHAT THE PEOPLE ARE SEEKING --

15 THE COURT: COUNSEL.

16 MS. FRIEDLAND: YES, YOUR HONOR.

17 THE COURT: I'VE READ YOUR PAPERS. YOU DON'T
18 NEED TO TELL ME WHAT THE PEOPLE ARE SEEKING.

19 MS. FRIEDLAND: THANK YOU, YOUR HONOR.

20 I DON'T --

21 THE COURT: I JUST ASK THE FOLLOWING, THOUGH,
22 BEFORE WE GO ANY FURTHER, AND THAT IS THAT THE PAPERS
23 THAT THE COURT RECEIVED WERE FILED UNDER SEAL THAT I
24 RECEIVED THIS MORNING, DOCUMENTS THAT APPEAR TO BE
25 EXACTLY THE SAME THAT WAS FILED IN THE OPEN FILE.

26 SO LET ME HEAR FROM COUNSEL ABOUT THAT BEFORE
27 WE PROCEED ANY FURTHER.

28 MS. FRIEDLAND: SORRY, YOUR HONOR. CAN YOU

1 REPEAT THE LAST PART OF THAT QUESTION?

2 THE COURT: SURE.

3 I GOT THE DOCUMENTS FOR TODAY'S IDC SAYING
4 DOCUMENTS FILED UNDER SEAL. BOTH OF THEM, BOTH
5 MS. FRIEDLAND'S DECLARATION AND THE PARTIES' JOINT
6 INFORMAL DISCOVERY CONFERENCE STATEMENTS. BUT I WAS
7 HANDED BY THE JUDICIAL ASSISTANT JUST A BIT AGO BOTH
8 DOCUMENTS AND THEY APPEAR TO HAVE BEEN FILED NOT UNDER
9 SEAL, AND IN THE OPEN FILE.

10 LET ME HEAR FROM THE PARTIES, STARTING WITH
11 MS. FRIEDLAND, I SUPPOSE, SINCE IT'S YOUR DECLARATION,
12 AND SO ON, AS TO WHETHER YOU INTENDED TO FILE THESE
13 UNDER SEAL OR NOT.

14 MS. FRIEDLAND: WE FILED BOTH A VERSION UNDER
15 SEAL AND A PUBLIC VERSION WITH A COUPLE NUMBERS REDACTED
16 IN THE PUBLIC VERSION. SO ANY PUBLIC VERSION SHOULD
17 HAVE A FEW PIECES OF INFORMATION THAT INTUIT DESIGNATED
18 AS "CONFIDENTIAL, REDACTED."

19 THE COURT: I SEE. I UNDERSTAND. OKAY. GOT
20 IT.

21 SO I UNDERSTAND WHAT THE PEOPLE ARE SEEKING,
22 BUT WHAT I'M NOT UNDERSTANDING FROM THE PAPERS, AND I'D
23 LIKE TO HEAR FROM COUNTY COUNSEL FIRST, IS WHY KNOWLEDGE
24 IS RELEVANT AT ALL TO YOUR CLAIM. YOU HAVE A SINGLE
25 CLAIM UNDER 17200. KNOWLEDGE DOES NOT APPEAR TO BE ANY
26 PART OF THE CAUSE OF ACTION, AND FRANKLY, I'M HAVING A
27 HARD TIME UNDERSTANDING WHAT KNOWLEDGE YOU COULD GAIN --
28 WHAT -- WHAT INFERENCE OF KNOWLEDGE COULD BE GAINED FROM

1 THIS INFORMATION.

2 MS. FRIEDLAND: THANK YOU, YOUR HONOR.

3 WE BELIEVE THIS INFORMATION IS RELEVANT TO BOTH
4 PRONGS OF THE FAL CLAIM. THE FIRST PRONG, WHETHER A
5 REASONABLE CONSUMER IS LIKELY TO DECEIVE -- BE DECEIVED
6 BY INTUIT'S PRACTICES IS CERTAINLY IMPLICATED BY
7 NATIONAL DATA.

8 INTUIT'S NOT SUGGESTING THAT THERE'S ANYTHING
9 SPECIAL ABOUT A CALIFORNIA CONSUMER THAT WOULD MAKE THEM
10 MORE OR LESS LIKELY TO BE A REASONABLE CONSUMER. AND
11 WHETHER PEOPLE AROUND THE COUNTRY WERE, IN FACT,
12 DECEIVED BY INTUIT'S PRACTICES IS CERTAINLY RELEVANT TO
13 WHETHER A REASONABLE CONSUMER WOULD BE DECEIVED UNDER
14 CALIFORNIA'S VERY BROAD DISCOVERY STANDARDS.

15 AND AS TO THIS SECOND PRONG ABOUT WHETHER THE
16 DEFENDANT KNEW OR SHOULD HAVE KNOWN THAT THE PRACTICES
17 WERE LIKELY TO DECEIVE, WE BELIEVE THAT'S ALSO
18 IMPLICATED BECAUSE INTUIT USED THE SAME ADVERTISING
19 PRACTICES ACROSS THE COUNTRY AND THEY TRACKED THIS
20 INFORMATION ON A NATIONAL LEVEL.

21 SO WHEN WE LOOK AT THE DOCUMENTS, AND NOW WHEN
22 WE LOOK AT HOW INTUIT'S ATTORNEYS ARE PRESENTING THIS
23 INFORMATION TO THE COURT, THEY REALLY ARE USING NATIONAL
24 DATA TO TALK ABOUT HOW MANY PEOPLE USED FREE EDITION TO
25 FILE THEIR TAXES FOR FREE. AND WE BELIEVE THE PEOPLE
26 ARE ENTITLED TO CONTEXTUALIZE THAT DATA WITH ADDITIONAL
27 INFORMATION ABOUT HOW MANY PEOPLE ACCESSED THE PRODUCT,
28 FOR EXAMPLE, AND HOW MANY PEOPLE ULTIMATELY PAID INTUIT

1 TO USE THE PRODUCT.

2 THE COURT: I DON'T UNDERSTAND WHY THAT IS
3 RELEVANT TO EITHER PRONG, NOTWITHSTANDING YOUR
4 DISCUSSIONS.

5 FIRST OF ALL, PRESUMABLY, AS YOU SAY,
6 CALIFORNIA CONSUMERS ARE NO DIFFERENT THAN NATIONAL
7 CONSUMERS, SO IT WOULD SEEM TO ME THAT YOU COULD
8 DETERMINE WHAT CALIFORNIA CONSUMERS THINK BY CALIFORNIA
9 DATA. YOU DON'T NEED NATIONAL DATA TO SEE WHAT THE
10 REASONABLE CONSUMER WOULD NEED, IT WOULD SEEM TO ME.

11 AND SECONDLY, I TRULY DON'T UNDERSTAND WHY
12 INTUIT WOULD HAVE MORE OR LESS INFORMATION ABOUT
13 KNOWLEDGE, IF IT'S EVEN RELEVANT -- AND I'M NOT REALLY
14 UNDERSTANDING THAT IT IS, BASED ON WHAT YOU'VE JUST
15 SAID -- BASED ON NATIONAL DATA AS OPPOSED TO CALIFORNIA
16 DATA. CALIFORNIA MAKES UP, I DON'T KNOW WHAT THE NUMBER
17 IS RIGHT NOW, BUT PROBABLY 10 PERCENT OF THE UNITED
18 STATES.

19 SO LET ME HEAR FROM YOU ONE OTHER TIME ABOUT
20 THIS.

21 MS. FRIEDLAND: THANK YOU, YOUR HONOR. A
22 COUPLE POINTS IN RESPONSE TO THAT. SO THE FIRST IS THAT
23 INTUIT IS TRYING TO INVERT THE DISCOVERY STANDARD BY
24 SUGGESTING THAT WE HAVE TO SHOW THAT WE NEED THIS DATA.
25 BUT, OF COURSE, AT THIS STAGE WE ONLY HAVE TO SHOW THAT
26 THE DATA APPEARS REASONABLY CALCULATED TO LEAD TO THE
27 DISCOVERY OF ADMISSIBLE EVIDENCE. AND WE BELIEVE --

28 THE COURT: LET ME STOP AND ASK YOU A QUESTION

1 ABOUT THAT.

2 ISN'T THAT A SLIGHT MISSTATEMENT OF LAW,
3 COUNSEL? BECAUSE WHEN IT'S ALLEGED TO BE BURDENSOME,
4 THE BURDEN LIES WITH YOU TO SHOW THAT THE DATA IS NOT
5 ONLY RELEVANT, BUT SUFFICIENTLY RELEVANT THAT THE BURDEN
6 SHOULD BE OVERCOME. THAT'S THE LEGAL STANDARD, IS IT
7 NOT?

8 MS. FRIEDLAND: YOUR HONOR, I BELIEVE THAT IS
9 THE LEGAL STANDARD, BUT I ALSO DON'T BELIEVE THAT INTUIT
10 IS RELYING ON A BURDEN ARGUMENT BECAUSE AT THIS STAGE
11 THEY HAVEN'T ARTICULATED ANY BURDEN OR STATED ANY BURDEN
12 ASSOCIATED WITH PRODUCING THIS DATA.

13 AND I THINK TO YOUR POINT ABOUT CALIFORNIA DATA
14 BEING REPRESENTATIVE, THE STANDARD UNDER THE FAL IS BOTH
15 A REASONABLE PERSON STANDARD AND ALSO KNOWLEDGE IS AN
16 ELEMENT OF AN FAL CLAIM. AND SO WE THINK IT IS
17 RELEVANT. AND PERHAPS AT THE RESTITUTION PHASE, THE
18 CALIFORNIA DATA WOULD BE MORE RELEVANT BECAUSE WE WOULD
19 BE SHOWING SPECIFICALLY WHICH RESIDENTS ARE ENTITLED TO
20 RESTITUTION. BUT AT THIS STAGE OF THE CASE, WHEN WE'RE
21 PROVING THE CLAIMS UNDER A REASONABLE-PERSON STANDARD,
22 WE BELIEVE THE NATIONAL DATA IS RELEVANT TO SHOWING
23 THAT.

24 THE COURT: DO YOU HAVE ANY EXPERT TESTIMONY
25 THAT WOULD SUGGEST THAT THAT'S THE CASE?

26 MS. FRIEDLAND: I'M SORRY, YOUR HONOR, SUGGEST
27 THAT WHAT'S THE CASE?

28 THE COURT: THAT'S THE CASE, THAT YOU NEED

1 NATIONAL DATA TO GET TO WHAT'S RELEVANT HERE, WHAT A
2 REASONABLE CONSUMER WOULD THINK.

3 MS. FRIEDLAND: I THINK, YOUR HONOR, THE CASE
4 LAW IS CLEAR THAT --

5 THE COURT: I'M NOT INTERESTED IN -- COUNSEL, I
6 KNOW WHAT THE CASE LAW SAYS.

7 MY QUESTION WAS: DO YOU HAVE ANY DATA OR
8 EXPERT OPINION THAT THAT'S NECESSARY TO GET TO WHAT A
9 REASONABLE CONSUMER SAYS -- THINKS?

10 MS. FRIEDLAND: WE DON'T CURRENTLY HAVE ANY
11 EXPERT TESTIMONY ABOUT THAT.

12 THE COURT: ALL RIGHT. THANK YOU.

13 YOU DON'T HAVE ANY EXPERT THAT SAYS, "I NEED
14 THIS DATA TO MAKE THAT ANALYSIS"?

15 MS. FRIEDLAND: YOUR HONOR, WE BELIEVE THIS
16 IS -- THIS DATA IS IMPORTANT TO OUR ANALYSIS, BUT WE
17 DON'T BELIEVE --

18 THE COURT: COUNSEL --

19 MS. FRIEDLAND: -- THAT WE --

20 THE COURT: SO THE ANSWER'S "NO"?

21 MS. FRIEDLAND: YES, YOUR HONOR.

22 THE COURT: LET ME HEAR FROM INTUIT ABOUT THIS.

23 IF IT'S NOT BURDENSOME -- WELL, HOW BURDENSOME
24 IS IT, REALLY? BECAUSE IF IT'S NOT BURDENSOME, IT
25 DOESN'T REALLY MATTER. IF IT'S EVEN marginally
26 RELEVANT, THEN IT'S PROBABLY PRODUCIBLE.

27 MR. BENEDETTO: THANK YOU, YOUR HONOR. THIS IS
28 MATTHEW BENEDETTO.

1 YOU KNOW, AS WITH -- AS WITH MANY THINGS AT THE
2 COMPANY, WHAT MIGHT SEEM TO BE NOT BURDENSOME CAN BE
3 BURDENSOME. AND THEY -- THE DATA IS -- FALLS INTO THAT
4 CATEGORY, PARTICULARLY REVENUE DATA. AS WE HAD
5 DISCUSSED WITH RESPECT TO THE CITY ATTORNEY'S CASE,
6 IT -- THIS IS NOT A QUESTION OF SORT OF CLICK A BUTTON
7 AND THE DATA GETS POPPED OUT.

8 BUT THE MORE IMPORTANT SORT OF THRESHOLD ISSUE
9 HERE REALLY IS THE RELEVANCE. AND THERE'S A
10 JURISDICTIONAL PROBLEM, THERE'S A PROBLEM UNDER THE FAL,
11 AND THERE'S A KIND OF COMMON-SENSE PROBLEM.

12 THE JURISDICTIONAL PROBLEM IS THAT THE COUNTY
13 COUNSEL'S AUTHORITY DOESN'T GO BEYOND THE STATE OF
14 CALIFORNIA.

15 GOOGLE TOLD ME THIS MORNING THAT CALIFORNIA'S
16 POPULATION IS 12 PERCENT OF THE U.S. POPULATION. THAT
17 IS MORE THAN A STATISTICAL SAMPLE TO ANYTHING THAT WE'VE
18 PRODUCED -- AND WE'VE ALREADY AGREED TO PRODUCE
19 CALIFORNIA-WIDE DATA -- WILL TELL THE COUNTY COUNSEL
20 MORE THAN ENOUGH IF IT CLAIMS THAT IT NEEDS TO KNOW --
21 OR THAT INFORMATION ABOUT WHAT WAS HAPPENING OUTSIDE OF
22 CALIFORNIA WOULD INFORM WHAT INTUIT KNEW, WHICH IS
23 DEBATABLE, OR WHAT A REASONABLE CONSUMER WOULD KNOW,
24 WHICH I THINK IS -- WE DISPUTE.

25 SO AT EVERY POINT IN OUR MEET-AND-CONFER, WE
26 HAVE ASKED THE COUNTY COUNSEL FOR AN ARTICULATION OF THE
27 SPECIFIC RELEVANCE OF NATIONWIDE DATA BEYOND A
28 RECOUNTING OF THE ELEMENTS OF THE FAL, AND WE -- AND WE

1 HAVEN'T GOTTEN IT. AND WHAT WE GOT WAS SORT OF WHAT
2 COUNSEL TOLD -- JUST TOLD THE COURT.

3 AND WE DON'T THINK THAT THAT REALLY IS ENOUGH
4 TO JUSTIFY THE RELEVANCE OF THIS DATA, ESPECIALLY WHEN
5 THE DATA THAT THE COMPANY HAS ALREADY AGREED TO PRODUCE
6 IS SO VAST, AND -- AND MORE THAN SUFFICIENT, I WOULD
7 IMAGINE, FOR AN EXPERT TO DO ANY KIND OF EXPERT WORK
8 THAT HE OR SHE WOULD NEED TO DO.

9 SO WE THINK, YOU KNOW, WITHOUT EVEN GETTING TO
10 BURDEN, WHICH I -- WHICH, YOU KNOW, HAS ITS SEPARATE
11 ISSUES, THE COUNTY COUNSEL HAS JUST NOT DEMONSTRATED THE
12 SPECIFIC RELEVANCE OF -- OF THIS DATA.

13 THE COURT: WELL, WHAT IS THE BURDEN, COUNSEL?

14 BECAUSE IF A MOTION IS BROUGHT, THERE WILL HAVE
15 TO BE A SPECIFIC DECLARATION FROM INTUIT THAT DETAILS
16 PRECISELY WHAT THE BURDEN IS, THE EXPENSE, AND THE LIKE,
17 RIGHT?

18 MR. BENEDETTO: YES. ABSOLUTELY, YOUR HONOR.

19 AND, YOU KNOW, I -- I DON'T THINK THAT -- I'M
20 NOT PREPARED HERE TODAY TO SORT OF ARTICULATE THAT. AND
21 WE KNOW THAT WE WOULD HAVE A -- TO PRODUCE A DECLARATION
22 THAT SUBSTANTIATES THE BURDEN, BUT AS THE COURT WILL
23 REMEMBER FROM PRIOR DISCUSSIONS, SORT OF DATA-DRIVEN
24 DISCUSSIONS WITH RESPECT TO THE CITY ATTORNEY'S CLAIMS,
25 THERE ARE A LOT OF BACK-END SYSTEMS, ESPECIALLY AS YOU
26 GO BACK IN TIME, YOU KNOW, TAX YEARS 2014, 2015, THEY
27 WERE KEPT ON SEPARATE SYSTEMS.

28 SO THERE IS A -- THERE IS A BURDEN THAT WE

1 WOULD BE ABLE TO DESCRIBE IF, IN FACT, A MOTION WERE
2 BROUGHT. I DON'T WANT TO MISSPEAK HERE WITHOUT ALL OF
3 THE DETAILS AT MY FINGERTIPS, BUT I -- AGAIN, WE THOUGHT
4 THE PRIMARY -- REALLY, THE -- WE DIDN'T GET TO THE
5 BURDEN QUESTION, IF YOU WILL, BECAUSE WE DID NOT BELIEVE
6 THAT THE COUNTY COUNSEL CROSSED THE RELEVANT THRESHOLD.

7 THE COURT: WELL, RELEVANCE IS FAIRLY BROAD,
8 COUNSEL. THAT'S THE --

9 MR. BENEDETTO: YES, YOUR HONOR. I -- I DON'T
10 DISAGREE WITH THAT. RELEVANCE IS BROAD AND, YOU KNOW,
11 COULD LEAD TO ADMISSIBLE EVIDENCE. I THINK IT, YOU
12 KNOW, DOES RAISE SOME INTERESTING SORT OF LEGAL
13 QUESTIONS, WHICH IS WHETHER EVIDENCE OF WHAT CONSUMERS
14 WERE DOING OUTSIDE OF CALIFORNIA WOULD, IN FACT, BE
15 RELEVANT TO A CLAIM UNDER CALIFORNIA'S FAL.

16 AGAIN, WE DISPUTE WHETHER DATA FROM OUTSIDE OF
17 CALIFORNIA WOULD SHOW WHETHER INTUIT KNEW ANYTHING.
18 AND -- AND THAT ITSELF AS A LEGAL PRONG, WE THINK, IS UP
19 FOR DEBATE, LEGAL DEBATE. AND THE -- THE -- WHETHER
20 DATA FROM OUTSIDE OF CALIFORNIA BEARS ON THE QUESTION OF
21 A REASONABLE CONSUMER, I THINK IS AGAIN QUESTIONABLE,
22 GIVEN THAT THE UNIVERSE OF DATA THAT WE ARE PRODUCING
23 FOR CALIFORNIA WOULD BE MORE THAN ADEQUATE FOR AN
24 EXPERT, FOR INSTANCE, TO OPINE ON THE REASONABLENESS OF
25 A CONSUMER INTERACTING WITH TURBOTAX WITHIN THE STATE.

26 SO, YOU KNOW, WHAT I HAVE HEARD FROM THE COUNTY
27 COUNSEL ARE SORT OF CONCLUSIONS ABOUT WHY NATIONWIDE
28 DATA MIGHT BE HELPFUL, AS OPPOSED TO SORT OF SPECIFIC

1 REASONS THAT WOULD -- THAT WOULD JUSTIFY THE COMPANY
2 PRODUCING SUCH DATA.

3 THE COURT: SO I WANT TO CIRCLE BACK TO ONE
4 THING YOU SAID, AND THAT IS THE QUESTION ABOUT THE LEGAL
5 QUESTION OF WHETHER DATA IN OTHER STATES CAN BE USED TO
6 SHOW THAT INTUIT KNEW OR SHOULD HAVE KNOWN THAT ITS
7 STATEMENTS IN CALIFORNIA WERE UNTRUE OR MISLEADING.

8 MR. BENEDETTO: YES.

9 THE COURT: THAT'S WHAT I UNDERSTAND YOUR
10 ARGUMENT TO BE.

11 MR. BENEDETTO: YES, YOUR HONOR. I -- YOU
12 KNOW, I -- SO I DON'T HAVE ANY SPECIFIC AUTHORITY AT MY
13 FINGERTIPS, YOU KNOW. AND, I MEAN, I SUPPOSE IT'S NOT
14 CRAZY, RIGHT, THAT A TRIAL COURT SOMEWHERE WOULD ADMIT
15 SUCH INFORMATION.

16 BUT AGAIN, IF GIVEN THE SAMPLE SIZE THAT WE
17 HAVE HERE, RIGHT, IF THE PLAINTIFF WOULD NEED TO SHOW OR
18 ARGUE THAT THE DATA AVAILABLE TO IT IN CALIFORNIA WOULD
19 BE SOMEHOW INSUFFICIENT FOR THEM TO MAKE OUT THEIR
20 CLAIM, AND THAT -- THAT SOMEHOW DATA FROM OUTSIDE OF
21 CALIFORNIA WOULD FILL IN THE GAP, OR OTHERWISE INFORM
22 THE CLAIM, I GUESS I JUST PRACTICALLY DON'T SEE THE
23 NECESSITY FOR THAT, GIVEN THE VOLUME OF DATA THAT IS
24 ACTUALLY BEING PRODUCED, THE VOLUME OF E-MAILS, THE
25 VOLUME -- YOU KNOW, WE'VE PRODUCED 75,000 DOCUMENTS TO
26 SANTA CLARA COUNSEL -- TO THE COUNTY COUNSEL.

27 SO THERE ISN'T -- THERE ISN'T A QUESTION OF
28 SORT OF DEARTH OF INFORMATION, WHERE A PLAINTIFF WOULD

1 SAY, "OKAY. I NEED TO GO ELSEWHERE. I NEED TO GO TO
2 COLORADO OR TEXAS OR LOUISIANA." IT DOESN'T -- IT JUST
3 DOESN'T SEEM PRACTICAL HERE, GIVEN THE SIZE OF
4 CALIFORNIA, THE MEANINGFUL DOCUMENT PRODUCTIONS THAT WE
5 HAVE MADE, AND -- AND THAT THE COUNTY COUNSEL HAS AMPLE
6 INFORMATION TO BE ABLE TO TRY AND MAKE OUT A CLAIM.

7 THE COURT: SO LET ME HEAR FROM COUNTY COUNSEL
8 ABOUT ANYTHING FURTHER YOU WANT TO SAY ABOUT THE
9 PROBLEM.

10 MS. FRIEDLAND: THANK YOU, YOUR HONOR.

11 I'D JUST MAKE TWO FINAL POINTS ABOUT THIS
12 ISSUE. FIRST, JUST TO REITERATE THAT INTUIT HAS NOT
13 ARTICULATED ANY BURDEN ASSOCIATED WITH PRODUCING THIS
14 DATA, NOT DURING THE MEET-AND-CONFER PROCESS AND NOT IN
15 THE IDC STATEMENT HERE. AS COUNSEL JUST EXPLAINED,
16 THEY'RE REALLY RELYING ON A RELEVANCE OBJECTION THAT WE
17 BELIEVE IS UNFOUNDED.

18 AND THE SECOND POINT IS JUST THAT INTUIT USED
19 THE SAME ADVERTISING ALL ACROSS THE COUNTRY, AND THAT'S
20 THE DATA THAT IT ANALYZED IN ITS OWN DOCUMENTS. AND SO
21 THAT'S THE DATA THAT THE PEOPLE NEED IN ORDER TO
22 CONTEXTUALIZE WHAT WE'RE SEEING THIS IN PIECES OF
23 THROUGHOUT THE DOCUMENT PRODUCTION.

24 THE COURT: CAN YOU SAY A LITTLE BIT MORE ABOUT
25 THAT SO I CAN UNDERSTAND IT, WHAT THE RELEVANCE OF THAT
26 IS TO YOUR CLIENT?

27 IS THE IDEA THAT WHETHER A CONSUMER WOULD BE
28 MISLED OR NOT CAN BE SHOWN BY NATIONAL ADVERTISING? I'M

1 JUST NOT QUITE FOLLOWING THAT.

2 MS. FRIEDLAND: THANK YOU, YOUR HONOR.

3 YES. WELL, IT'S BOTH PRONGS OF THE FAL CLAIM.
4 AND SO THE FIRST CLAIM IS JUST THE -- THAT THE NATIONAL
5 DATA IS RELEVANT TO SHOWING WHETHER A REASONABLE
6 CONSUMER IS LIKELY TO HAVE BEEN MISLED BY INTUIT'S
7 ADVERTISING SINCE THAT ADVERTISING WAS THE SAME ALL
8 ACROSS THE COUNTRY.

9 AND THE SECOND PRONG ABOUT WHAT THEY KNEW OR
10 SHOULD HAVE KNOWN, YOU KNOW, THE -- THEY RELY ON THIS
11 IDEA THAT CALIFORNIA IS A LARGE SAMPLE SIZE, BUT THE
12 SIZE OF THE SAMPLE WE'VE RECEIVED HAS NOTHING TO DO WITH
13 WHETHER OR NOT INTUIT KNEW OR SHOULD HAVE KNOWN, BASED
14 ON THEIR OWN DATA, THAT MANY PEOPLE WERE ACCESSING THE
15 COMMERCIAL-FREE PRODUCT WHO WERE ULTIMATELY PAYING
16 INTUIT TO FILE THEIR TAXES. THAT'S THE DATA THAT CAN
17 HELP SHOW THAT INTUIT KNEW THAT THEIR ADVERTISING
18 PRACTICES THAT WERE QUITE LUCRATIVE WERE MISLEADING
19 CONSUMERS.

20 THE COURT: SO I GUESS I -- SAY THAT SECOND
21 PART AGAIN BECAUSE I'M NOT QUITE FOLLOWING THAT.

22 WHY WOULD IT NOT BE THE CASE -- AND -- THAT --
23 AND I'LL JUST GIVE A HYPOTHETICAL HERE: IF THE
24 CALIFORNIA DATA SHOWS THAT SOME PERCENTAGE OF FILERS
25 STARTED OFF THINKING THEY WERE GOING TO HAVE A FREE
26 PRODUCT AND THEN PURCHASED A -- HAD TO PURCHASE, BY
27 INTUIT'S STATEMENTS, ONE OF THE INTUIT PRODUCTS, THE
28 PAID PRODUCT, THAT IS, WHY WOULD THIS BE ANY DIFFERENT

1 OR SHOW ANY MORE OR LESS KNOWLEDGE IF THEY SHOWED THE
2 DATA NATIONALLY, AS OPPOSED TO IN THE STATE OF
3 CALIFORNIA?

4 I'M JUST NOT QUITE FOLLOWING THAT.

5 MS. FRIEDLAND: THANK YOU, YOUR HONOR.

6 WELL, QUITE FRANKLY, WE'RE -- WE DON'T KNOW
7 WHAT THE NATIONAL DATA WOULD SHOW. AND OUR CONTENTION
8 IS THAT UNDERSTANDING THE NATIONWIDE DATA AS A RESULT OF
9 THE NATIONWIDE ADVERTISING WILL PROVIDE A MORE COMPLETE
10 PICTURE OF HOW THE DATA WAS BEING -- OF HOW THE
11 ADVERTISING WAS BEING RECEIVED BY CONSUMERS ACROSS THE
12 COUNTRY.

13 AND SO BECAUSE IT IS RELEVANT TO THE CLAIMS, WE
14 DO BELIEVE THAT IT CROSSES THIS THRESHOLD STANDARD UNDER
15 THE CALIFORNIA RULES THAT THE STANDARD HAS NOT CHANGED
16 AS A RESULT OF ANY BURDEN ARGUMENTS BECAUSE INTUIT
17 SIMPLY HASN'T MADE ANY OF THOSE ARGUMENTS WITH RESPECT
18 TO THIS DATA.

19 THE COURT: SO ONE OTHER QUESTION: DOES THE --
20 IS THERE ANY REASON TO SUPPOSE THAT CALIFORNIA CONSUMERS
21 MIGHT BEHAVE DIFFERENTLY THAN THOSE IN OTHER PARTS OF
22 THE COUNTRY IF THE SAME ADVERTISING IS USED IN ALL 50
23 STATES OR -- AND EITHER JUST BECAUSE THEY ARE CALIFORNIA
24 CONSUMERS OR BECAUSE THERE'S SOMETHING PARTICULAR ABOUT
25 CALIFORNIA TAXPAYERS?

26 IS THERE SOME NOVELTY TO CALIFORNIA LAW, FOR
27 EXAMPLE, TAX LAW, THAT IS, THAT WOULD BEAR ON THE
28 QUESTION?

1 MS. FRIEDLAND: YOUR HONOR, I'M NOT CURRENTLY
2 AWARE OF ANY DIFFERENCES THAT WOULD LEAD THE CONSUMER --
3 THE CALIFORNIA CONSUMERS TO ACT DIFFERENTLY, BUT I THINK
4 THAT'S PART OF WHAT GETTING THE NATIONAL DATA WOULD HELP
5 US ASSESS.

6 BECAUSE IF THERE ARE BIG DIFFERENCES BETWEEN
7 THE NATIONAL DATA AND THE CALIFORNIA DATA, THAT WOULD BE
8 RELEVANT TO GETTING A MORE COMPLETE PICTURE OF HOW THE
9 ADVERTISING WOULD BE UNDERSTOOD BY A REASONABLE
10 CONSUMER.

11 THE COURT: SO, I MEAN, I SUPPOSE THERE'S TWO
12 WAYS TO LOOK AT IT: IF YOU HAVE THE SAME ADVERTISING
13 NATIONWIDE, ONE MIGHT SUPPOSE THAT ALL CONSUMERS
14 NATIONWIDE WOULD RESPOND THE SAME WAY TO IT, BUT AS YOU
15 SAY, IF THEY RESPONDED DIFFERENTLY, THAT MIGHT INFORM
16 THE QUESTION OF WHETHER CONSUMERS THOUGHT IT WAS
17 MISLEADING OR NOT.

18 IS THAT A FAIR WAY TO PUT IT?

19 MS. FRIEDLAND: YES, YOUR HONOR.

20 THE COURT: OKAY. LET ME HEAR FROM INTUIT ON
21 THIS POINT BECAUSE THAT'S A -- IT'S AN INTERESTING
22 POINT.

23 MR. BENEDETTO: YES, YOUR HONOR. THIS IS
24 MATTHEW BENEDETTO.

25 I GUESS I'M STRUCK BY THE FACT THAT THE -- THE
26 COUNTY COUNSEL'S CONCESSION THAT THE ADVERTISING WAS THE
27 SAME SORT OF CUTS THE OTHER WAY IN OUR VIEW, RIGHT?

28 I MEAN, IF IT -- IF IT'S -- IF IT IS THE SAME

1 ADVERTISING IN CALIFORNIA AS ELSEWHERE, AND THERE HAS
2 NOT BEEN ANY EVIDENCE PROFFERED BY THE COUNTY COUNSEL
3 THAT CONSUMERS OUTSIDE OF THE STATE OF CALIFORNIA
4 BEHAVED DIFFERENTLY, AND BECAUSE THE UNIVERSE OF
5 CALIFORNIA DATA IS SO VAST, BECAUSE CALIFORNIA ITSELF IS
6 A HETEROGENOUS STATE, ALL OF THOSE FACTORS, I THINK,
7 FAVOR OUR POSITION HERE, WHICH IS THAT THE -- THAT THE
8 DATA THAT WE HAVE AGREED TO PRODUCE IS ADEQUATE FOR THE
9 PEOPLE TO BE ABLE TO TRY AND MAKE THEIR CLAIM.

10 THE ADVERTISING THAT THE CALIFORNIA CONSUMERS
11 SEE IS NO DIFFERENT THAT THE ADVERTISING THAT IS SEEN BY
12 ANYONE LIVING OUTSIDE OF THE STATE OF CALIFORNIA. AND
13 THERE'S BEEN NO SPECIFIC ARTICULATION FOR WHY IT -- WHY
14 CALIFORNIA CONSUMERS COULD NOT BE TRUSTED, RIGHT, FOR
15 THE PURPOSES OF A REASONABLE CONSUMER TEST.

16 THE COURT: WELL, BUT ISN'T IT FAIR TO SAY THAT
17 THERE'S NO WAY FOR THE PLAINTIFF TO KNOW THAT WITHOUT
18 SEEING THE DATA NATIONWIDE?

19 MR. BENEDETTO: WELL, WHAT I -- YOUR HONOR, I
20 MEAN, I GUESS SORT EPISTEMOLOGICALLY THERE'S NO WAY FOR
21 THEM TO KNOW IT WITHOUT SEEING THE DATA, THAT IS TRUE,
22 BUT THE -- THE ADVERTISING IS THE SAME.

23 AND THE -- YOU KNOW, AND AGAIN, THE AMOUNT OF
24 DATA THAT'S PRODUCED IS SO VAST THAT IF YOU'RE GOING TO
25 DRAW CONCLUSIONS, RIGHT, BECAUSE THE SAMPLE SIZE IS SO
26 LARGE, ONE WOULD -- ONE EXPERT WOULD BE ABLE TO SORT OF
27 OPINE, IF THAT IS WHAT THE COUNTY COUNSEL WANTED TO DO.

28 BUT IT -- THAT SEEMS TO PUT SORT OF THE CART

1 BEFORE THE HORSE, RIGHT? BECAUSE IF THE CLAIMS ARE
2 LIMITED TO CALIFORNIA, I JUST -- I AM NOT -- I'M NOT
3 SEEING HOW WHAT, YOU KNOW, CONSUMERS DOING -- WHAT
4 THEY'RE DOING IN OTHER STATES IS SORT OF RELEVANT TO
5 MAKE OUT A CLAIM UNDER THE FAL. I GUESS THAT'S WHERE
6 I'M STUCK.

7 THE COURT: WELL, I CAN ONLY GIVE THE PARTIES
8 SOME INFORMAL GUIDANCE, WHICH IS THAT THE RELEVANCE
9 STANDARD IN CALIFORNIA IS FAIRLY BROAD. AND WHILE I
10 UNDERSTAND INTUIT'S ARGUMENT, THERE'S AT LEAST SOME
11 MARGINAL RELEVANCE TO THE NATIONWIDE DATA FOR THE REASON
12 THAT COUNTY COUNSEL ARTICULATED JUST NOW.

13 THE -- BUT IF IT IS BURDENSOME, AND IT DEPENDS
14 HOW BURDENSOME IT IS, THEN IT MAY WELL BE THAT THE
15 RELEVANCE OF IT IS SO MARGINAL THAT IT SHOULDN'T BE
16 PRODUCED.

17 BUT I DON'T HAVE SUFFICIENT INFORMATION HERE TO
18 SAY IT'S BURDENSOME OR IT'S NOT BURDENSOME. I MEAN, I
19 UNDERSTAND WHAT MR. BENEDETTO SAYS, THAT IT CAN'T BE
20 DONE AT THE PUSH OF A BUTTON, BUT I DON'T REALLY KNOW.
21 AND I TAKE IT THAT HASN'T REALLY BEEN EXPLORED BY
22 COUNSEL. I CAN ONLY GIVE YOU THE FRAMEWORK FOR
23 ANALYSIS, WHICH IS THAT A LOT DEPENDS ON HOW BURDENSOME
24 IT IS.

25 I UNDERSTAND INTUIT'S POINT, BUT I THINK -- AND
26 IT MIGHT BE THAT, YOU KNOW, WHEN IT COMES TIME FOR
27 TRIAL, CALIFORNIA DATA ONLY MIGHT BE WHAT'S RELEVANT FOR
28 PURPOSES OF TRIAL; BUT FOR PURPOSES OF DISCOVERY, IT

1 MIGHT BE SOMEWHAT BROADER, PARTICULARLY IF THE SAME
2 ADVERTISING IS USED NATIONWIDE, BECAUSE WE DON'T KNOW
3 WHAT THE DATA SHOWS.

4 YOU KNOW, ANOTHER WAY TO LOOK AT, IF IT IS
5 BURDENSOME, AND COUNSEL MIGHT CONSIDER THIS, IS TAKING
6 A -- IF IT'S VERY BURDENSOME, IS TAKING A SAMPLING OF
7 NATIONWIDE DATA TO PRODUCE THE CALIFORNIA DATA AND DATA
8 FROM, YOU KNOW, SOME STATES CHOSEN AT RANDOM, RATHER
9 THAN ALL OF IT. BUT I JUST DON'T KNOW HOW BURDENSOME IT
10 IS OR HOW HARD IT IS OR IF IT BECOMES HARDER IF YOU TRY
11 TO DO A RANDOM SAMPLE, WHICH MIGHT BE THE CASE.

12 AND I DON'T KNOW IF INTUIT ALREADY HAS INTERNAL
13 DATA OR NOT. AND COUNSEL WOULD KNOW BETTER BECAUSE I
14 THINK AT LEAST SOME OF THE MARKETING DATA, I TAKE IT,
15 HAS BEEN PRODUCED.

16 SO I DON'T KNOW IF THE DATA SHOWS IF THERE ARE
17 MORE OR LESS PEOPLE THAT SWITCHED TO A PAID PRODUCT
18 IN -- AS A PERCENTAGE IN CALIFORNIA THAN IN -- PICK
19 SOMEWHERE -- MAINE. I HAVE NO IDEA. AND I DON'T KNOW
20 IF THE MARKETING PEOPLE HAVE LOOKED AT THAT AND SAID,
21 "GEE, MAYBE WE SHOULD CHANGE OUR MARKETING BECAUSE
22 CALIFORNIA CONSUMERS ARE DIFFERENT SOMEHOW."

23 SO ALL I CAN DO IS GIVE COUNSEL SOME GUIDANCE
24 IN THAT RESPECT, BUT I THINK IF YOU'RE GOING TO BRING A
25 MOTION ON THIS, I'M NOT PERSUADED THAT THERE'S BEEN AN
26 ADEQUATE MEET-AND CONFER IN TERMS OF THE BURDENSOMENESS.

27 AND I WOULD THINK THAT COUNTY COUNSEL WOULD
28 WANT TO CONSIDER HOW USEFUL THE INFORMATION REALLY IS IF

1 YOU HAVE, YOU KNOW, SOMETHING HIGH OF 10 PERCENT OF THE
2 COUNTRY IN THE DATA ALREADY, AND WHETHER IT'S REALLY
3 GOING TO ADD ANYTHING.

4 SO ALL I CAN SUGGEST IS THAT YOU GO BACK TO
5 YOUR MEET-AND-CONFER AND LOOK AT THE BURDEN ISSUE.

6 MR. BENEDETTO: THANK YOU, YOUR HONOR.

7 THE COURT: AS TO THE FTC INTERROGATORIES, I
8 DON'T UNDERSTAND THE STATUTE TO MAKE THOSE ANSWERS
9 CONFIDENTIAL, BUT I ALSO WONDER WHY IT IS THAT COUNTY
10 COUNSEL DOESN'T SIMPLY, IF THEY DON'T ALREADY HAVE THE
11 ANSWERS THAT THEY NEED, SERVE THE SAME KIND OF
12 DISCOVERY.

13 LET ME HEAR FROM COUNTY COUNSEL FIRST.

14 MS. FRIEDLAND: THANK YOU, YOUR HONOR.

15 COUNTY COUNSEL'S POSITION IS THAT INTUIT HAS
16 DOCUMENTS IN ITS POSSESSION THAT IT DOES NOT AND CANNOT
17 DISPUTE ARE RELEVANT. THESE INTERROGATORIES AND
18 INTERROGATORY RESPONSES RELATED TO THE FTC'S
19 INVESTIGATION OF WHETHER INTUIT MISLED CONSUMERS TO USE
20 ITS COMMERCIAL PRODUCTS, THE EXACT SUBJECT OF THE
21 PEOPLE'S CASE.

22 AND BECAUSE THESE DOCUMENTS WERE INDISPUTABLY
23 RELEVANT, INTUIT HAS TO EXPLAIN WHY IT'S NOT REQUIRED TO
24 PRODUCE THEM, AND WE BELIEVE IT HAS FAILED TO DO SO. IT
25 HAS NOT PROVIDED ANY REASON WHY PRODUCING THESE
26 DOCUMENTS WOULD BE BURDENSOME. AND BECAUSE COUNTY
27 COUNSEL HEARD INTUIT'S BURDEN CONCERNS ABOUT THE
28 ORIGINAL REQUEST, IT, IN THE EFFORT TO COMPROMISE,

1 SUBSTANTIALLY NARROWED THOSE REQUESTS TO JUST THE
2 INTERROGATORIES AND INTERROGATORY RESPONSES, AND DOES
3 NOT HAVE TO, AS HE SUGGESTS, PARSE THROUGH THESE
4 DOCUMENTS.

5 AS YOUR HONOR KNOWS, THE DOCUMENTS CONTAIN
6 RELEVANT INFORMATION. INTUIT HAS TO PRODUCE ANY PART OF
7 THAT THAT'S NOT PRIVILEGED. AND, IN FACT, THE PARTIES
8 CAN ONLY WITHHOLD OR REDACT INFORMATION THAT IS
9 PRIVILEGED. SO THERE'S SIMPLY NO EXTRA BURDEN
10 ASSOCIATED WITH PRODUCING THESE DOCUMENTS.

11 AND AS TO YOUR HONOR'S QUESTION ABOUT ASKING
12 FOR THIS INFORMATION IN ANOTHER WAY, I THINK THAT
13 INTUIT'S USE OF THIS CLONE DISCOVERY FRAMEWORK IS A BIT
14 OF A RED HERRING HERE.

15 THE COURTS ARE SOMETIMES CONCERNED ABOUT CLONE
16 DISCOVERY BECAUSE IT IMPLICATES TYPICAL DISCOVERY ISSUES
17 LIKE BURDEN AND RELEVANCE. AND THOSE ISSUES JUST AREN'T
18 AT PLAY HERE. SO INTUIT ON THE ONE HAND SAYS THAT IT
19 WON'T WITHHOLD ANYTHING JUST BECAUSE IT RELATES TO THE
20 FTC'S INVESTIGATION, BUT THEN ON THE OTHER HAND, RAISES
21 THESE CONFIDENTIALITY ARGUMENTS THAT, AS YOUR HONOR
22 NOTED, JUST DON'T -- THOSE STATUTES JUST DON'T APPLY IN
23 THIS SITUATION, TO SAY THAT THEY WOULD NOT PRODUCE THESE
24 INTERROGATORIES UNDER ANY CIRCUMSTANCES.

25 SO THE PEOPLE ARE -- ARE IN A POSITION WHERE
26 THEY'VE HAD TO REQUEST THESE INTERROGATORIES
27 SPECIFICALLY, SINCE THEY CONTAIN RELEVANT INFORMATION TO
28 THE PEOPLE'S CASE.

1 THE COURT: IS IT CORRECT, THOUGH, IN -- I
2 HAVEN'T DONE EXTENSIVE RESEARCH ON THIS, BUT THAT YOU
3 COULD NOT GET THIS INFORMATION IN A PRIOR REQUEST?

4 MS. FRIEDLAND: IT IS TRUE THAT YOU COULD NOT
5 OBTAIN THE INFORMATION FROM THE FTC IN A FOIA REQUEST.
6 SO THE STATUTES AND REGULATIONS THAT INTUIT CITES REALLY
7 HAS TO DO WITH THE FTC'S CONFIDENTIALITY OBLIGATIONS,
8 WHICH MAKES SENSE IF THE GOVERNMENT'S INVESTIGATING AN
9 ENTITY THAT THE CONTENTS OF THAT INVESTIGATION REMAIN
10 CONFIDENTIAL FROM THE GOVERNMENT ENTITY DISCLOSING THEM
11 TO THE PUBLIC.

12 BUT IN THIS CASE, WE HAVE A PROTECTIVE ORDER
13 AND INTUIT HAS BEEN PRODUCING CONFIDENTIAL DOCUMENTS
14 THROUGHOUT THE ENTIRETY OF THIS CASE, AND WE DO HAVE A
15 PROCESS FOR DEALING WITH THAT.

16 THE COURT: ALL RIGHT. WHAT YOU'RE REALLY
17 SAYING -- AND MAYBE I'M MISUNDERSTANDING THIS, BUT IT
18 SEEMS TO ME WHAT YOU'RE REALLY SAYING IS NOTWITHSTANDING
19 THE FACT THAT WE COULD NOT OBTAIN THESE DOCUMENTS
20 PURSUANT TO A FOIA REQUEST, THAT THE -- WE SHOULD
21 DISREGARD THAT BECAUSE WE HAVE A PROTECTIVE ORDER.

22 MS. FRIEDLAND: YOUR HONOR, THAT'S PART OF WHAT
23 I'M SAYING, BUT I THINK THE OTHER PART IS THAT JUST
24 BECAUSE THESE DOCUMENTS ARE RELATED TO A GOVERNMENT
25 INVESTIGATION DOESN'T MAKE THEM, PER SE, EXEMPT FROM
26 CIVIL DISCOVERY. AND COURTS --

27 THE COURT: THAT'S A DIFFERENT QUESTION,
28 THOUGH. IT WOULD BE ONE THING IF YOU ASKED, YOU KNOW,

1 TO PRODUCE CERTAIN DOCUMENTS THAT ARE INTUIT DOCUMENTS
2 THAT EXIST OUTSIDE OF THE FTC INVESTIGATION, BUT THIS IS
3 A DOCUMENT THAT -- THESE ARE DOCUMENTS THAT COME ABOUT
4 ONLY BECAUSE OF THE FTC INVESTIGATION, CORRECT?

5 MS. FRIEDLAND: THAT'S CORRECT, YOUR HONOR.
6 AND I THINK COURTS HAVE SPOKEN ON THIS EXACT ISSUE. SO
7 ONE EXAMPLE OF A CASE THAT'S ON POINT HERE IS BAXTER V.
8 BARON & CO. [PHONETIC]. AND IN THAT CASE, THE
9 PLAINTIFFS WERE ASKING FOR TRANSCRIPTS FROM AN SEC
10 INVESTIGATION. AND DEFENDANTS MADE THE SAME ARGUMENT:
11 THESE TRANSCRIPTS ONLY EXIST BECAUSE THE GOVERNMENT IS
12 INVESTIGATING THE DEFENDANT, AND THEY'RE CONFIDENTIAL
13 AND THEY SHOULDN'T HAVE TO BE PRODUCED.

14 AND THE COURT REJECTED THAT ARGUMENT AND SAID
15 JUST BECAUSE THE TRANSCRIPTS ARE CREATED AS A RESULT OF
16 THIS GOVERNMENT INVESTIGATION DOESN'T SOMEHOW ENTITLE
17 THEM TO SPECIAL PROTECTION FROM DISCOVERY IF THEY DO
18 CONTAIN RELEVANT INFORMATION.

19 THE COURT: WAS THERE A FOIA RESTRICTION ON THE
20 SEC TURNING THE DATA OVER?

21 MS. FRIEDLAND: I'M NOT SURE WHETHER
22 SPECIFICALLY IT WAS A FOIA STATUTE, BUT I BELIEVE THERE
23 ARE SIMILAR STATUTES ABOUT THE SEC'S CONFIDENTIALITY
24 OBLIGATIONS DURING INVESTIGATION.

25 THE COURT: WHAT'S THE NAME OF THE CASE? I
26 DON'T THINK THAT'S CITED IN YOUR PAPERS, UNLESS I MISSED
27 IT.

28 MS. FRIEDLAND: NO, YOUR HONOR, WE DID NOT CITE

1 IT IN THE STATEMENT FOR TODAY'S CONCERNS, BUT I'M HAPPY
2 TO PROVIDE YOU WITH THE CITATION.

3 THE COURT: WHAT'S THE CITE?

4 MS. FRIEDLAND: IT'S 1996 WESTLAW 709624. AND
5 IT'S A SOUTHERN DISTRICT OF NEW YORK CASE, SO IT'S JUST
6 PERSUASIVE AUTHORITY.

7 THE COURT: LET ME HEAR FROM INTUIT.

8 MR. BENEDETTO: THANK YOU, YOUR HONOR.

9 I WOULD HAVE RESPONDED TO THAT CASE, BUT IT
10 WASN'T CITED, AND I -- SO I CAN'T. BUT I COULD -- YOU
11 KNOW, THERE ARE MANY CASES IN FEDERAL CASES, FOR
12 INSTANCE, LOOKING AT RULE 6(E) OF THE FEDERAL RULES OF
13 CRIMINAL PROCEDURE, WHICH IMPOSES CONFIDENTIALITY
14 OBLIGATIONS ON FEDERAL PROSECUTORS, BUT NOT ON
15 DEFENDANTS, AND CASES THAT SAY THAT YOU CAN'T END-RUN
16 THAT RULE BY ASKING THE DEFENDANTS FOR DOCUMENTS THEY'VE
17 PRODUCED TO A GRAND JURY BECAUSE THAT VIOLATES THE
18 SECRECY PROVISIONS OF THE ENTIRE PROCESS. AND THAT'S
19 REALLY WHAT IS HAPPENING HERE. THE COUNTY COUNSEL
20 CONCEDED THAT THEY CAN'T GET THIS INFORMATION FROM THE
21 FTC. INTUIT DOES DISPUTE THAT THE INTERROGATORIES
22 THEMSELVES ARE RELEVANT. THEY, IN FACT, ARE NOT
23 RELEVANT TO THIS CASE. AND THE COUNTY COUNSEL HASN'T
24 YET ARTICULATED WHY IT IS THEY COULD NOT ISSUE
25 INTERROGATORIES OR SPECIFIC DOCUMENT REQUESTS FOR THE
26 SAME CATEGORIES OF INFORMATION.

27 AND SO -- SO WHAT -- WHAT SEEMS TO BE HAPPENING
28 HERE IS A DESIRE TO SORT OF FREE RIDE ON WHAT THE FTC

1 HAS DONE. AND THE FACT THAT THERE IS AN FTC
2 INVESTIGATION OF COURSE IS NOT INDEPENDENTLY RELEVANT TO
3 THIS CASE. INTUIT IS NOT WITHHOLDING ANY FACT FROM
4 SANTA CLARA ON THE BASIS THAT IT HAS BEEN PRODUCED TO
5 THE FTC.

6 AND SO -- SO I AM THEN LEFT WONDERING SORT OF
7 WHAT EXACTLY IS THE BASIS FOR THE RELEVANCE REALLY OF
8 THESE REQUESTS. AND THAT, OF COURSE, IS BEFORE WE GET
9 TO THE ISSUE OF BURDEN, WHICH I'LL JUST SAY A COUPLE OF
10 WORDS ON.

11 AS WE HAVE EXPLAINED, I BELIEVE TO THIS COURT
12 LAST YEAR AND ALSO DURING THE MEET-AND-CONFER, THE --
13 BOTH THE TIME PERIOD AND THE SUBSTANTIVE SCOPE OF THE
14 FTC INVESTIGATIONS ARE NOT IDENTICAL TO SANTA CLARA'S
15 CASE. AND SO THERE IS BURDEN, THEN, THAT WOULD BE
16 INVOLVED IN REREVIEWING THE DOCUMENTS, REREVIEWING THE
17 ANSWERS, FIGURING OUT WHICH PORTIONS ARE ACTUALLY
18 RESPONSIVE TO OUR REQUEST THAT HAS BEEN PROPOUNDED IN
19 THIS CASE.

20 AND, YOU KNOW, THE COUNTY COUNSEL APPEARS TO
21 DISMISS THAT OR SAY THAT IT'S NOT MEANINGFUL, BUT IT
22 ACTUALLY IS A MEANINGFUL BURDEN THAT WOULD BE PLACED ON
23 INTUIT TO RESPOND TO REQUESTS THAT IT ARGUES ARE SIMPLY
24 NOT PROPER AND ARE REALLY IN SORT OF TYPICAL CLONED
25 DISCOVERY, WHERE THE PLAINTIFF, THE PROPOUNDING PARTY,
26 HAS NOT ARTICULATED ANY INDEPENDENT RELEVANCE FOR THE
27 REQUEST.

28 THE COURT: LET ME JUST ASK THIS: WHY IS IT

1 THAT COUNTY COUNSEL CANNOT SERVE THE SAME DISCOVERY?

2 LET ME HEAR FROM COUNTY COUNSEL.

3 MS. FRIEDLAND: THANK YOU, YOUR HONOR.

4 JUST TO CLARIFY, DOES YOUR HONOR MEAN ASKING
5 FOR DOCUMENTS THAT -- IF WE WERE TO PROPOUND A REQUEST
6 FOR PRODUCTION OF DOCUMENTS, ASKING FOR PARTICULAR
7 TOPICS THAT WE KNOW ARE PART OF THE FTC INVESTIGATION
8 AND INTUIT HAS THOSE DOCUMENTS, HAS THOSE FTC
9 INTERROGATORY AND INTERROGATORY RESPONSES IN ITS
10 POSSESSION, AND THEY CONTAIN RELEVANT INFORMATION?

11 WE BELIEVE THAT INTUIT WOULD HAVE TO PRODUCE
12 THOSE DOCUMENTS, BUT IT HAS TAKEN THE POSITION THAT IT
13 WOULD NOT PRODUCE THESE INTERROGATORIES AND
14 INTERROGATORY RESPONSES FOR INDEPENDENT REASONS, LIKE
15 THE INAPPLICABLE CONFIDENTIALITY STATUTES THEY CITED.

16 AND SO IT WOULD BE POSSIBLE FOR COUNTY COUNSEL
17 TO ASK FOR DOCUMENTS ABOUT CERTAIN TOPICS THAT, OF
18 COURSE, WOULD ENCOMPASS THESE FTC INTERROGATORY AND
19 INTERROGATORY RESPONSES, BUT BECAUSE OF THESE OTHER
20 ISSUES, WE'VE ASKED FOR THEM DIRECTLY.

21 THE COURT: WELL, WHAT EXACTLY DO YOU THINK IS
22 THE RELEVANCE OF THIS DISCOVERY? IF YOU HAVEN'T SEEN
23 IT, HOW DO YOU KNOW?

24 MS. FRIEDLAND: THANK YOU, YOUR HONOR.

25 THE RELEVANCE OF THIS DISCOVERY IS THAT THE FTC
26 IS INVESTIGATING EXACTLY THE SAME CONDUCT THAT THE
27 PEOPLE ARE INVESTIGATING, AND AT LEAST IN A -- IN A
28 LARGELY OVERLAPPING FASHION. AND WE KNOW THAT FROM

1 PUBLIC PETITIONS TO QUASH THE FTC'S CIVIL INVESTIGATIVE
2 DEMANDS AND THE FTC'S DECISION ON THAT PETITION TO
3 QUASH.

4 AND IN THE CASE THE PEOPLE CITE IN THEIR
5 PAPERS, MUNOZ [PHONETIC], THE COURT SAYS THAT THE
6 PLAINTIFFS WERE ENTITLED TO THE GOVERNMENT AGENCY
7 DOCUMENTS BECAUSE THE GOVERNMENT AGENCY WAS
8 INVESTIGATING THE SAME ALLEGED WRONGFUL CONDUCT THAT WAS
9 ALLEGED BY THE PLAINTIFFS. AND THAT'S EXACTLY WHAT WE
10 HAVE HERE.

11 IN FACT, INTUIT, TO THIS COURT, SAID THAT THE
12 FTC'S INVESTIGATION RESEMBLED THE PEOPLE'S CASE IN TERMS
13 OF SCOPE. AND AS TO THIS -- THIS TIMING ISSUE, THE
14 FTC'S INVESTIGATION BEGINS IN JUNE OF 2016, WHICH
15 ACTUALLY IS CONTERMINANT WITH THE PEOPLE'S CASE.

16 AND IN ANY CASE, IF INTUIT PRODUCED DOCUMENTS
17 GOING BACK TO 2013, AS THEY SUGGEST THAT THEY DO, COURTS
18 HAVE BEEN CLEAR THAT PLAINTIFFS ARE ENTITLED TO
19 INFORMATION THAT GOES BACK A WAYS BEFORE THE EVENTS IN
20 THEIR CASE.

21 AND I WOULD JUST ALSO NOTE FOR THE COURT THAT
22 WE HAVE LIMITED OUR REQUESTS IN THE ORIGINAL REQUEST TO
23 TOPICS THAT OVERLAP EXACTLY WHAT THE PEOPLE'S CASE AND
24 THE KEY COMPONENTS OF OUR CASE, THE ADS, THE UPGRADES,
25 AND MONETIZATION OF INTUIT'S COMMERCIAL PRODUCT.

26 THE COURT: ANYTHING FURTHER FROM INTUIT ON
27 THIS POINT?

28 MR. BENEDETTO: YES, YOUR HONOR. JUST BRIEFLY.

1 I WOULD SAY "RESEMBLE" DOES NOT MEAN
2 "IDENTICAL." WE HAVE SAID THAT A NUMBER OF TIMES, BOTH
3 IN TERMS OF THE TIME PERIOD AND -- AND THE
4 SUBSTANTIAL -- THE SUBSTANCE OF THE INVESTIGATION, WHICH
5 I'M BEING RESPECTFUL OF THAT INVESTIGATION BECAUSE IT'S
6 CONFIDENTIAL.

7 AND WHEN WE ASKED THE COUNTY COUNSEL TO, YOU
8 KNOW, BASICALLY TELL US WHAT YOU WANT, THEY CAME BACK
9 AND THEY PURPORTED TO NARROW THEIR REQUEST TO ANY
10 DOCUMENTS THAT RELATE TO THE ADVERTISING, MARKETING,
11 DESIGN, USER EXPERIENCE, UPGRADE REQUIREMENTS, OR
12 MONETIZATION OF THE FREE EDITION PRODUCT, WHICH IS TO
13 SAY THE ADDITION -- ALMOST THE ENTIRETY OF THE INTUIT'S
14 COMMERCIAL BUSINESS, WHICH IS NOT A MEANINGFUL
15 NARROWING, CERTAINLY, NOR A -- A SPECIFIC ARTICULATION
16 OF THE RELEVANCE OF SPECIFIC CATEGORIES OF DOCUMENTS.

17 AND THAT'S WHAT WE HAVE SAID ALL ALONG, "TELL
18 US WHAT YOU WANT AND WE WILL GIVE IT TO YOU. IT HAS --
19 IT'S NOT RELEVANT WHETHER OR NOT IT'S BEEN PRODUCED TO
20 THE FTC, BUT IF YOU HAVE A SPECIFIC REQUEST FOR
21 INFORMATION OR FOR DOCUMENTS, PROPOUND IT PROPERLY AND
22 WE WILL RESPOND."

23 AND INSTEAD, THEY HAVE GONE -- YOU KNOW, TAKEN
24 THE EASY WAY OUT, IF YOU WILL, TO GO TO A UNIVERSE OF
25 DOCUMENTS THAT HAVE ALREADY BEEN PRODUCED TO A
26 GOVERNMENT AGENCY. AND WE JUST DON'T THINK THAT THAT'S
27 PROPER HERE, FOR THE REASONS THAT WE'VE DESCRIBED.

28 THE COURT: ALL RIGHT. WELL, SUFFICE TO SAY

1 THE FOLLOWING: FIRST OF ALL, I HAVEN'T SEEN THE CASE
2 THAT'S BEEN CITED BY COUNTY COUNSEL, BUT THERE IS A
3 DISTINCTION DRAWN, AT LEAST IN CALIFORNIA LAW, BETWEEN
4 THE PRODUCTION OF DOCUMENTS THAT ARE MAYBE PART OF A
5 CONFIDENTIAL INVESTIGATION AND THOSE THAT ARE NOT.

6 VERY LIMITED WORK HAS BEEN DONE ON THIS, BUT I
7 WOULD CALL COUNSEL'S ATTENTION TO KIRKLAND AGAINST
8 SUPERIOR COURT, 95 CAL.APP.4TH AT 92, WHICH HAS TO DO
9 WITH TRANSCRIPTS OF SEC INVESTIGATIONS, WHICH THE COURT
10 SAYS ARE NOT CONFIDENTIAL. THE RULE MAY BE DIFFERENT
11 WHERE THEY ARE CONFIDENTIAL. THAT'S NUMBER ONE.

12 I MUST SAY THAT THERE IS SOME CONCERN, I THINK,
13 THAT A PARTY CAN BE THE SUBJECT OF AN INVESTIGATION BY
14 THE FTC, AND THE FTC SAY, "WELL, THIS IS A CONFIDENTIAL
15 INVESTIGATION, AND PARTIES CAN'T GET -- CAN'T GET THE
16 DOCUMENTS IN THE FOIA REQUEST." BUT, NONETHELESS, FOR
17 THE COURT TO THEN SAY, "OH, IT'S RELEVANT. YOU HAVE TO
18 TURN IT OVER," I THINK THAT IMPLICATES SOME PUBLIC
19 POLICY ISSUES HERE THAT HAVE NOT REALLY BEEN WORKED
20 THROUGH BY COUNTY COUNSEL IN THIS CONTEXT.

21 SECONDLY, I DO THINK THAT IF THE REQUEST --
22 IF -- IF THE REQUEST WERE LIMITED TO ONE SET OF ANSWERS
23 TO INTERROGATORIES, THAT MIGHT BE ONE THING, BUT THAT'S
24 NOT WHAT I'M READING THAT COUNTY COUNSEL ASKED FOR. AND
25 THAT GETS TO A WHOLE OTHER LEVEL OF PROPRIETY,
26 ESPECIALLY IF IT'S ALREADY BEEN PRODUCED IN SOME FORMAT
27 IN THIS CASE.

28 SO I WOULD ENCOURAGE COUNTY COUNSEL TO RETHINK

1 THIS REQUEST RATHER CAREFULLY, IN LIGHT OF THE PUBLIC
2 POLICY ISSUES HERE. THAT'S A -- THAT'S A REAL ISSUE, I
3 THINK, FROM THE COURT'S STANDPOINT.

4 AND THE FACT THAT THERE'S A CONFIDENTIALITY
5 RECORD OR PROTECTIVE ORDER I DON'T THINK NECESSARILY
6 RESOLVES IT.

7 YOU KNOW, I REALLY -- PARTICULARLY IF COUNTY
8 COUNSEL CAN GET MUCH OF THE SAME INFORMATION BY
9 TENDERING ITS OWN DISCOVERY, THAT PROBABLY SHOULD
10 HAPPEN. THEY CAN MAKE A GOOD FAITH -- YOU KNOW, GOOD
11 CAUSE SHOWING. I ASSUME YOU'VE EXCEEDED YOUR 35
12 INTERROGATORIES BY NOW.

13 LET ME HEAR FROM COUNTY COUNSEL.

14 MS. FRIEDLAND: THANK YOU, YOUR HONOR.

15 I WOULD FIRST FLAG THAT THE CONFIDENTIALITY
16 STATUTES RELY ON INTUIT'S DESIGNATION OF WHAT'S
17 CONFIDENTIAL. SO THEY'RE NOT ABOUT PROTECTING THE
18 ENTIRETY OF THE FTC'S INVESTIGATION, THEY'RE ABOUT
19 PROTECTING AN ENTITY'S ABILITY TO DESIGNATE CERTAIN
20 INFORMATION AS CONFIDENTIAL TO PROTECT IT FROM PUBLIC
21 DISCLOSURE. AND THAT'S A LITTLE BIT DIFFERENT, FROM A
22 PUBLIC POLICY STANDPOINT, IN TERMS OF ALLOWING THAT
23 INFORMATION TO BE SHARED IN THE NARROW CONTEXT OF CIVIL
24 DISCOVERY WITH A PROTECTIVE ORDER.

25 AND MY OTHER CONCERN ABOUT THIS ISSUE IS JUST
26 WHETHER INTUIT SHOULD BE ALLOWED TO NOT DISCLOSE THIS
27 INFORMATION AT ALL, WHETHER IT'S REQUESTED IN THIS FORM
28 OR IN ANOTHER FORM OF DISCOVERY, IF IT CONTAINS RELEVANT

1 INFORMATION.

2 AND I WOULD NOTE THAT DURING THE
3 MEET-AND-CONFER PROCESS, INTUIT DID NOT CLAIM THAT THESE
4 INTERROGATORIES DIDN'T HAVE ANY RELEVANT INFORMATION,
5 AND I DON'T REALLY THINK, GIVEN THE FTC'S INVESTIGATION,
6 THAT THEY WOULD BE ABLE TO CLAIM THAT.

7 THE COURT: WELL, THE STATUTE DOES -- THE
8 FEDERAL STATUTE, DOES IT NOT -- AND OF COURSE WE'LL HAVE
9 TO BRIEF THIS IF A MOTION'S BEING MADE, BUT FEDERAL
10 STATUTE, AS I READ IT, OR AS I UNDERSTAND IT, I SHOULD
11 SAY -- AND COUNSEL CAN CORRECT ME ABOUT THIS IF I'M
12 WRONG IN MY UNDERSTANDING OF IT -- IS NOT JUST WHAT THE
13 PARTIES MARK AS CONFIDENTIAL, BUT PROHIBITS A THIRD
14 PARTY FROM GETTING IT UNDER A FOIA REQUEST.

15 IS IT YOUR -- IS IT COUNTY COUNSEL'S POSITION
16 THAT ONLY THAT WHICH INTUIT MARKS AS CONFIDENTIAL IS
17 SUBJECT TO THE FEDERAL STATUTES?

18 MS. FRIEDLAND: YOUR HONOR, I WOULD HAVE TO
19 CONFIRM THIS. MY UNDERSTANDING IS THAT'S TRUE FOR THE
20 FEDERAL STATUTE. THE FEDERAL REGULATION ABOUT FOIA
21 REQUESTS, WHERE WE'RE TALKING ABOUT JUST DISCLOSING THE
22 INFORMATION TO THE PUBLIC, MIGHT BE BROADER, BUT I
23 BELIEVE THAT THE 15 U.S.C. 57B STATUTE THAT INTUIT CITES
24 IS ABOUT INFORMATION THAT INTUIT DESIGNATES THAT WAY IN
25 AN EFFORT TO PROTECT A PARTY THAT'S BEING INVESTIGATED
26 FROM BEING ABLE TO, YOU KNOW, PROTECT CERTAIN TRADE
27 SECRETS, FOR EXAMPLE, FROM BEING DISCLOSED. AND THAT'S
28 EXACTLY WHAT THE PROTECTIVE ORDER IN OUR CASE GOES TO.

1 THE COURT: SO I UNDERSTAND THAT. BUT MY
2 UNDERSTANDING -- AND INTUIT, CORRECT ME IF I'M WRONG
3 ABOUT THIS -- IS THAT THE -- IT'S NOT JUST THE
4 INFORMATION THAT YOU DESIGNATE AS CONFIDENTIAL THAT'S
5 PROTECTED UNDER THE FEDERAL STATUTE, BUT OTHERWISE.

6 IF I'M WRONG ABOUT THAT, I MIGHT HAVE A VERY
7 DIFFERENT POINT OF VIEW ABOUT THIS.

8 LET ME HEAR FROM INTUIT ABOUT THAT.

9 MR. BENEDETTO: YES, YOUR HONOR.

10 YOU KNOW, OUR UNDERSTANDING IS YOUR
11 UNDERSTANDING IS CORRECT. AND AGAIN, THIS IS -- IT IS
12 LESS ABOUT SPECIFIC TRADE SECRET -- YOU KNOW, THIS ISN'T
13 A SEALING MOTION, FOR INSTANCE, THIS IS --

14 THE COURT: RIGHT.

15 MR. BENEDETTO: -- RESPECTING THE CONFIDENTIAL
16 NATURE OF A FEDERAL GOVERNMENT INVESTIGATION. AND THERE
17 ARE STRUCTURES IN PLACE TO ENSURE THAT HAPPENS.

18 AND REALLY, THE EXISTENCE OR NONEXISTENCE OF A
19 CONFIDENTIALITY ORDER IN THIS CASE IS TO THE SIDE OF
20 THAT, RIGHT? THIS IS ABOUT THE -- PROTECTING THE
21 INTEGRITY OF THAT PROCESS. AND USING CIVIL DISCOVERY AS
22 A WAY AROUND THAT, CERTAINLY COUNTY COUNSEL COULDN'T,
23 YOU KNOW, ISSUE A THIRD-PARTY DISCOVERY TO THE FTC. AND
24 THEY, YOU KNOW, SHOULD NOT BE ABLE TO USE AN
25 INTERROGATORY REQUEST IN -- TO US -- TO INTUIT AS A WAY
26 TO GET INFORMATION THEY COULD NOT OTHERWISE GET FROM A
27 GOVERNMENT AGENCY.

28 THE COURT: WELL, I THINK IF WE HAVE TO HAVE A

1 MOTION ON THIS, THERE WILL HAVE TO BE VERY CAREFUL
2 BRIEFING BY THE PARTIES ABOUT WHAT IS CONFIDENTIAL IN
3 THE FTC INVESTIGATION AND WHAT IS NOT.

4 BECAUSE TO THE EXTENT THAT IT'S CONFIDENTIAL,
5 EITHER BECAUSE SOMEONE DESIGNATES IT AS CONFIDENTIAL,
6 INTUIT DOES, OR BECAUSE, BY STATUTORY DEFINITION, SUCH
7 INVESTIGATION IS CONFIDENTIAL, THAT BEARS VERY MUCH ON
8 THE QUESTION OF WHETHER THE INFORMATION IS DISCOVERABLE.
9 AND I THINK COUNSEL ARE GOING TO HAVE TO BE VERY
10 THOUGHTFUL IN THEIR BRIEFING ON THAT ISSUE IF IT COMES
11 ABOUT.

12 YOU KNOW, AND AT THE SAME TIME, AS I THINK
13 EVERYONE ON THE LINE IS RECOGNIZING, FACTS DO NOT BECOME
14 NONDISCOVERABLE JUST BECAUSE THEY'RE AT ISSUE IN AN FTC
15 INVESTIGATION. BUT YOU CAN GET TO THOSE FACTS, TO THE
16 EXTENT THEY'RE RELEVANT, THROUGH YOUR OWN DISCOVERY.

17 SO I WOULD SUGGEST THAT COUNSEL REALLY NEED TO
18 LOOK CAREFULLY AT THE FEDERAL STATUTE ON THIS BEFORE ANY
19 FURTHER MOTIONS CAN BE BROUGHT OR TIME IS SPENT ON THAT.

20 I DON'T KNOW HOW MUCH MORE GUIDANCE I CAN GIVE
21 COUNSEL ON THIS, BUT YOU SEE THE DISTINCTION THAT I DRAW
22 HERE.

23 MS. FRIEDLAND: YES, YOUR HONOR. THANK YOU FOR
24 YOUR GUIDANCE ON THESE ISSUES.

25 THE COURT: ALL RIGHT.

26 MR. BENEDETTO: YES, YOUR HONOR. THANK YOU.

27 THE COURT: IS THERE ANYTHING ELSE COUNSEL WANT
28 TO TAKE UP THIS AFTERNOON ON THESE TWO DISCOVERY ISSUES?

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MS. FRIEDLAND: NOTHING FROM THE PEOPLE, YOUR HONOR. THANK YOU.

MR. BENEDETTO: NOTHING FROM --
THE COURT: COUNSEL FOR INTUIT?

MR. BENEDETTO: NO, YOUR HONOR. THANK YOU VERY MUCH.

THE COURT: ALL RIGHT. THANK YOU BOTH -- OR ALL. I GUESS WE HAVE MANY ON THE LINE. THANKS, EVERYONE.

MR. BENEDETTO: THANK YOU.

MS. FRIEDLAND: THANK YOU.

(PROCEEDINGS ADJOURNED)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

DEPARTMENT 17

HON. MAREN NELSON, JUDGE

TURBOTAX FREE FILING CASES)	
)	
PEOPLE OF THE STATE OF CALIFORNIA,)	
ACTING BY AND THROUGH SANTA CLARA)	
COUNTY COUNSEL JAMES R. WILLIAMS,)	
)	
PLAINTIFF(S),)	
VS.	)	NO. JCCP5067
	)	INCLUDED ACTION
	)	CASE NO: 19CV354178
INTUIT INC., AND DOES 1-50,)	
INCLUSIVE,)	
)	
DEFENDANT(S))	
)	

TUESDAY, JUNE 1, 2021
REPORTER'S CERTIFICATE

I, DONNA E. BOULGER, CSR NO. 6162, OFFICIAL COURT REPORTER PRO TEMPORE, OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE ABOVE PROCEEDINGS WERE HELD VIA TELECONFERENCE, WITH THE COURT REPORTER IN A REMOTE LOCATION, SEPARATE AND APART FROM THE ATTORNEYS AND THE JUDGE, AND ALL AUDIBLE TESTIMONY WAS WRITTEN AND HEREIN TRANSCRIBED TO THE BEST ABILITY OF THE COURT REPORTER TO HEAR AND UNDERSTAND THE PROCEEDINGS, AND THE FOREGOING PAGES 1 THROUGH 35 COMPRISE A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS AND TESTIMONY TAKEN IN THE MATTER OF THE ABOVE-ENTITLED CAUSE ON JUNE 1, 2021.

DATED THIS 3RD OF JUNE, 2021.

Donna E. Boulger
DONNA E. BOULGER, CSR NO. 6162

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EXHIBIT 3

1 JAMES R. WILLIAMS, County Counsel (S.B. #271253)
 GRETA S. HANSEN, Chief Assistant County Counsel (S.B. #251471)
 2 AARON BLOOM, Deputy County Counsel (S.B. #281079)
 TONY LOPRESTI, Deputy County Counsel (S.B. #289269)
 3 SUSAN P. GREENBERG, Deputy County Counsel (S.B. #318055)
 ZOE E. FRIEDLAND, Deputy County Counsel (S.B. #319986)
 4 OFFICE OF THE COUNTY COUNSEL
 70 West Hedding Street, East Wing, Ninth Floor
 5 San José, California 95110-1770
 Telephone: (408) 299-5900
 6 Facsimile: (408) 292-7240

7 Attorneys for Plaintiff
 PEOPLE OF THE STATE OF CALIFORNIA,
 8 ACTING BY AND THROUGH SANTA CLARA
 COUNTY COUNSEL JAMES R. WILLIAMS
 9

10 SUPERIOR COURT OF CALIFORNIA,
 11 COUNTY OF LOS ANGELES
 12

13 TURBOTAX FREE FILING CASES

JCCP No. 5067

14 PEOPLE OF THE STATE OF CALIFORNIA,
 acting by and through Santa Clara County
 15 Counsel James R. Williams,

Included Action Case No. 19CV354178

16 Plaintiff,

**PLAINTIFF PEOPLE OF THE STATE OF
 CALIFORNIA, ACTING BY AND
 THROUGH SANTA CLARA COUNTY
 COUNSEL JAMES R. WILLIAMS'
 REQUESTS FOR PRODUCTION OF
 DOCUMENTS (SET 1)**

17 v.

18 INTUIT INC., and DOES 1-50, inclusive,

19 Defendants.
 20

Complaint Filed: September 6, 2019
 Trial Date: None set

21
 22
 23 **PROPOUNDING PARTY:** Plaintiff, PEOPLE OF THE STATE OF CALIFORNIA, ACTING BY
 AND THROUGH SANTA CLARA COUNTY COUNSEL JAMES R.
 24 WILLIAMS

25 **RESPONDING PARTY:** Defendant, INTUIT INC.
 26 **SET NUMBER:** ONE (1)
 27
 28

1 Pursuant to Section 2030.010 of the Code of Civil Procedure Defendant Intuit Inc. shall
2 respond to the following document requests and produce the responsive documents within 30 days of
3 the date of service. Plaintiff is amenable to receiving documents in electronic format; please contact
4 Plaintiff's counsel to discuss the details of such a production.

5 **DEFINITIONS**

6 As used herein, the following terms shall have the meanings set forth below:

- 7 1. "INTUIT" means Defendant Intuit Inc.
- 8 2. "YOU" and "YOUR" means INTUIT and (i) any parent subsidiary, predecessor, or
9 successor thereof, or related entity; (ii) any owner, officer, director, agent, employee, servant,
10 representative, accountant, investigator, consultant, advisor, manager, and/or attorney of INTUIT or
11 any of the above-described entities; and (iii) any other PERSON, agent, or entity acting or
12 purporting to act on behalf of INTUIT or of any of the above-described entities.
- 13 3. "PRODUCT" means any good or service made available for consumer use.
- 14 4. "TURBOTAX FREE EDITION" means "TurboTax Free Edition," "TurboTax Absolute
15 Zero," and any other TURBOTAX PRODUCT that YOU market or have marketed as "free,"
16 including as "free" for federal tax filing, but that is not offered as part of the IRS Free File Program.
- 17 5. "TURBOTAX PAID PRODUCT(S)" means any TURBOTAX PRODUCT for which
18 consumers must pay YOU money.
- 19 6. "COVERED PERIOD" means the period beginning September 6, 2015 and continuing
20 to the present.
- 21 7. "DOCUMENT" means any medium on which information is recorded and includes all
22 "writings" as defined in Section 250 of the California Evidence Code, including but not limited to
23 writings, pictures, images, graphical depictions, sound and video recordings, emails, information
24 communicated through Slack (including but not limited to chats, messages, and postings in
25 channels), text messages, communications via mobile messaging apps, content posted on the
26 Internet, including on social medial platforms (e.g. Instagram, Twitter, Facebook, and YouTube,
27 among others), reports, memoranda, files, data, and other electronically stored information
28 (including metadata), and tangible things. DOCUMENTS includes originals, copies, and drafts of

1 DOCUMENTS. Each and every draft, annotated version, or copy of a DOCUMENT in the
2 possession of a different custodian is a separate DOCUMENT for purposes of these Interrogatories.

3 8. As used herein, the words “and” as well as “or” shall be construed disjunctively or
4 conjunctively as necessary to bring within the scope of the request all information and things which
5 might otherwise be construed as outside its scope. “Any” shall be understood to include “all” and
6 “all” shall be understood to include “any.” “Each” shall be understood to include “every” and
7 “every” shall be understood to include “each.” “Including” shall be understood to mean including
8 but not limited to. Singular nouns and pronouns shall be deemed to include the plural, and vice
9 versa, and masculine, feminine and neuter nouns and pronouns shall be deemed to include one
10 another, wherever appropriate.

11 **GENERAL INSTRUCTIONS**

12 1. YOU are required to respond to these Requests for Production pursuant to and in
13 accordance with California Code of Civil Procedure §§ 2031.010 *et seq.*, and all requirements
14 therein.

15 2. In responding to each of these requests, YOU are to produce each and every
16 DOCUMENT in YOUR possession, custody or control, including DOCUMENTS in the possession,
17 custody or control of YOUR attorneys, agents, employees, accountants, financial or tax advisors, or
18 any other persons and/or entities acting or purporting to act on YOUR behalf. A DOCUMENT is
19 deemed to be in YOUR “control” if any of YOUR owners, attorneys, agents, employees,
20 accountants, financial or tax advisors, or any other persons and/or entities purporting to act on
21 YOUR behalf have actual physical possession of the DOCUMENT or a copy thereof, or if YOU
22 have the right to access or secure the DOCUMENT or a copy thereof from another PERSON having
23 actual physical possession or custody thereof, or if as a practical matter YOU have been able to use
24 or access such DOCUMENT when YOU sought to do so.

25 3. YOU shall produce all non-identical copies of a DOCUMENT. Any alteration of a
26 DOCUMENT, including any marginal notes, handwriting, underlining, date stamps, received
27 stamps, endorsed or filed stamps, drafts, revisions, modifications and other versions of a final
28 DOCUMENT, is a separate and distinct DOCUMENT and must be produced.

1 4. If any DOCUMENTS or parts of DOCUMENTS called for by these requests have been
2 destroyed, discarded, or otherwise disposed of, YOU should produce a copy of YOUR
3 DOCUMENT retention policy applicable during the period from May 6, 2015 to the present, and
4 identify as to each such DOCUMENT the following information:

- 5 a. The nature of the DOCUMENT, e.g., letter, memorandum, etc.;
- 6 b. The name, address, occupation, title, and business affiliation of each PERSON
7 who prepared, received, viewed, has knowledge of the contents of, or had
8 possession, custody, or control of the DOCUMENT;
- 9 c. The date of the DOCUMENT;
- 10 d. A description of the subject matter of the DOCUMENT;
- 11 e. The date of destruction or other disposition;
- 12 f. A statement of the reasons for destruction or other disposition;
- 13 g. The name, address, occupation, title, and business affiliation of each PERSON
14 who authorized destruction or other disposition;
- 15 h. The name, address, occupation, title, and business affiliation of each PERSON
16 who destroyed or disposed of the DOCUMENT; and
- 17 i. The request or requests to which the DOCUMENT is responsive.

18 5. If YOU withhold any DOCUMENT(S) under claim of attorney-client privilege or any
19 other privilege, provide a privilege log stating the following for each DOCUMENT withheld:

- 20 a. State the nature of the privilege or protection claimed;
- 21 b. State the nature and identity of the attorney (or other appropriate party) with
22 respect to whom the privilege or protection is claimed;
- 23 c. State the basis for claiming the privilege or protection as to the specific
24 information or DOCUMENT involved in a manner that, without revealing
25 information itself privileged or protected, will enable the propounding party to
26 assess the claim;
- 27 d. Identify each PERSON who has knowledge of such information or to whom such
28 information has been COMMUNICATED in any way at any time; and

1 e. Provide the following information about the purportedly privileged
2 DOCUMENT:

- 3 i. The author, primary addressee, and secondary addressees or
4 PERSONS copied, including the relationship of those PERSONS to
5 any party in this litigation and/or author of the DOCUMENT;
6 ii. A brief description sufficient to identify the type, subject matter, and
7 purpose of the DOCUMENT;
8 iii. All PERSONS to whom its contents have been disclosed;
9 iv. The date the DOCUMENT was prepared, the date the DOCUMENT
10 bears, the date the DOCUMENT was sent, and the date the
11 DOCUMENT was received;
12 v. A precise description of the place where each copy of that
13 DOCUMENT is kept, including the title or description of the file in
14 which said DOCUMENT may be found and the location of such file;
15 and
16 vi. Other information sufficient to enable a full assessment of the
17 applicability of the privilege or protection claims, as required by state
18 law, the court's local rules and the judge's individual practice rules.

19 6. If a portion of any DOCUMENT responsive to these requests is withheld under claim of
20 privilege pursuant to the preceding instruction, any non-privileged portion of such DOCUMENT
21 must be produced with the portion claimed to be privileged redacted. For each such DOCUMENT,
22 please provide a redaction log identifying:

- 23 a. The nature of the privilege or protection claimed;
24 b. The nature and identity of the attorney (or other appropriate party) with respect to
25 whom the privilege or protection is claimed;
26 c. A brief description sufficient to identify the type, subject matter, and purpose of
27 the redacted information;
28 d. The basis for claiming the privilege or protection as to the specific information

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involved in a manner that, without revealing information itself privileged or protected, will enable the propounding party to assess the claim;

- e. Each PERSON who has knowledge of such information or to whom such information has been COMMUNICATED in any way at any time; and
- f. Other information sufficient to enable a full assessment of the applicability of the privilege or protection claims, as required by state law, and the Court’s local rules.

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REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1

All DOCUMENTS consulted or relied upon in responding to the People’s Special Interrogatory Nos. 1-32 in this matter (Case No. 19CV354178).

REQUEST FOR PRODUCTION NO. 2

All DOCUMENTS and information YOU produced to the FTC in connection with the FTC’s investigation of INTUIT, File No. 1923119, including but not limited to the document productions and interrogatory responses reflected in INTUIT’s publicly-filed Petition to Quash in Part May 19, 2020 Civil Investigative Demand (Exhibit A), dated July 7, 2020, that relate to the advertising, marketing, design, user experience, upgrade requirements, or monetization for the TURBOTAX FREE EDITION PRODUCT and YOUR TURBOTAX PAID PRODUCTS.

Dated: October 6, 2020

Respectfully submitted,

JAMES R. WILLIAMS
County Counsel

By: /s/ Zoe Friedland
ZOE FRIEDLAND
Deputy County Counsel

Attorneys for Plaintiff
PEOPLE OF THE STATE OF CALIFORNIA,
ACTING BY AND THROUGH SANTA
CLARA COUNTY COUNSEL JAMES R.
WILLIAMS

2272377

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

-----x
IN THE MATTER OF INTUIT INC.
-----x

File No. 1923119

INTUIT INC.'S PETITION TO QUASH IN PART
MAY 19, 2020 CIVIL INVESTIGATIVE DEMAND

July 7, 2020

David Gringer
D. Reed Freeman
Wilmer Cutler Pickering
Hale and Dorr LLP
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Washington, D.C. 20006
Telephone: (202) 663-6000
Facsimile: (202)-663-6363
david.gringer@wilmerhale.com
reed.freeman@wilmerhale.com

Counsel for Petitioner

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

-----x
IN THE MATTER OF INTUIT INC.

File No. 1923119

-----x
**INTUIT INC.'S PETITION TO QUASH IN PART
MAY 19, 2020 CIVIL INVESTIGATIVE DEMAND**

Last year, more taxpayers filed their taxes completely for free using Intuit’s TurboTax software—over 13 million—than all of TurboTax’s competitors combined. Nonetheless, for over a year, the Commission has been investigating Intuit’s participation in the IRS Free File program, a voluntary federal program created and administered by the IRS to provide eligible taxpayers with a free government-sponsored online tax software option. The IRS’s rules for the program are clear: participants like Intuit have no obligation whatsoever to market the software they donate to the Free File program, and they are free to engage in commercial activity in the same manner as if they did not participate in the program. Notwithstanding these clear regulations, staff’s investigation has focused on whether Intuit has a duty to disclose its Free File program offer on its commercial website, and whether marketing for Intuit’s commercial products “misdirects” customers otherwise eligible for the IRS Free File program to TurboTax.

Intuit has cooperated extensively with staff’s investigation, providing over forty pages of interrogatory responses and 500,000 pages of documents in response to the FTC’s first CID, issued on June 28, 2019. The voluminous information Intuit established that an enforcement action would be unwarranted, and that Intuit was at all times clear and fair with its customers. Instead of closing the investigation, as the facts, law, and an independent investigation

commissioned by the IRS compel, the FTC issued a second CID on May 18, 2020 that expands the investigation into a full-fledged audit of Intuit's business practices, Intuit's relationship with the IRS, and even whether Intuit has ever sought or claimed a tax deduction for its charitable giving.

The new CID is incredibly burdensome. Counting subparts, it includes 166 interrogatories. There are broad document demands. And notwithstanding the new and unanticipated stresses of work in the COVID-19 environment, the staff seeks investigational hearings with at least eight different Intuit employees, and the CID includes a sixteen-topic corporate hearing notice that will require at least *five* Intuit employees to testify over several days. All this on top of the substantial burdens associated with Intuit's full compliance with the first CID, and all because Intuit had the temerity to participate in a voluntary federal program where it donated software to low and middle income taxpayers and adhered to the IRS's rules in doing so. Truly, no good deed goes unpunished.

Even though it believes the CID unwarranted in scope and substance, Intuit has agreed to comply with nearly all of it because the evidence—when objectively considered—strongly exonerates it from any alleged wrongdoing.

In this Petition, however, Intuit respectfully requests only minor modifications to its corporate investigational hearing. *First*, that the Commission eliminate topic 12 of the investigational hearing, which as modified by FTC staff seeks information about the “public relations benefits,” and “tax deductions or other tax benefits sought, claimed or received by the Company for offering its Free File Product.” Plainly, even under the FTC's broad authority under Section 6 of the FTC Act, this topic has no bearing whatsoever on whether Intuit engaged

in unfair or deceptive conduct. It also potentially seeks to impose an undue burden on Intuit's constitutionally-protected right to petition the government.

Second, Intuit requests that the Commission eliminate topic 16, which requires testimony on 211 interrogatory responses Intuit has or will provide to the staff. While the staff has proposed narrowing the request to fewer interrogatories, even as modified the topic remains incredibly overbroad and impermissibly intrudes on privileged communications.

After multiple, good-faith attempts at resolution, the staff has refused to withdraw the topics at issue, and Intuit is left with no recourse but to seek the Commission's assistance to limit the scope of the testimony sought. This motion is timely brought pursuant to 16 C.F.R. § 2.10 because staff agreed to extend the deadline for a Petition to quash to July 7, 2020.

BACKGROUND

A. Intuit's Free Products

Intuit currently offers two free tax filing solutions to customers: IRS Free File Program Delivered by TurboTax, which as the name suggests, is provided through the IRS; and TurboTax Free Edition, a completely free product offered on Intuit's commercial website. Although both products provide for genuinely free tax filing, they have a different genesis and serve different segments of customers.

In 2002, the IRS established the Free File program, a public-private partnership between the agency and a consortium of online tax companies to offer free tax-filing software to a segment of the American public. *See* 2002 Memorandum of Understanding ("MOU") § I (Oct. 30, 2002), <https://www.irs.gov/pub/irs-utl/2002-free-online-electronic-tax-filing-agreement.pdf>. The partnership ensured "higher quality" tax services than the federal government could provide on its own, "maximize[d] consumer choice" in light of the many participating companies, and

“promote[d] competition” for free tax-preparation services, *id.* § 2, while allowing the IRS to stay out of the tax software business, as it wished.

Pursuant to the terms of the agreement, the IRS assumes *sole responsibility* for “[p]romotion of the [Free File program]” and Intuit and program participants have no obligation to advertise or market it. *Id.* § VI.B. The IRS sets the criteria for eligibility for the program and each FFA member’s Free File offering has its own eligibility criteria, *see IRS, Free File: Do Your Federal Taxes for Free* (last accessed July 4, 2020), <https://www.irs.gov/filing/free-file-do-your-federal-taxes-for-free>, structured so that the product can be used by at least 10% but no more than 50% of taxpayers eligible for Free File, *see Byers v. Intuit, Inc.*, 600 F.3d 286, 289–90 (3d Cir. 2010). To use Intuit’s Free File software in the 2020 filing season, a taxpayer must have an Adjusted Gross Income (“AGI”) of \$36,000 or less, be on active military duty with an AGI of \$69,000 or less, or be eligible for the Earned Income Tax Credit.

Although participants have no obligation to advertise the program, *see IRS, Independent Assessment of the Free File Program - Appendix A: The Economics of IRS Free File 35* (Sept. 13, 2019), <https://www.irs.gov/pub/newsroom/02-appendix-a-economics-of-irs-free-file.pdf> (explaining that “the MOU puts the burden of advertising on the IRS alone”), Intuit has focused in recent years on growing Free File usage. During the 2019 filing season, Intuit invested \$1.5 million in its Tax Time Allies campaign to broadly promote no-cost tax filing services, including Free File, which resulted in more than 700,000 taxpayers clicking on ads that directed them to the IRS’s Free File homepage. As in the past, moreover, Intuit sent former Free File customers *up to seven* email reminders inviting them to again use Intuit’s Free File product, far exceeding the *one* required by the MOU, *see Eighth MOU* § 4.32.4 (Oct. 31, 2018), <https://www.irs.gov/pub/irsutl/Eight%20Free%20File%20MOU.pdf>. Approximately 230,000

taxpayers clicked on those email reminders, bringing them directly to the landing page for Intuit’s Free File offering. In the end, approximately 1.2 million Americans filed their 2018 taxes using Intuit’s Free File product, accounting for more than 50 percent of *all* Free File use, *see* IRS, Independent Assessment of the Free File Program 26 (Oct. 3, 2019), https://www.irs.gov/pub/newsroom/01_free-file-programassessment-100319.pdf (“IRS Report”).

The Free File program allows access to the free tax software contributed by participating companies through a “website hosted and maintained by the IRS.” Eighth MOU § 1.17. This system makes sense. The software of each participating company has its own eligibility criteria, such as based on age, income, or state residency. Accessing the program through the IRS page allows eligible taxpayers to “review each company offer or . . . use a ‘Lookup’ tool that will find the software for which they are eligible.” IRS, *Tax Time Guide: Try Money-Saving IRS Free File*, IR-2018-38 (Mar. 1, 2018), <https://www.irs.gov/newsroom/tax-time-guide-try-money-saving-irs-free-file>. Agency press releases regarding the Free File program have thus advised that “taxpayers can ONLY access Free File sites through IRS.gov.” IRS Report at 84.

Separate from its participation in the Free File program, Intuit offers TurboTax Free Edition on its commercial website. Free Edition may be used for free by any taxpayer, no matter her income, so long as she has a “tax return[] that can be filed on Form 1040 without any attached schedules.” *E.g.*, TurboTax Help, *Is TurboTax Free Edition Right for Me?*, Intuit TurboTax (May 24, 2019), <https://ttlc.intuit.com/community/choosing-a-product/help/is-turbotax-free-edition-right-for-me/00/26236>. According to government estimates, nearly 50 million Americans—approximately one third of all taxpayers—file tax returns using only Form 1040 and could therefore file for free using Free Edition. *See* National Taxpayer Advocate, *2018 Annual Report to Congress* ix (2019), <https://taxpayeradvocate.irs.gov/Media/Default/>

Documents/2018-ARC/ARC18_Volume1.pdf (“[I]t is estimated [that] approximately 47 million taxpayers (32 percent) [can] meet their filing requirements [using only Form 1040].”). Over 12 million taxpayers did just that last year.

The TurboTax commercial site features important services that cannot be offered through the Free File program due to the IRS’s rules. For example, Community (formerly known as AnswerXchange), TurboTax’s free and widely-used question-and-answer service, cannot be offered on the Free File platform because it could expose Free Filers to marketing or sales activity—or links to such activity—in violation of the FFA’s MOU with the IRS. *See* Eighth MOU § 4.32.5 (generally prohibiting all “marketing, soliciting, sales or selling activity, or electronic links to such activity” in the Free File program). The same is true of TurboTax Live, which offers live, line-by-line tax advice and expert review by credentialed Certified Public Accountants and tax attorneys.

B. ProPublica’s Accusations

In April and May 2019, ProPublica published a number of stories critical of Intuit. Claiming without basis that tax-preparation software companies “like Intuit” “would rather [consumers] didn’t know” about the Free File program, ProPublica complained that Intuit did not direct Free File-eligible taxpayers on its commercial website to its Free File product. J. Elliot & L. Waldron, *Here’s How TurboTax Just Tricked You Into Paying to File Your Taxes*, ProPublica (Apr. 22, 2019), <https://www.propublica.org/article/turbotax-just-tricked-you-into-paying-to-file-your-taxes>. And it criticized Intuit for promoting TurboTax Free Edition, which it panned (without basis) as “only free for people with the simplest taxes,” *id.*, without mentioning the product’s eligibility criteria or acknowledging that it covers—for free—the tax needs of nearly

one-third of all American taxpayers or that more taxpayers use it to file for free than all other methods of free tax preparation combined.

In short order, Intuit received notice that the FTC had begun investigating whether the company had engaged in, or was engaged in, violations of Section 5 of the FTC Act “by misdirecting eligible taxpayers away from the Internal Revenue Service’s Free File Program.” *See* Letter from Tejasvi Srimushnam to Intuit Inc. dated May 9, 2019. Notably, Intuit is unaware of any customer who had complained to the FTC about these issues before that date.

C. The FTC Staff’s Expanding Investigation of Intuit

After receiving notice of the FTC’s investigation on May 9, 2019, Intuit received the Commission’s first Civil Investigative Demand (the “First CID”) on June 28, 2019. The First CID included 45 separate interrogatories, counting subparts, along with 24 document requests (again, counting subparts). Although the Applicable Time Period was stated as June 24, 2016 to the date of full and complete compliance with the CID, 16 of the interrogatory requests and 13 of the document requests requested information or documents reaching back to 2013, more than doubling the time period implicated.

Intuit engaged in good-faith negotiations with FTC staff regarding the scope of the First CID, including an in-person meeting with the staff on July 18, 2019 and multiple phone conversations. Intuit provided proposed search terms and custodians for all document requests (including document collections for 27 custodians across the company), which the staff reviewed, provided modifications to, and approved. Pursuant to these negotiations, the FTC modified the scope of the First CID in a letter dated August 30, 2019. Intuit made nine productions in response to the First CID, on July 29, July 31, September 4, September 13, October 11, November 21, and December 23, 2019; and on January 23 and March 27, 2020.

These productions included more than 40 pages of interrogatory responses and more than 500,000 pages of documents.

On May 19, 2020, the FTC issued a second CID (the “Second CID”) to Intuit. The Second CID included 166 interrogatory requests, counting subparts, and six new document requests. Additionally, the Second CID requested that Intuit designate a corporate representative to give testimony on 16 broad topics, which together encompass virtually every part of Intuit’s TurboTax business. The FTC also issued 11 individual CIDs to Intuit employees for investigational hearings, each of which included 11 identical topics of inquiry.

Intuit again negotiated in good faith with staff regarding the scope of the CIDs’ requests. Intuit met and conferred three times with the staff, on May 27, 2020, June 4, 2020, and June 17, 2020. In response to various concerns raised by Intuit, including that it called for the same information provided in response to the First CID, the staff partially modified the scope of the Second CID on June 10, 2020. On June 15, 2020, staff further modified the Second CID, agreeing to accept a declaration in lieu of oral testimony for two of the individual CIDs, postpone a decision about how to proceed with a third, and to modify the scope of certain topics for Intuit’s corporate designees and of a number of interrogatories and requests for documents.

Since the June 15, 2020 letter, Intuit and the staff have engaged in further negotiation over email, including, as relevant here, on topics 12 and 16. On June 25, 2020, staff proposed changing topic 12 to seek testimony about:

the Company’s involvement in Free File, Inc. (including financial, monetary, and public relations benefits) in regard to:

- Preventing, avoiding, or limiting state or federal government “encroachment” into the online tax preparation market. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] and

- Tax deductions or other tax benefits sought, claimed, or received by the Company for offering its Free File Product.

The staff proposed narrowing topic 16 from “[e]ach of the Company’s answers to Interrogatories in response to this CID and the CID issued July 1, 2019,” to:

The substance, meaning of, and factual basis for the Company’s answers and responses to the following Interrogatories in this CID and the prior CID issued July 1, 2019:

- CID 1: Interrogatories 2(a), 3(a), 3(b), 4(a), 5(a), and 5(e)
- CID 2: Interrogatories 1, 2, 4(a)–4(e), 13, 21, 22, and 25.

Intuit also requested that the individual investigational hearings not be scheduled during the first two weeks of September, when schools will be starting, considering the unusual difficulties associated with beginning the school year during a pandemic. Staff responded that they would agree to Intuit’s request only if Intuit accepted the proposed modifications and did not pursue relief with the Commission. Intuit explained in response that its reasonable request for a two-week pause in investigational hearings because of a global pandemic should not be used to coerce agreement. On July 6, 2020, staff agreed to Intuit’s request to start the investigational hearings on September 14, but refused to withdraw the topics at issue. The staff did say it would withdraw topic 12 but only if Intuit stipulated “that the free file offering is an Intuit product that Intuit benefits from offering.” As Intuit explained in response, Intuit would not so stipulate because the proposed stipulation was counterfactual.¹

¹ The staff’s request for an inaccurate one-sentence stipulation in return for withdrawing the topic illustrates that the topic serves no valid investigative purpose.

ARGUMENT

The Commission should quash topics 12 and 16 of the investigational hearing request in the Second CID. Topic 12 is not relevant to the FTC’s investigation and impermissibly burdens Intuit’s protected First Amendment conduct. Topic 16 is overbroad and unduly burdensome, and impermissibly seeks testimony as to privileged and protected information. Intuit has brought these concerns to, and sought to negotiate in good faith with, FTC staff, but those efforts were unsuccessful.

I. TOPIC 12 IS IRRELEVANT AND VIOLATES INTUIT’S FIRST AMENDMENT RIGHTS

First, the Commission should limit the CID to exclude testimony on topic 12, because it is irrelevant and it impermissibly intrudes on Intuit’s protected First Amendment activity.

A. Topic 12 Has No Relation To The Conduct Under Investigation

Topic 12, both as written and with the staff’s proposed modification, is irrelevant. This is because neither the generalized “benefit” Intuit derives from Free File, nor the slightly more specific “public relations” benefit or tax benefit Intuit may (or may not) have received from its participation in the Free File program and charitable donation of its TurboTax software to the IRS, are topics relevant to the FTC’s inquiry into whether Intuit “has engaged in deceptive or unfair acts or practices with respect to the marketing or advertising of online tax preparation products.”

The FTC’s “[s]ubpoena enforcement power is not limitless[.]” *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001). Indeed, the Supreme Court has recognized that “matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). One such limitation is that the information sought by the FTC must be “reasonably relevant” to

its investigation. *FTC v. Texaco*, 555 F.2d 862, 872 (D.C. Cir. 1977); *see also FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1977) (“The test for the relevancy of an administrative subpoena . . . is whether the information sought is ‘reasonably relevant’ to the agency’s inquiry.”). That is to say, although “law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest,” *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1030 (D.C. Cir. 1978) (quoting *Morton Salt Co.*, 338 U.S. at 652), the information sought must be “adequate, but not excessive, for the purposes of the relevant inquiry,” *id.* (quoting *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946)). That is not the case here, and the Commission should therefore exclude testimony sought on topic 12.

Even with the staff’s proposed modification, topic 12 simply is not “reasonably relevant” to the FTC’s investigation. Information about “public relations” benefits Intuit purportedly receives from its participation in the Free File program, or about any alleged benefit Intuit derives from the program in terms of so-called government “encroachment,”² say nothing about whether Intuit has engaged in deceptive or unfair trade practices *with respect to the marketing or advertising* of its online tax products. Likewise, whether Intuit sought or received a tax benefit from donations of software to the IRS has no connection to any issue under investigation.

It is telling that despite Intuit’s repeated requests to the staff to articulate any basis for seeking this information, they have been unwilling to do so. Instead, staff has either asked Intuit

² The IRS has “no interest in entering the market” because doing so is not “an economically feasible option for the agency,” even in the absence of the Free File program. IRS Report App. A, at 26. Intuit is unaware of any effort by staff to coordinate (or consult) with the IRS, notwithstanding the latter’s oversight of the Free File program and its completed investigation of Propublica’s allegations, and notwithstanding 16 C.F.R. § 4.6, which states that “[i]t is the policy of the Commission to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions.”

to stipulate—counterfactually—that Intuit obtains unspecified “benefits” from the program, or responded with bromides like, “I think we get to ask about that,” or “we may just have to agree to disagree on that one.” This is insufficient. Because it lacks any connection to the investigation, topic 12 should be quashed. *See, e.g., FTC v. Turner*, 609 F.2d 743, 746 (5th Cir. 1980) (affirming district court’s decision not to enforce FTC subpoena seeking information about respondent’s financial assets when such information was irrelevant to the FTC’s investigation).

B. Topic 12 Impermissibly Intrudes on Protected First Amendment Activity

In addition, the FTC’s proposed modification to topic 12 seeks testimony that impermissibly intrudes on Intuit’s First Amendment-protected conduct.

It is axiomatic that “[t]he First Amendment protects political association as well as political expression.” *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). “[T]he government must justify its[elf] . . . when governmental action ‘would have the practical effect of ‘discouraging’ the exercise of constitutionally protected political rights.’” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2009) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). That includes when the government compels disclosure of political activity, which can have a chilling effect on protected First Amendment speech. *See id.* at 1139–40. A party can accordingly assert a First Amendment privilege against discovery requests that seek such disclosures. *See id.* at 1140.

In analyzing an assertion of First Amendment privilege, courts first look to whether the party asserting the privilege has made a *prima facie* case that enforcing the request would have a chilling effect on the party’s First Amendment rights, before shifting the burden to the government to show that the information sought is rationally related to a compelling government interest and that the discovery sought is the least-restrictive means of obtaining the information. *Perry*, 591 F.3d at 1140. As with every First Amendment analysis, courts “balance the burdens

imposed on individuals and associations against the significance of the . . . interest in disclosure,” *id.* (quoting *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003)). “The party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation.” *Id.* at 1141.

Intuit has clearly made the requisite *prima facie* showing. The First Amendment guarantees Intuit “the right . . . to petition the Government for a redress of grievances.” U.S. Const. amend. I. This right certainly extends to petitioning the government with regard to taxes and tax policy. *Cf. Campbell v. PMI Food Equip. Group, Inc.*, 509 F.3d 776, 790 (6th Cir. 2007). Nor could there be any question that the CID, if enforced, would burden Intuit’s exercise of that right. *See, e.g., AFL-CIO*, 333 F.3d at 175 (noting that “[t]he Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation” (citations omitted)); *see also Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971) (“[W]hen a State attempts to make inquiries about a person’s beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.” (citations omitted)).

In contrast, staff cannot rebut Intuit’s *prima facie* case. In seeking information from Intuit about the tax benefits it sought, claimed, or received for taking part in the Free File Program, the FTC is asking for testimony on Intuit’s protected activity of petitioning the government for tax benefits, presumably because such protected activity will somehow influence the staff’s decision whether or not to recommend an enforcement action. This creates precisely the type of chilling effect the First Amendment privilege is intended to protect, by bringing additional risks and scrutiny to Intuit for engaging in protected conduct. And the staff has so far

not provided any rationale for why such sought or obtained tax benefits would be relevant, let alone *highly* relevant, to its investigation into Intuit's marketing and advertising practices for its online tax software. Thus, at the very least, the FTC should quash this part of topic 12 as violating the First Amendment privilege.

II. TOPIC 16 OF THE INVESTIGATIONAL HEARING REQUEST INTRUDES ON ATTORNEY-CLIENT COMMUNICATIONS AND IS OVERBROAD

Next, topic 16 should be quashed because it intrudes impermissibly on attorney-client communications and attorney work product, and because it seeks testimony that is overbroad and unduly burdensome to Intuit.

A. Topic 16 Seeks Privileged Communications

“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Both FTC regulations, 16 C.F.R. § 2.7(a)(4), and the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26(b)(1), recognize that attorney-client communications can accordingly be withheld from discovery.

Topic 16 seeks testimony on “[t]he substance and meaning of” Intuit's answer to the FTC's interrogatories in the two CIDs, “as well as the factual basis for such answers.” Intuit's interrogatory responses were prepared with the assistance of undersigned counsel, and providing testimony on “[t]he substance and meaning of[,] . . . as well as the factual basis for” the company's answers would implicate privileged attorney-client communications made in the process of preparing those responses. At least one court has found a Rule 30(b)(6) request for deposition on the topic of a party's responses to interrogatories unenforceable precisely for that reason. *See Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 WL 116082, at *9

(N.D. Ill. Jan. 24, 2000) (noting that such a “proposed area of inquiry improperly trespasses into areas of work product and attorney-client privilege” and granting motion for a protective order).

Under staff’s proposed modification, topic 16 would cover only a subset of interrogatories. However, the privilege applies equally to a subset of the interrogatories as it applies to the whole—the interrogatories the FTC focuses on in its proposal were drafted with the advice of counsel, and such communications are privileged. The Commission should accordingly quash the CID to exclude any testimony on topic 16.

B. Topic 16 is Overbroad and Unduly Burdensome

Topic 16 is also overbroad and unduly burdensome because it does not identify with any reasonable particularity which information in Intuit’s answers to the FTC’s interrogatories the company should prepare to testify on. A CID is unenforceable if “the demand is unduly burdensome or unreasonably broad.” *Texaco*, 555 F.2d at 882. While “[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest,” courts have modified or quashed investigative subpoenas that “unduly disrupt or seriously hinder normal operations of a business.” *Id.* The broad scope of topic 16 creates exactly such a situation, by requiring Intuit to expend significant resources to prepare multiple employees to serve as corporate representative on a topic that essentially covers every aspect of Intuit’s online marketing and advertising.

Topic 16 asks for testimony as to “[t]he substance and meaning of each of the Company’s answers to Interrogatories in response to this CID and the CID issued July 1, 2019, as well as the factual basis for such answers.” Between the two CIDs, there are, counting subparts, 211 interrogatories covered by this topic, ranging across the entire spectrum of Intuit’s online products and covering all aspects of the company’s marketing and advertising strategy. As Intuit

explained in meet-and-confer negotiations, no person could educate themselves across that scope of information *and* be able to speak knowledgeably about such a breadth of content.

Indeed, courts have rejected as overbroad Rule 30(b)(6) topics indistinguishable from topic 16, because they lack the requisite particularity. *See, e.g., Integra Bank Corp. v. Fidelity & Deposit Co. of Maryland*, No. 3-11-cv-00019-RLY-WGH, 2014 WL 109105, at *3 (S.D. Ind. Jan. 10, 2014) (listing cases) (overruling objections to protective order issued in response to 30(b)(6) topic calling for testimony on responses to 24 interrogatories). In this case, such an overbroad line of inquiry would also be unduly burdensome to Intuit, by requiring it to put forward somewhere between eight and ten witnesses to satisfactorily cover the topics of both CIDs' interrogatories.

Even with staff's proposed modification, topic 16 suffers from the same defects. Though restricted to a smaller subset of interrogatories, topic 16 still lacks reasonable particularity because it does not identify with specificity the information sought. The modification would also still result in undue burden, by requiring Intuit to prepare multiple corporate designees on a wide range of topics. As modified, the topic still covers 30 interrogatories, including subparts, ranging from Intuit's use of subject advertising keywords; to web traffic on the TurboTax website; design of, features, and marketing for all of Intuit's TurboTax Products; and even Intuit's position in related private litigation.

As Intuit has explained to the staff, if it wishes to inquire about Intuit's interrogatory responses, it may do so during the individual investigative hearings. It does not need a separate Investigative Hearing centered around those responses.

CONCLUSION

Intuit respectfully requests that its Petition be granted, and the Commission should limit its Second CID in the manner described above.

Respectfully submitted,

Dated: July 7, 2020

WILMER CUTLER PICKERING HALE
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EXHIBIT 4

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 COUNTY COUNSEL JAMES R. WILLIAMS
 9

10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF LOS ANGELES

12
 13 TURBOTAX FREE FILING CASES

JCCP No. 5067

14 PEOPLE OF THE STATE OF CALIFORNIA,
 acting by and through Santa Clara County
 15 Counsel James R. Williams,

Included Action Case No. 19CV354178

16 Plaintiff,

**PLAINTIFF PEOPLE OF THE STATE OF
 CALIFORNIA, ACTING BY AND
 THROUGH SANTA CLARA COUNTY
 COUNSEL JAMES R. WILLIAMS'
 SPECIAL INTERROGATORIES (SET 1)**

17 v.

18 INTUIT INC., and DOES 1-50, inclusive,

19 Defendants.

Complaint Filed: September 6, 2019
 Trial Date: None set

20
 21
 22
 23
 24 **PROPOUNDING PARTY:** Plaintiff, PEOPLE OF THE STATE OF CALIFORNIA, ACTING BY
 AND THROUGH SANTA CLARA COUNTY COUNSEL JAMES R.
 25 WILLIAMS

26 **RESPONDING PARTY:** Defendant, INTUIT INC.

27 **SET NUMBER:** ONE (1)
 28

1 Pursuant to Section 2030.010 of the Code of Civil Procedure defendant Intuit Inc. shall
2 answer the following interrogatories under oath within 30 days of the date of service.

3 **DEFINITIONS**

4 As used herein, the following terms shall have the meanings set forth below:

5 1. "INTUIT" means Defendant Intuit Inc.

6 2. "YOU" and "YOUR" means INTUIT and (i) any parent subsidiary, predecessor, or
7 successor thereof, or related entity; (ii) any owner, officer, director, agent, employee, servant,
8 representative, accountant, investigator, consultant, advisor, manager, and/or attorney of INTUIT or
9 any of the above-described entities; and (iii) any other PERSON, agent, or entity acting or
10 purporting to act on behalf of INTUIT or of any of the above-described entities.

11 3. "PRODUCT" means any good or service made available for consumer use.

12 4. "TURBOTAX PRODUCT(S)" means any tax preparations and filing software
13 PRODUCT that YOU market or have marketed under the registered trademark TurboTax®,
14 including all of YOUR online tax preparation PRODUCTS (e.g. "TurboTax Free Edition,"
15 "TurboTax Deluxe," "TurboTax Deluxe Live," "TurboTax Premier," TurboTax Premier Live,"
16 "TurboTax Self-Employed," "TurboTax Self-Employed Live," and "TurboTax Free File"),
17 CD/download tax preparation PRODUCTS, and mobile tax preparation PRODUCTS.

18 5. "TURBOTAX FREE FILE PRODUCT" means "TurboTax Free File," "TurboTax
19 Freedom Edition," and any other TURBOTAX PRODUCT that YOU offer or have offered as part of
20 the IRS Free File Program.

21 6. "TURBOTAX FREE EDITION" means "TurboTax Free Edition," "TurboTax Absolute
22 Zero," and any other TURBOTAX PRODUCT that YOU market or have marketed as "free,"
23 including as "free" for federal tax filing, but that is not offered as part of the IRS Free File Program.

24 7. "TURBOTAX PAID PRODUCT(S)" means any TURBOTAX PRODUCT for which
25 consumers must pay YOU money.

26 8. "COMMERCIAL PRODUCT(S)" means TURBOTAX FREE EDITION and all
27 TURBOTAX PAID PRODUCTS.

28 9. "REQUIRED UPGRADE MESSAGE" means any instance within YOUR

1 COMMERCIAL PRODUCTS in which YOU present the USER with a message that they must
2 purchase a PRODUCT upgrade or change, remove, or make substantive alterations to some portion
3 of the previously entered information in order to file or “accurately” file their taxes with a
4 TURBOTAX PRODUCT.

5 10. “TURBOTAX WEBSITE” means the website through which YOU offer consumers
6 access to YOUR TURBOTAX PAID PRODUCTS, i.e. <https://turbotax.intuit.com> and any precursor
7 thereof.

8 11. “USER” means any PERSON who accesses a TURBOTAX PRODUCT.

9 12. “TAX YEAR” means the consecutive 12-month period beginning January 1 and ending
10 December 31 covered by a particular tax return.

11 13. “COVERED PERIOD” means the period beginning September 6, 2015 and continuing
12 to the present.

13 14. “PROMPT” means a button, link, icon, or equivalent on a website or mobile app that
14 could be selected or clicked on to interact with the website or mobile app.

15 15. “ADVERTISEMENT” means any statement made in connection with the sale of goods
16 or services.

17 16. “PERSON” includes the plural as well as the singular and has the same meaning as
18 “person” under California Corporations Code § 28043, i.e. “any natural person, proprietorship, joint
19 venture, partnership, trust, business trust, syndicate, association, joint stock company, corporation,
20 limited liability company, government, agency of any government, or any other organization.”

21 17. “DOCUMENT” means any medium on which information is recorded and includes all
22 “writings” as defined in Section 250 of the California Evidence Code, including but not limited to
23 writings, pictures, images, graphical depictions, sound and video recordings, emails, information
24 communicated through Slack (including but not limited to chats, messages, and postings in
25 channels), text messages, communications via mobile messaging apps, content posted on the
26 Internet, including on social medial platforms (e.g. Instagram, Twitter, Facebook, and YouTube,
27 among others), reports, memoranda, files, data, and other electronically stored information
28 (including metadata), and tangible things. DOCUMENTS includes originals, copies, and drafts of

1 DOCUMENTS. Each and every draft, annotated version, or copy of a DOCUMENT in the
2 possession of a different custodian is a separate DOCUMENT for purposes of these Interrogatories.

3 18. As used herein, the words “and” as well as “or” shall be construed disjunctively or
4 conjunctively as necessary to bring within the scope of the interrogatory all information and things
5 which might otherwise be construed as outside its scope. “Any” shall be understood to include “all”
6 and “all” shall be understood to include “any.” “Each” shall be understood to include “every” and
7 “every” shall be understood to include “each.” “Including” shall be understood to mean including
8 but not limited to. Singular nouns and pronouns shall be deemed to include the plural, and vice
9 versa, and masculine, feminine and neuter nouns and pronouns shall be deemed to include one
10 another, wherever appropriate.

11 **GENERAL INSTRUCTIONS**

12 1. YOU are required to respond to these Special Interrogatories pursuant to and in
13 accordance with California Code of Civil Procedure §§ 2030.010 *et seq.*, and all requirements
14 therein.

15 2. In responding to these Special Interrogatories, YOUR answers shall include and reflect
16 all information available to YOU directly or through YOUR owners, directors, officers, agents,
17 employees, representatives, attorneys, or anyone else acting or purporting to act on YOUR behalf.

18 3. If YOU perceive any ambiguity in any interrogatory, instruction, or definition, set forth
19 the matter deemed ambiguous and the construction used in answering. If an interrogatory cannot be
20 answered completely, answer it to the extent possible.

21 4. Whenever an interrogatory may be answered by referring to DOCUMENTS, Bates-
22 stamped copies of the DOCUMENTS may be attached as exhibits to the response and referred to in
23 YOUR response by citation to each DOCUMENTS’ Bates range. If YOU answer by referring to a
24 DOCUMENT that has more than one page, refer to the page and section where the answer to the
25 interrogatory can be found.

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SPECIAL INTERROGATORIES

SPECIAL INTERROGATORY NO. 1:

For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of PERSONS who accessed or used the TURBOTAX FREE EDITION.

SPECIAL INTERROGATORY NO. 2:

For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of PERSONS in California who accessed or used the TURBOTAX FREE EDITION.

SPECIAL INTERROGATORY NO. 3:

For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of PERSONS who filed federal income tax returns, but not state income tax returns, using the TURBOTAX FREE EDITION.

SPECIAL INTERROGATORY NO. 4:

For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of PERSONS who filed both federal and state income tax returns using the TURBOTAX FREE EDITION.

SPECIAL INTERROGATORY NO. 5:

For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of PERSONS in California who filed federal income tax returns, but not state income tax returns, using the TURBOTAX FREE EDITION.

SPECIAL INTERROGATORY NO. 6:

For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of PERSONS in California who filed both federal and state income tax returns using the TURBOTAX FREE EDITION.

SPECIAL INTERROGATORY NO. 7:

For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of PERSONS identified in response to Special Interrogatory No. 1 who were presented with a REQUIRED UPGRADE MESSAGE.

1 **SPECIAL INTERROGATORY NO. 8:**

2 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
3 PERSONS identified in response to Special Interrogatory No. 2 who were presented with a
4 REQUIRED UPGRADE MESSAGE.

5 **SPECIAL INTERROGATORY NO. 9:**

6 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
7 PERSONS identified in response to Special Interrogatory No. 7 who upgraded to a TURBOTAX
8 PAID PRODUCT and filed an income tax return using that or another TURBOTAX PAID
9 PRODUCT.

10 **SPECIAL INTERROGATORY NO. 10:**

11 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
12 PERSONS identified in response to Special Interrogatory No. 8 who upgraded to a TURBOTAX
13 PAID PRODUCT and filed an income tax return using that or another TURBOTAX PAID
14 PRODUCT.

15 **SPECIAL INTERROGATORY NO. 11:**

16 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the total money
17 YOU received for tax filing services from all PERSONS who upgraded to a TURBOTAX PAID
18 PRODUCT within the meaning of Special Interrogatory No. 9.

19 **SPECIAL INTERROGATORY NO. 12:**

20 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the amount each
21 PERSON who upgraded to a TURBOTAX PAID PRODUCT within the meaning of Special
22 Interrogatory No. 10 paid YOU for tax filing services.

23 **SPECIAL INTERROGATORY NO. 13:**

24 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
25 PERSONS identified in response to Special Interrogatory No. 7 who did not file their taxes using a
26 TURBOTAX PRODUCT.

27 **SPECIAL INTERROGATORY NO. 14:**

28 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of

1 PERSONS identified in response to Special Interrogatory No. 8 who did not file their taxes using a
2 TURBOTAX PRODUCT.

3 **SPECIAL INTERROGATORY NO. 15:**

4 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
5 PERSONS who accessed or used a TURBOTAX COMMERCIAL PRODUCT after selecting or
6 clicking on a PROMPT or ADVERTISEMENT stating “File for \$0.”

7 **SPECIAL INTERROGATORY NO. 16:**

8 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
9 PERSONS identified in response to Special Interrogatory No. 15 who were presented with a
10 REQUIRED UPGRADE MESSAGE.

11 **SPECIAL INTERROGATORY NO. 17:**

12 Identify the time periods in which some portion of the PERSONS who attempted to access,
13 or did access, a TURBOTAX COMMERCIAL PRODUCT or who visited the TURBOTAX
14 WEBSITE were presented with the following language: “Don’t worry about pulling out your
15 wallet—look for the payment option to deduct the cost from your federal refund.”

16 **SPECIAL INTERROGATORY NO. 18:**

17 Identify the time periods in which some portion of the PERSONS who attempted to access,
18 or did access, a TURBOTAX COMMERCIAL PRODUCT or who visited the TURBOTAX
19 WEBSITE were presented with language, other than the language identified in Special Interrogatory
20 No. 17, that informed the PERSON that they could deduct the cost of upgrading to a TURBOTAX
21 COMMERCIAL PRODUCT from a federal tax refund.

22 **SPECIAL INTERROGATORY NO. 19:**

23 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
24 PERSONS presented with a REQUIRED UPGRADE MESSAGE who clicked on or selected a
25 PROMPT entitled “keep free.”

26 **SPECIAL INTERROGATORY NO. 20:**

27 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
28 PERSONS identified in response to Special Interrogatory No. 19 who during the same tax year paid

1 for a TURBOTAX COMMERCIAL PRODUCT.

2 **SPECIAL INTERROGATORY NO. 21:**

3 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
4 PERSONS identified in response to Special Interrogatory No. 19 who filed their taxes for free using
5 a TURBOTAX COMMERCIAL PRODUCT.

6 **SPECIAL INTERROGATORY NO. 22:**

7 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
8 PERSONS identified in response to Special Interrogatory No. 19 who did not, during the same tax
9 year, file a tax return using a TURBOTAX COMMERCIAL PRODUCT.

10 **SPECIAL INTERROGATORY NO. 23:**

11 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
12 PERSONS who used the TURBOTAX FREE EDITION to file their income tax return after being
13 presented with a REQUIRED UPGRADE MESSAGE.

14 **SPECIAL INTERROGATORY NO. 24:**

15 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, of the PERSONS
16 identified in response to Special Interrogatory No. 23, state the number of PERSONS who received
17 the REQUIRED UPGRADE MESSAGE after the relevant TurboTax program or software
18 determined that the PERSON could not obtain the benefit of one or more applicable tax deductions if
19 the PERSON used the TURBOTAX FREE EDITION to file their income tax return.

20 **SPECIAL INTERROGATORY NO. 25:**

21 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, of the PERSONS
22 identified in response to Special Interrogatory No. 23, state the number of PERSONS who received
23 the REQUIRED UPGRADE MESSAGE after the relevant TurboTax program or software
24 determined that the PERSON could not report all required financial information for their income tax
25 return using the IRS tax forms supported by the TURBOTAX FREE EDITION.

26 **SPECIAL INTERROGATORY NO. 26:**

27 If YOU contend that YOUR ADVERTISEMENTS contained any disclaimers, qualifying
28 language, or information regarding eligibility that disclosed that some PERSONS would not be able

1 to file for free using the TURBOTAX FREE EDITION, state with specificity the basis for YOUR
2 contention and the content of each such disclaimer, qualifying language, or information regarding
3 eligibility.

4 **SPECIAL INTERROGATORY NO. 27:**

5 Identify the time period each of the disclaimers, qualifying language, or information
6 regarding eligibility identified in Special Interrogatory No. 26 was visible to PERSONS who viewed
7 ADVERTISEMENTS for the TURBOTAX FREE EDITION.

8 **SPECIAL INTERROGATORY NO. 28:**

9 If any of the disclaimers, qualifying language, or information regarding eligibility YOU
10 identified in Special Interrogatory No. 26 was accessed through a hyperlink or icon, state the number
11 of PERSONS during each tax year who clicked on each such hyperlink or icon.

12 **SPECIAL INTERROGATORY NO. 29:**

13 Identify all documents, including without limitation studies, reports, and correspondence in
14 Intuit's possession, custody, or control, that analyze or discuss the efficacy or clarity of each of the
15 disclaimers, qualifying language, or information regarding eligibility identified in Special
16 Interrogatory No. 26.

17 **SPECIAL INTERROGATORY NO. 30:**

18 Identify all applications, software, and platforms that YOUR employees use to chat, message,
19 email, or otherwise communicate with other Intuit employees including without limitation email
20 programs and messaging platforms such as Slack.

21 **SPECIAL INTERROGATORY NO. 31:**

22 Identify the time period within the COVERED PERIOD that each application, software, and
23 platform identified in Special Interrogatory No. 30 was used by Intuit employees.

24 **SPECIAL INTERROGATORY NO. 32:**

25 Identify any applicable retention policy for each application, software, and platform
26 identified in Special Interrogatory No. 30.

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Dated: October 6, 2020

Respectfully submitted,

JAMES R. WILLIAMS
County Counsel

By: /s/ Aaron Bloom
AARON BLOOM
Deputy County Counsel

Attorneys for Plaintiff
PEOPLE OF THE STATE OF CALIFORNIA,
ACTING BY AND THROUGH SANTA
CLARA COUNTY COUNSEL JAMES R.
WILLIAMS

2272377

EXHIBIT 5

CONFIDENTIAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

-----x
IN THE MATTER OF INTUIT INC.
-----x

File No. 1923119

INTUIT INC.'S PETITION TO QUASH IN PART
MAY 19, 2020 CIVIL INVESTIGATIVE DEMAND

July 7, 2020

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Counsel for Petitioner

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

-----x
IN THE MATTER OF INTUIT INC.

File No. 1923119

-----x
**INTUIT INC.'S PETITION TO QUASH IN PART
MAY 19, 2020 CIVIL INVESTIGATIVE DEMAND**

Last year, more taxpayers filed their taxes completely for free using Intuit’s TurboTax software—over 13 million—than all of TurboTax’s competitors combined. Nonetheless, for over a year, the Commission has been investigating Intuit’s participation in the IRS Free File program, a voluntary federal program created and administered by the IRS to provide eligible taxpayers with a free government-sponsored online tax software option. The IRS’s rules for the program are clear: participants like Intuit have no obligation whatsoever to market the software they donate to the Free File program, and they are free to engage in commercial activity in the same manner as if they did not participate in the program. Notwithstanding these clear regulations, staff’s investigation has focused on whether Intuit has a duty to disclose its Free File program offer on its commercial website, and whether marketing for Intuit’s commercial products “misdirects” customers otherwise eligible for the IRS Free File program to TurboTax.

Intuit has cooperated extensively with staff’s investigation, providing over forty pages of interrogatory responses and 500,000 pages of documents in response to the FTC’s first CID, issued on June 28, 2019. The voluminous information Intuit established that an enforcement action would be unwarranted, and that Intuit was at all times clear and fair with its customers. Instead of closing the investigation, as the facts, law, and an independent investigation

commissioned by the IRS compel, the FTC issued a second CID on May 18, 2020 that expands the investigation into a full-fledged audit of Intuit's business practices, Intuit's relationship with the IRS, and even whether Intuit has ever sought or claimed a tax deduction for its charitable giving.

The new CID is incredibly burdensome. Counting subparts, it includes 166 interrogatories. There are broad document demands. And notwithstanding the new and unanticipated stresses of work in the COVID-19 environment, the staff seeks investigational hearings with at least eight different Intuit employees, and the CID includes a sixteen-topic corporate hearing notice that will require at least *five* Intuit employees to testify over several days. All this on top of the substantial burdens associated with Intuit's full compliance with the first CID, and all because Intuit had the temerity to participate in a voluntary federal program where it donated software to low and middle income taxpayers and adhered to the IRS's rules in doing so. Truly, no good deed goes unpunished.

Even though it believes the CID unwarranted in scope and substance, Intuit has agreed to comply with nearly all of it because the evidence—when objectively considered—strongly exonerates it from any alleged wrongdoing.

In this Petition, however, Intuit respectfully requests only minor modifications to its corporate investigational hearing. *First*, that the Commission eliminate topic 12 of the investigational hearing, which as modified by FTC staff seeks information about the “public relations benefits,” and “tax deductions or other tax benefits sought, claimed or received by the Company for offering its Free File Product.” Plainly, even under the FTC's broad authority under Section 6 of the FTC Act, this topic has no bearing whatsoever on whether Intuit engaged

in unfair or deceptive conduct. It also potentially seeks to impose an undue burden on Intuit's constitutionally-protected right to petition the government.

Second, Intuit requests that the Commission eliminate topic 16, which requires testimony on 211 interrogatory responses Intuit has or will provide to the staff. While the staff has proposed narrowing the request to fewer interrogatories, even as modified the topic remains incredibly overbroad and impermissibly intrudes on privileged communications.

After multiple, good-faith attempts at resolution, the staff has refused to withdraw the topics at issue, and Intuit is left with no recourse but to seek the Commission's assistance to limit the scope of the testimony sought. This motion is timely brought pursuant to 16 C.F.R. § 2.10 because staff agreed to extend the deadline for a Petition to quash to July 7, 2020.

BACKGROUND

A. Intuit's Free Products

Intuit currently offers two free tax filing solutions to customers: IRS Free File Program Delivered by TurboTax, which as the name suggests, is provided through the IRS; and TurboTax Free Edition, a completely free product offered on Intuit's commercial website. Although both products provide for genuinely free tax filing, they have a different genesis and serve different segments of customers.

In 2002, the IRS established the Free File program, a public-private partnership between the agency and a consortium of online tax companies to offer free tax-filing software to a segment of the American public. *See* 2002 Memorandum of Understanding ("MOU") § I (Oct. 30, 2002), <https://www.irs.gov/pub/irs-utl/2002-free-online-electronic-tax-filing-agreement.pdf>. The partnership ensured "higher quality" tax services than the federal government could provide on its own, "maximize[d] consumer choice" in light of the many participating companies, and

“promote[d] competition” for free tax-preparation services, *id.* § 2, while allowing the IRS to stay out of the tax software business, as it wished.

Pursuant to the terms of the agreement, the IRS assumes *sole responsibility* for “[p]romotion of the [Free File program]” and Intuit and program participants have no obligation to advertise or market it. *Id.* § VI.B. The IRS sets the criteria for eligibility for the program and each FFA member’s Free File offering has its own eligibility criteria, *see IRS, Free File: Do Your Federal Taxes for Free* (last accessed July 4, 2020), <https://www.irs.gov/filing/free-file-do-your-federal-taxes-for-free>, structured so that the product can be used by at least 10% but no more than 50% of taxpayers eligible for Free File, *see Byers v. Intuit, Inc.*, 600 F.3d 286, 289–90 (3d Cir. 2010). To use Intuit’s Free File software in the 2020 filing season, a taxpayer must have an Adjusted Gross Income (“AGI”) of \$36,000 or less, be on active military duty with an AGI of \$69,000 or less, or be eligible for the Earned Income Tax Credit.

Although participants have no obligation to advertise the program, *see IRS, Independent Assessment of the Free File Program - Appendix A: The Economics of IRS Free File 35* (Sept. 13, 2019), <https://www.irs.gov/pub/newsroom/02-appendix-a-economics-of-irs-free-file.pdf> (explaining that “the MOU puts the burden of advertising on the IRS alone”), Intuit has focused in recent years on growing Free File usage. During the 2019 filing season, Intuit invested \$1.5 million in its Tax Time Allies campaign to broadly promote no-cost tax filing services, including Free File, which resulted in more than 700,000 taxpayers clicking on ads that directed them to the IRS’s Free File homepage. As in the past, moreover, Intuit sent former Free File customers *up to seven* email reminders inviting them to again use Intuit’s Free File product, far exceeding the *one* required by the MOU, *see Eighth MOU* § 4.32.4 (Oct. 31, 2018), <https://www.irs.gov/pub/irsutl/Eight%20Free%20File%20MOU.pdf>. Approximately 230,000

taxpayers clicked on those email reminders, bringing them directly to the landing page for Intuit’s Free File offering. In the end, approximately 1.2 million Americans filed their 2018 taxes using Intuit’s Free File product, accounting for more than 50 percent of *all* Free File use, *see* IRS, Independent Assessment of the Free File Program 26 (Oct. 3, 2019), https://www.irs.gov/pub/newsroom/01_free-file-programassessment-100319.pdf (“IRS Report”).

The Free File program allows access to the free tax software contributed by participating companies through a “website hosted and maintained by the IRS.” Eighth MOU § 1.17. This system makes sense. The software of each participating company has its own eligibility criteria, such as based on age, income, or state residency. Accessing the program through the IRS page allows eligible taxpayers to “review each company offer or . . . use a ‘Lookup’ tool that will find the software for which they are eligible.” IRS, *Tax Time Guide: Try Money-Saving IRS Free File*, IR-2018-38 (Mar. 1, 2018), <https://www.irs.gov/newsroom/tax-time-guide-try-money-saving-irs-free-file>. Agency press releases regarding the Free File program have thus advised that “taxpayers can ONLY access Free File sites through IRS.gov.” IRS Report at 84.

Separate from its participation in the Free File program, Intuit offers TurboTax Free Edition on its commercial website. Free Edition may be used for free by any taxpayer, no matter her income, so long as she has a “tax return[] that can be filed on Form 1040 without any attached schedules.” *E.g.*, TurboTax Help, *Is TurboTax Free Edition Right for Me?*, Intuit TurboTax (May 24, 2019), <https://ttlc.intuit.com/community/choosing-a-product/help/is-turbotax-free-edition-right-for-me/00/26236>. According to government estimates, nearly 50 million Americans—approximately one third of all taxpayers—file tax returns using only Form 1040 and could therefore file for free using Free Edition. *See* National Taxpayer Advocate, *2018 Annual Report to Congress* ix (2019), <https://taxpayeradvocate.irs.gov/Media/Default/>

Documents/2018-ARC/ARC18_Volume1.pdf (“[I]t is estimated [that] approximately 47 million taxpayers (32 percent) [can] meet their filing requirements [using only Form 1040].”). Over 12 million taxpayers did just that last year.

The TurboTax commercial site features important services that cannot be offered through the Free File program due to the IRS’s rules. For example, Community (formerly known as AnswerXchange), TurboTax’s free and widely-used question-and-answer service, cannot be offered on the Free File platform because it could expose Free Filers to marketing or sales activity—or links to such activity—in violation of the FFA’s MOU with the IRS. *See* Eighth MOU § 4.32.5 (generally prohibiting all “marketing, soliciting, sales or selling activity, or electronic links to such activity” in the Free File program). The same is true of TurboTax Live, which offers live, line-by-line tax advice and expert review by credentialed Certified Public Accountants and tax attorneys.

B. ProPublica’s Accusations

In April and May 2019, ProPublica published a number of stories critical of Intuit. Claiming without basis that tax-preparation software companies “like Intuit” “would rather [consumers] didn’t know” about the Free File program, ProPublica complained that Intuit did not direct Free File-eligible taxpayers on its commercial website to its Free File product. J. Elliot & L. Waldron, *Here’s How TurboTax Just Tricked You Into Paying to File Your Taxes*, ProPublica (Apr. 22, 2019), <https://www.propublica.org/article/turbotax-just-tricked-you-into-paying-to-file-your-taxes>. And it criticized Intuit for promoting TurboTax Free Edition, which it panned (without basis) as “only free for people with the simplest taxes,” *id.*, without mentioning the product’s eligibility criteria or acknowledging that it covers—for free—the tax needs of nearly

one-third of all American taxpayers or that more taxpayers use it to file for free than all other methods of free tax preparation combined.

In short order, Intuit received notice that the FTC had begun investigating whether the company had engaged in, or was engaged in, violations of Section 5 of the FTC Act “by misdirecting eligible taxpayers away from the Internal Revenue Service’s Free File Program.” *See* Letter from Tejasvi Srimushnam to Intuit Inc. dated May 9, 2019. Notably, Intuit is unaware of any customer who had complained to the FTC about these issues before that date.

C. The FTC Staff’s Expanding Investigation of Intuit

After receiving notice of the FTC’s investigation on May 9, 2019, Intuit received the Commission’s first Civil Investigative Demand (the “First CID”) on June 28, 2019. The First CID included 45 separate interrogatories, counting subparts, along with 24 document requests (again, counting subparts). Although the Applicable Time Period was stated as June 24, 2016 to the date of full and complete compliance with the CID, 16 of the interrogatory requests and 13 of the document requests requested information or documents reaching back to 2013, more than doubling the time period implicated.

Intuit engaged in good-faith negotiations with FTC staff regarding the scope of the First CID, including an in-person meeting with the staff on July 18, 2019 and multiple phone conversations. Intuit provided proposed search terms and custodians for all document requests (including document collections for 27 custodians across the company), which the staff reviewed, provided modifications to, and approved. Pursuant to these negotiations, the FTC modified the scope of the First CID in a letter dated August 30, 2019. Intuit made nine productions in response to the First CID, on July 29, July 31, September 4, September 13, October 11, November 21, and December 23, 2019; and on January 23 and March 27, 2020.

REDACTED PUBLIC VERSION

These productions included more than 40 pages of interrogatory responses and more than 500,000 pages of documents.

On May 19, 2020, the FTC issued a second CID (the “Second CID”) to Intuit. The Second CID included 166 interrogatory requests, counting subparts, and six new document requests. Additionally, the Second CID requested that Intuit designate a corporate representative to give testimony on 16 broad topics, which together encompass virtually every part of Intuit’s TurboTax business. The FTC also issued 11 individual CIDs to Intuit employees for investigational hearings, each of which included 11 identical topics of inquiry.

Intuit again negotiated in good faith with staff regarding the scope of the CIDs’ requests. Intuit met and conferred three times with the staff, on May 27, 2020, June 4, 2020, and June 17, 2020. In response to various concerns raised by Intuit, including that it called for the same information provided in response to the First CID, the staff partially modified the scope of the Second CID on June 10, 2020. On June 15, 2020, staff further modified the Second CID, agreeing to accept a declaration in lieu of oral testimony for two of the individual CIDs, postpone a decision about how to proceed with a third, and to modify the scope of certain topics for Intuit’s corporate designees and of a number of interrogatories and requests for documents.

Since the June 15, 2020 letter, Intuit and the staff have engaged in further negotiation over email, including, as relevant here, on topics 12 and 16. On June 25, 2020, staff proposed changing topic 12 to seek testimony about:

the Company’s involvement in Free File, Inc. (including financial, monetary, and public relations benefits) in regard to:

- Preventing, avoiding, or limiting state or federal government “encroachment” into the online tax preparation market. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

REDACTED PUBLIC VERSION

[REDACTED]
[REDACTED]
[REDACTED] and

- Tax deductions or other tax benefits sought, claimed, or received by the Company for offering its Free File Product.

The staff proposed narrowing topic 16 from “[e]ach of the Company’s answers to Interrogatories in response to this CID and the CID issued July 1, 2019,” to:

The substance, meaning of, and factual basis for the Company’s answers and responses to the following Interrogatories in this CID and the prior CID issued July 1, 2019:

- CID 1: Interrogatories 2(a), 3(a), 3(b), 4(a), 5(a), and 5(e)
- CID 2: Interrogatories 1, 2, 4(a)–4(e), 13, 21, 22, and 25.

Intuit also requested that the individual investigational hearings not be scheduled during the first two weeks of September, when schools will be starting, considering the unusual difficulties associated with beginning the school year during a pandemic. Staff responded that they would agree to Intuit’s request only if Intuit accepted the proposed modifications and did not pursue relief with the Commission. Intuit explained in response that its reasonable request for a two-week pause in investigational hearings because of a global pandemic should not be used to coerce agreement. On July 6, 2020, staff agreed to Intuit’s request to start the investigational hearings on September 14, but refused to withdraw the topics at issue. The staff did say it would withdraw topic 12 but only if Intuit stipulated “that the free file offering is an Intuit product that Intuit benefits from offering.” As Intuit explained in response, Intuit would not so stipulate because the proposed stipulation was counterfactual.¹

¹ The staff’s request for an inaccurate one-sentence stipulation in return for withdrawing the topic illustrates that the topic serves no valid investigative purpose.

ARGUMENT

The Commission should quash topics 12 and 16 of the investigational hearing request in the Second CID. Topic 12 is not relevant to the FTC’s investigation and impermissibly burdens Intuit’s protected First Amendment conduct. Topic 16 is overbroad and unduly burdensome, and impermissibly seeks testimony as to privileged and protected information. Intuit has brought these concerns to, and sought to negotiate in good faith with, FTC staff, but those efforts were unsuccessful.

I. TOPIC 12 IS IRRELEVANT AND VIOLATES INTUIT’S FIRST AMENDMENT RIGHTS

First, the Commission should limit the CID to exclude testimony on topic 12, because it is irrelevant and it impermissibly intrudes on Intuit’s protected First Amendment activity.

A. Topic 12 Has No Relation To The Conduct Under Investigation

Topic 12, both as written and with the staff’s proposed modification, is irrelevant. This is because neither the generalized “benefit” Intuit derives from Free File, nor the slightly more specific “public relations” benefit or tax benefit Intuit may (or may not) have received from its participation in the Free File program and charitable donation of its TurboTax software to the IRS, are topics relevant to the FTC’s inquiry into whether Intuit “has engaged in deceptive or unfair acts or practices with respect to the marketing or advertising of online tax preparation products.”

The FTC’s “[s]ubpoena enforcement power is not limitless[.]” *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001). Indeed, the Supreme Court has recognized that “matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). One such limitation is that the information sought by the FTC must be “reasonably relevant” to

its investigation. *FTC v. Texaco*, 555 F.2d 862, 872 (D.C. Cir. 1977); *see also FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1977) (“The test for the relevancy of an administrative subpoena . . . is whether the information sought is ‘reasonably relevant’ to the agency’s inquiry.”). That is to say, although “law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest,” *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1030 (D.C. Cir. 1978) (quoting *Morton Salt Co.*, 338 U.S. at 652), the information sought must be “adequate, but not excessive, for the purposes of the relevant inquiry,” *id.* (quoting *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946)). That is not the case here, and the Commission should therefore exclude testimony sought on topic 12.

Even with the staff’s proposed modification, topic 12 simply is not “reasonably relevant” to the FTC’s investigation. Information about “public relations” benefits Intuit purportedly receives from its participation in the Free File program, or about any alleged benefit Intuit derives from the program in terms of so-called government “encroachment,”² say nothing about whether Intuit has engaged in deceptive or unfair trade practices *with respect to the marketing or advertising* of its online tax products. Likewise, whether Intuit sought or received a tax benefit from donations of software to the IRS has no connection to any issue under investigation.

It is telling that despite Intuit’s repeated requests to the staff to articulate any basis for seeking this information, they have been unwilling to do so. Instead, staff has either asked Intuit

² The IRS has “no interest in entering the market” because doing so is not “an economically feasible option for the agency,” even in the absence of the Free File program. IRS Report App. A, at 26. Intuit is unaware of any effort by staff to coordinate (or consult) with the IRS, notwithstanding the latter’s oversight of the Free File program and its completed investigation of Propublica’s allegations, and notwithstanding 16 C.F.R. § 4.6, which states that “[i]t is the policy of the Commission to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions.”

to stipulate—counterfactually—that Intuit obtains unspecified “benefits” from the program, or responded with bromides like, “I think we get to ask about that,” or “we may just have to agree to disagree on that one.” This is insufficient. Because it lacks any connection to the investigation, topic 12 should be quashed. *See, e.g., FTC v. Turner*, 609 F.2d 743, 746 (5th Cir. 1980) (affirming district court’s decision not to enforce FTC subpoena seeking information about respondent’s financial assets when such information was irrelevant to the FTC’s investigation).

B. Topic 12 Impermissibly Intrudes on Protected First Amendment Activity

In addition, the FTC’s proposed modification to topic 12 seeks testimony that impermissibly intrudes on Intuit’s First Amendment-protected conduct.

It is axiomatic that “[t]he First Amendment protects political association as well as political expression.” *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). “[T]he government must justify its[elf] . . . when governmental action ‘would have the practical effect of ‘discouraging’ the exercise of constitutionally protected political rights.’” *Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2009) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). That includes when the government compels disclosure of political activity, which can have a chilling effect on protected First Amendment speech. *See id.* at 1139–40. A party can accordingly assert a First Amendment privilege against discovery requests that seek such disclosures. *See id.* at 1140.

In analyzing an assertion of First Amendment privilege, courts first look to whether the party asserting the privilege has made a *prima facie* case that enforcing the request would have a chilling effect on the party’s First Amendment rights, before shifting the burden to the government to show that the information sought is rationally related to a compelling government interest and that the discovery sought is the least-restrictive means of obtaining the information. *Perry*, 591 F.3d at 1140. As with every First Amendment analysis, courts “balance the burdens

imposed on individuals and associations against the significance of the . . . interest in disclosure,” *id.* (quoting *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003)). “The party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation.” *Id.* at 1141.

Intuit has clearly made the requisite *prima facie* showing. The First Amendment guarantees Intuit “the right . . . to petition the Government for a redress of grievances.” U.S. Const. amend. I. This right certainly extends to petitioning the government with regard to taxes and tax policy. *Cf. Campbell v. PMI Food Equip. Group, Inc.*, 509 F.3d 776, 790 (6th Cir. 2007). Nor could there be any question that the CID, if enforced, would burden Intuit’s exercise of that right. *See, e.g., AFL-CIO*, 333 F.3d at 175 (noting that “[t]he Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation” (citations omitted)); *see also Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971) (“[W]hen a State attempts to make inquiries about a person’s beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.” (citations omitted)).

In contrast, staff cannot rebut Intuit’s *prima facie* case. In seeking information from Intuit about the tax benefits it sought, claimed, or received for taking part in the Free File Program, the FTC is asking for testimony on Intuit’s protected activity of petitioning the government for tax benefits, presumably because such protected activity will somehow influence the staff’s decision whether or not to recommend an enforcement action. This creates precisely the type of chilling effect the First Amendment privilege is intended to protect, by bringing additional risks and scrutiny to Intuit for engaging in protected conduct. And the staff has so far

not provided any rationale for why such sought or obtained tax benefits would be relevant, let alone *highly* relevant, to its investigation into Intuit's marketing and advertising practices for its online tax software. Thus, at the very least, the FTC should quash this part of topic 12 as violating the First Amendment privilege.

II. TOPIC 16 OF THE INVESTIGATIONAL HEARING REQUEST INTRUDES ON ATTORNEY-CLIENT COMMUNICATIONS AND IS OVERBROAD

Next, topic 16 should be quashed because it intrudes impermissibly on attorney-client communications and attorney work product, and because it seeks testimony that is overbroad and unduly burdensome to Intuit.

A. Topic 16 Seeks Privileged Communications

“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Both FTC regulations, 16 C.F.R. § 2.7(a)(4), and the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26(b)(1), recognize that attorney-client communications can accordingly be withheld from discovery.

Topic 16 seeks testimony on “[t]he substance and meaning of” Intuit's answer to the FTC's interrogatories in the two CIDs, “as well as the factual basis for such answers.” Intuit's interrogatory responses were prepared with the assistance of undersigned counsel, and providing testimony on “[t]he substance and meaning of[,] . . . as well as the factual basis for” the company's answers would implicate privileged attorney-client communications made in the process of preparing those responses. At least one court has found a Rule 30(b)(6) request for deposition on the topic of a party's responses to interrogatories unenforceable precisely for that reason. *See Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 WL 116082, at *9

(N.D. Ill. Jan. 24, 2000) (noting that such a “proposed area of inquiry improperly trespasses into areas of work product and attorney-client privilege” and granting motion for a protective order).

Under staff’s proposed modification, topic 16 would cover only a subset of interrogatories. However, the privilege applies equally to a subset of the interrogatories as it applies to the whole—the interrogatories the FTC focuses on in its proposal were drafted with the advice of counsel, and such communications are privileged. The Commission should accordingly quash the CID to exclude any testimony on topic 16.

B. Topic 16 is Overbroad and Unduly Burdensome

Topic 16 is also overbroad and unduly burdensome because it does not identify with any reasonable particularity which information in Intuit’s answers to the FTC’s interrogatories the company should prepare to testify on. A CID is unenforceable if “the demand is unduly burdensome or unreasonably broad.” *Texaco*, 555 F.2d at 882. While “[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest,” courts have modified or quashed investigative subpoenas that “unduly disrupt or seriously hinder normal operations of a business.” *Id.* The broad scope of topic 16 creates exactly such a situation, by requiring Intuit to expend significant resources to prepare multiple employees to serve as corporate representative on a topic that essentially covers every aspect of Intuit’s online marketing and advertising.

Topic 16 asks for testimony as to “[t]he substance and meaning of each of the Company’s answers to Interrogatories in response to this CID and the CID issued July 1, 2019, as well as the factual basis for such answers.” Between the two CIDs, there are, counting subparts, 211 interrogatories covered by this topic, ranging across the entire spectrum of Intuit’s online products and covering all aspects of the company’s marketing and advertising strategy. As Intuit

explained in meet-and-confer negotiations, no person could educate themselves across that scope of information *and* be able to speak knowledgeably about such a breadth of content.

Indeed, courts have rejected as overbroad Rule 30(b)(6) topics indistinguishable from topic 16, because they lack the requisite particularity. *See, e.g., Integra Bank Corp. v. Fidelity & Deposit Co. of Maryland*, No. 3-11-cv-00019-RLY-WGH, 2014 WL 109105, at *3 (S.D. Ind. Jan. 10, 2014) (listing cases) (overruling objections to protective order issued in response to 30(b)(6) topic calling for testimony on responses to 24 interrogatories). In this case, such an overbroad line of inquiry would also be unduly burdensome to Intuit, by requiring it to put forward somewhere between eight and ten witnesses to satisfactorily cover the topics of both CIDs' interrogatories.

Even with staff's proposed modification, topic 16 suffers from the same defects. Though restricted to a smaller subset of interrogatories, topic 16 still lacks reasonable particularity because it does not identify with specificity the information sought. The modification would also still result in undue burden, by requiring Intuit to prepare multiple corporate designees on a wide range of topics. As modified, the topic still covers 30 interrogatories, including subparts, ranging from Intuit's use of subject advertising keywords; to web traffic on the TurboTax website; design of, features, and marketing for all of Intuit's TurboTax Products; and even Intuit's position in related private litigation.

As Intuit has explained to the staff, if it wishes to inquire about Intuit's interrogatory responses, it may do so during the individual investigative hearings. It does not need a separate Investigative Hearing centered around those responses.

CONCLUSION

Intuit respectfully requests that its Petition be granted, and the Commission should limit its Second CID in the manner described above.

Respectfully submitted,

Dated: July 7, 2020

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MEET AND CONFER STATEMENT

Pursuant to 16 C.F.R. § 2.7(k), counsel for petitioner conferred with counsel for the Commission on several occasions in a good-faith effort to resolve the issues relating to the scope of investigational hearings topics in the Second CID raised in this petition. The meetings took place by telephone between D. Reed Freeman, David Gringer, Blake Roberts, and Ben Chapin (counsel for petitioner) and Ian Barlow, Frances Kern, James Evans, Rebecca Plett, and/or Bryan Cowell (counsel for the FTC) on May 27, 2020 at approximately 10:00 AM ET, June 4, 2020 at approximately 09:00 AM ET, and June 17, 2020 at approximately 01:00 PM ET. Counsel for petitioner and for the FTC also had extensive email communications during that period, and up to July 6, 2020. Although staff agreed to several modifications of the Second CID, the parties were not able to reach an agreement as to Topic 12 and Topic 16 of the investigational hearing demand of Intuit. The staff has not explained to counsel for petitioner why it was unwilling to withdraw the topics.

David Gringer

David Gringer

CERTIFICATE OF SERVICE

I hereby certify that, on July 7, 2020, the foregoing petition to quash was served by electronic mail to the following:

Office of the Secretary
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Washington, D.C. 20580
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Acting Secretary April Tabor
600 Pennsylvania Ave. NW
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David Gringer

David Gringer

EXHIBIT 6

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

COMMISSIONERS: **Joseph J. Simons, Chairman**
 Noah Joshua Phillips
 Rohit Chopra
 Rebecca Kelly Slaughter
 Christine S. Wilson

In the Matter of

**CIVIL INVESTIGATIVE DEMAND TO
INTUIT INC.,
DATED MAY 18, 2020.**

)
)
)
) **File No. 192-3119**
)
)
)

**ORDER DENYING PETITION TO QUASH IN PART
CIVIL INVESTIGATIVE DEMAND**

By PHILLIPS, Commissioner:

Intuit Inc. petitions the Commission to quash in part a Civil Investigative Demand (CID) issued on May 18, 2020 (and served on Intuit on May 19, 2020), in connection with the Commission’s investigation into whether Intuit has engaged in deceptive or unfair acts or practices with respect to the marketing or advertising of online tax preparation products, in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*¹

Specifically, Intuit requests the elimination of two of the topics designated in the CID for corporate investigational hearing testimony. *Petition*, at 2-3. Intuit seeks elimination of IH Topic 12, which seeks information about the benefits that Intuit has sought, claimed, or received from offering a free tax filing product as part of the “Free File Program” administered by the Internal Revenue Service (IRS). *Id.* at 2. It also seeks elimination of IH Topic 16, which seeks testimony about Intuit’s responses to the interrogatories served on it in both the May 18, 2020 CID and a

¹ The Commission initiated the Intuit investigation pursuant to a resolution to determine whether unnamed parties have been or are engaged in deceptive or unfair Internet-related practices, in violation of Sections 5 or 12 of the FTC Act, 15 U.S.C. §§ 45, 52. *See Resolution Directing Use of Compulsory Process in Non-Public Investigation of Unnamed Persons, Partnerships or Corporations Engaged in the Deceptive or Unfair Use of E-Mail, Metatags, Computer Code or Programs, or Deceptive or Unfair Practices Involving Internet-Related Goods or Services*, File No. 9923259 (Aug. 1, 2016). The investigation also seeks to determine whether Commission action to obtain equitable monetary relief for injury to consumers or others would be in the public interest. *Id.*

prior CID issued on July 1, 2019. *Id.* at 3. For the reasons set forth below, we deny Intuit’s petition.

I. Background

Intuit offers two products that provide consumers tax-filing services for free—to those individuals who meet certain eligibility requirements. *Petition*, at 3. The first product is Intuit’s “IRS Free File Program Delivered by TurboTax.” *Id.* at 3-5. That product is offered as a result of Intuit’s participation, along with other electronic tax preparation and filing companies, in an IRS program to deliver free online tax software to low and middle-income consumers. *Id.* at 1-2. Intuit offers its Free File product via freefile.intuit.com. The second free product is Intuit’s “TurboTax Free Edition.” *Petition*, at 5-6. Intuit offers that product via its primary website, turbotax.intuit.com.

In May 2019, the Commission initiated an investigation into whether Intuit had engaged, or was engaging, in violations of the FTC Act. *Petition*, at 7. On July 1, 2019, the Commission issued the first CID to Intuit, seeking the production of documents and responses to interrogatories. On May 18, 2020, the Commission issued a second CID to Intuit seeking further documents and responses to interrogatories and requiring Intuit to designate a corporate representative to testify in an investigational hearing (IH) set for July 14, 2020. The second CID was modified several times to accommodate Intuit’s concerns and schedule. The most recent modification, on July 8, 2020, affected, among other things, the scope of IH Topics 12 and 16—the subject of Intuit’s current petition. *See Letter from Lois C. Greisman to Intuit Inc. c/o D. Reed Freeman, Jr.* (dated July 8, 2020).

As modified, IH Topic 12 concerns Intuit’s involvement in the IRS Free File program, specifically: (a) preventing, avoiding, or limiting state or federal government “encroachment” into the online tax preparation market; and (b) the tax deductions or other tax benefits that Intuit has sought, claimed, or received for offering its Free File product. *Id.* at 2.

As modified, IH Topic 16 concerns the “substance, meaning of, and factual basis for” a subset of Intuit’s responses to the interrogatories served on it in the July 1, 2019 CID (namely, Interrogatory No. 2(a), 3(a)-(b), 4(a), 5(a), 5(e)), and the May 18, 2020 CID (Interrogatory No. 1, 2, 4(a)-(e), 13, 21, 22, 25). *Id.* at 3.

On July 7, 2020—the deadline date for challenging IH Topics 12 and 16, *see Letter from Lois C. Greisman to Intuit Inc. c/o D. Reed Freeman, Jr.* (dated June 29, 2020), at 1—Intuit transmitted by email to the Commission’s Acting Secretary its current petition to quash. *See Letter from David Gringer to April Tabor* (dated July 7, 2020). Intuit requested that the Commission “afford [its cover] letter, the accompanying Petition, and any written order in response with confidential treatment pursuant to 16 C.F.R. § 4.9(c).” *Id.* at 1. Intuit did not submit with its initial transmission a redacted public version of the petition that it sought to be treated as confidential, as required by Rule 4.2(d)(4) of our Rules of Practice, 16 C.F.R. § 4.2(d)(4). The following day, July 8, pursuant to the Acting Secretary’s notice of deficiency, Intuit submitted a redacted public version of its petition to quash.

II. Analysis

A. Timeliness of Intuit's Petition

On July 7, 2020, Intuit attempted to file its current petition. Intuit sought confidential treatment of the petition pursuant to 16 C.F.R. § 4.9.² Its attempted filing was rejected, however, because Intuit had failed to include a redacted version of the petition for public disclosure—as required by Rule 4.2 of our Rules of Practice. That rule provides that when a petition to quash is filed as confidential, “it will be rejected for filing pursuant to § 4.2(g), *and will not stay compliance* with any applicable obligation imposed by the Commission or the Commission staff, unless the filer simultaneously files * * * [a] redacted public version of the document that is clearly labeled ‘Public.’” 16 C.F.R. § 4.2(d)(4)(ii) (emphasis added).

Intuit attempted to cure this deficiency, by submitting a redacted public version, but it did so on July 8, the day after the deadline for filing had expired. Intuit's petition to quash is, therefore, procedurally untimely. *In the Matter of Petition to Limit or Quash Subpoena Duces Tecum Dated March 10, 2011 Directed to W.L. Gore & Associates, Inc.*, 151 F.T.C. 687, 689, 2011 FTC LEXIS 180, *4 (May 23, 2011).

Intuit's claim that its failure initially to include a redacted public version is justified by its request for confidential treatment of the entire petition, including any information that would identify the petitioner, *see Email from David Gringer to April Tabor* (dated July 8, 2020 at 9:26 AM), is contrary to our rules and precedent. Rule 4.2(d)(4) applies to “petitions labeled ‘confidential’ * * * [where the accompanying public versions] redact the identity of the petitioner or matter name, or lack an accompanying public redacted version.” *W.L. Gore*, 151 F.T.C. at 689, 2011 FTC LEXIS 180 at *5. Indeed, “the identity of the petitioner and the matter name * * * *may not be redacted.*” *Id.* n.6 (emphasis added).

Notwithstanding the untimeliness of Intuit's petition, the Commission, through the Acting Secretary, exercised its discretion to recognize documents filed on July 8th as timely. *See Email from April Tabor to David Gringer* (dated July 8, 2020 at 10:20 AM). For the reasons stated below, we conclude that it should be denied on the merits.

B. IH Topic 12

1. Relevance

Intuit first challenges IH Topic 12 on relevance grounds. *Petition*, at 10-12. It asserts that, even as modified, IH Topic 12 “simply is not ‘reasonably relevant’ to the FTC's investigation.” *Id.* at 11. According to Intuit, information about the benefits that Intuit may have sought, claimed

² Pursuant to authority delegated by the Commission, the Commission's Principal Deputy General Counsel addressed Intuit's request for confidential treatment in two separate letters, granting in part and denying in part Intuit's request for confidential treatment of the redacted material. *See Letter from J. Reilly Dolan to David Gringer, Esq.* (dated July 16, 2020); *Letter from J. Reilly Dolan to David Gringer, Esq.* (dated July 22, 2020).

or received from its participation in the IRS Free File program, including limiting governmental encroachment into its market, “say nothing about whether Intuit has engaged in deceptive or unfair trade practices *with respect to the marketing or advertising* of its online tax products.” *Id.* Although Intuit is correct that the investigation, at its core, seeks to determine whether its advertising and marketing practices have been deceptive or unfair, Intuit’s conception of relevance to that investigation is unduly limited.

In *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the Supreme Court held that an FTC compulsory process demand for information or documents is permissible “if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *Id.* at 652. Courts have long confirmed, moreover, that an FTC investigation is lawful where the Commission seeks to learn whether there is *reason to believe* that the law has been violated and, if so, whether issuance of a complaint would be in the public interest. *See FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*) (citing *Morton Salt Co.*, 338 U.S. at 642-43). The standard for the relevance of administrative compulsory process is, therefore, “broader and more relaxed” than would be in an adjudicatory discovery demand. *In the Matters of Civil Investigative Demand to Johnson & Johnson Dated August 19, 2019, and Subpoena Duces Tecum to Johnson & Johnson Dated August 19, 2019*, FTC File No. 191-0152, 2019 FTC LEXIS 95 (Oct. 18, 2019), at *7 (citing *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992)). Indeed, the Commission’s compulsory process need not be limited to information necessary to prove a specific charge; it can demand, instead, any documents or information “relevant to the investigation—the boundary of which may be defined quite generally” by the Commission. *Invention Submission*, 965 F.2d at 1090; *see Johnson & Johnson, supra*, 2019 FTC LEXIS 95, at *8.

IH Topic 12, as modified, easily meets those relaxed standards of relevance. Intuit’s participation in the IRS Free File program, as part of its efforts to prevent or limit the government’s “encroachment” into the online tax preparation market, is highly relevant, for example, to understanding the market relationship between Intuit’s participation in the IRS Free File Program, Intuit’s other free product, and Intuit’s paid tax preparation products. The more consumers that the IRS program draws away from, say, Intuit’s “TurboTax Free Edition,” the stronger are Intuit’s economic incentives to lure those consumers to its own products—whether free or not—by means of deceptive or unfair practices. To be sure, evidence of “intent” is not required for a deception or unfairness violation under the FTC Act. *See, e.g., FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977); *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976); *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968). But such evidence is undoubtedly “relevant to the proper scope of the remedial order” that the Commission may seek if its investigation results in the filing or issuance of a complaint against Intuit. *Chrysler Corp.*, 561 F.2d at 363. For example, such evidence would support a remedial order that Intuit affirmatively disclose the availability of its Free File product to its other customers who otherwise would be eligible for that program.

Likewise relevant is the information regarding Intuit’s tax benefits from participating in the IRS Free File program. In its discussions with the Commission staff, Intuit has raised two possible defenses to a potential Commission complaint that would implicate the tax benefits it

may have received. First, Intuit has claimed that its participation in the IRS program is charitable in nature, and that the product that Intuit administers in that program—the IRS Free File Program Delivered by TurboTax—is not owned by Intuit. Any tax benefits that Intuit claims or receives from participating in that program is likely to shed light on that claim. Second, Intuit has invoked the doctrine of derivative sovereign immunity as a possible defense, which would require Intuit to establish—as a factual predicate for that doctrine—a valid contract between Intuit and the IRS, including mutual consideration. Any Intuit tax benefits are plainly relevant to the question whether such a contractual relationship in fact exists.

Intuit’s tax benefits, if any, are also relevant to whether Intuit’s conduct is unfair. An act or practice is unfair under the FTC Act if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” 15 U.S.C. § 45(n); *see, e.g., FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010). The tax benefits that Intuit may have gained from participating in the IRS Free File program—while at the same time offering its other products, both free and paid—are relevant, in the unfairness analysis, to understanding the costs and countervailing benefits to consumers or to competition. They are also relevant to any remedy that the Commission may seek if a violation is proven. *See FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 299 (D. Mass. 2008) (“The potential costs of the proposed remedy on the parties and society in general are balanced against the benefits of avoiding injury to consumers.”).

2. The First Amendment

Intuit asserts that testifying on the issue of whether it has sought, claimed or received any tax benefits for participating in the IRS program would intrude on its First Amendment right against compelled disclosure of political activity. *Petition*, at 12-14. Specifically, it argues that that First Amendment privilege “extends to petitioning the government with regard to taxes and tax policy,” and that IH Topic 12 “creates precisely the type of chilling effect the First Amendment privilege is intended to protect.” *Id.* at 13. We are unconvinced that the testimony sought in the CID would in fact have the chilling effect that Intuit claims. Even if it does, moreover, the testimony is still permissible and the confidentiality safeguards in our statute and Rules of Practice are sufficient to ameliorate any such fears.

As Intuit acknowledges, the party invoking the First Amendment privilege against compelled testimony must first show that enforcing the testimonial demand would have the claimed chilling effect on that party’s First Amendment rights. *Petition*, at 12 (citing *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2009)). Only if that *prima facie* burden is met will the party seeking the testimony be required to articulate a compelling governmental interest that is rationally related to the information that the testimony seeks, and show that the testimony is the least restrictive means of obtaining that information. *Id.* Notably, that “second step of the analysis is meant to make discovery that impacts First Amendment * * * rights available only after careful consideration of the need for such discovery, but not necessarily to preclude it.” *Perry*, 591 F.3d at 1140.

Intuit’s petition does not satisfy those standards. Even assuming that the Commission’s seeking of information about Intuit’s tax benefits somehow implicates a government petitioning

activity,³ Intuit has not presented any evidence that “the CID, if enforced, would burden Intuit’s exercise of that right.” *Petition*, at 13. Nor has it explained how testifying about the tax benefits of the IRS program would chill its future protected activities, including petitioning of the government for like benefits. The cases that Intuit cites to support its otherwise-naked chilling claim are inapposite. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), struck down a bar admission requirement that compelled the disclosure of membership in political parties. *AFL-CIO v. Fed. Election Comm’n*, 333 F.3d 168 (D.C. Cir. 2003), invalidated a regulation that compels the disclosure of a political campaign’s staff, volunteers, and election strategies. Neither case concerned petitioning the government for tax benefits. And both involved the compelled public disclosure of the claimants’ political memberships and associations. It hardly strains the imagination to see how such public disclosure would have a chilling effect on the claimants’ First Amendment political rights.

Here, Intuit has not identified any nexus between the disclosure of a for-profit business’s tax benefits, as part of a *non-public* government investigation, and that business’s willingness to seek future tax benefits. Nor can we detect any. Indeed, it seems to defy common sense that a for-profit business might forgo seeking some (presumably lawful) tax benefits merely out of fear that those benefits may one day be the subject of testimony in a government investigation. We conclude, therefore, that Intuit has failed to carry its *prima facie* burden of showing that testifying on IH Topic 12 would chill its First Amendment rights.

Moreover, as we discussed above, Intuit’s tax benefits information is highly relevant to the Commission’s investigation—specifically, to Intuit’s own purported defenses. Intuit cannot, on the one hand, claim that its participation in the IRS Free File program is purely charitable and derivatively immune while, on the other hand, refusing to supply the information (which only Intuit can supply) that would support or rebut those claims. *See, e.g., P. & B. Marina, Ltd. P’ship v. Logrande*, 136 F.R.D. 50, 61-62 (E.D.N.Y. 1991) (plaintiffs entitled to discovery of information bearing on whether petitioning activities were a sham in response to defendant’s raising the Noerr-Pennington doctrine as a defense). Thus, even if compelled testimony on IH Topic 12 were deemed to have some chilling effect, the testimony is still necessary, and thus permissible, because the information sought is highly relevant to the compelling government interest in law enforcement, and it is the least restrictive means of obtaining that information. *Perry*, 591 F.3d at 1140. We also note that the FTC Act and our Rules of Practice provide Intuit with ample protections against the public disclosure of information obtained via compulsory process. *See, e.g.,* 15 U.S.C. §§ 46(f), 57b-2(b); 16 C.F.R. §§ 2.7(f)(3), 4.10(d)-(g). *See also Perry*, 591 F.3d at 1140 n.6 (“protective order limiting the dissemination of disclosed * * * information may mitigate the chilling effect and could weigh against a showing of [First Amendment] infringement.”).

³ The only case that Intuit cites, without discussion (*Petition*, at 13) for general support of that proposition—*Campbell v. PMI Food Equip. Grp., Inc.*, 509 F.3d 776, 790 (6th Cir. 2007)—expressly declined to decide the issue. *Id.*

C. IH Topic 16

1. Attorney-Client Privilege

Intuit first challenges IH Topic 16 on privilege grounds. It claims that because its interrogatory responses were prepared with the assistance of counsel, providing testimony on the substance, meaning, and factual basis of those responses “would implicate privileged attorney-client communications made in the process of preparing those responses.” *Petition*, at 14. Intuit’s position is unusual: although interrogatory responses are often drafted with the assistance of counsel, “depositions typically provide an opportunity to further probe the facts elicited through interrogatories.” *English v. WMATA*, 323 F.R.D. 1, 26 (D.D.C. 2017); *see, e.g., FDIC v. Giancola*, No. 13-C-3230, 2015 WL 5559804, at *4 (N.D. Ill. Sept. 18, 2015); *FDIC v. Brudnicki*, No. 5:12-CV-00398-RS-GRJ, 2013 WL 5814494, at *3 (N.D. Fla. Oct. 29, 2013).

At any rate, Intuit is mistaken. The attorney-client privilege “only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.” *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). Thus, “an objective fact is not privileged merely because it happened that * * * legal advice was ultimately sought about that fact.” *Intervet, Inc. v. Merial Ltd.*, 256 F.R.D. 229, 232 (D.D.C. 2009). Intuit, having provided responses to the Commission’s CID interrogatories, should reasonably expect to be queried about those responses. A corporate testimonial designee “must testify to both the facts within the knowledge of the business entity and the entity’s opinions and subjective beliefs * * * includ[ing] the entity’s interpretation of events and documents.” *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98-C-3952, 2000 WL 116082, *9 (N.D. Ill. Jan. 24, 2000).

Of course, to the extent that, during its corporate testimony, Intuit’s designee is asked a question that in fact elicits privileged information, Intuit’s counsel “may protect against the disclosure * * * by interposing appropriate objections and giving instructions on a question-by-question basis.” *SEC v. Merkin*, 283 F.R.D. 689, 698 (S.D. Fla. 2012). But the mere existence of such a possibility is no reason to preclude all questioning concerning Intuit’s responses. *See United States v. Matsura*, No. 14-CR-388, 2015 WL 10912346, at *5 (S.D. Cal. July 10, 2015) (withholding privileged information, not quashing entire subpoena request, is proper recourse to address privilege concerns).

Intuit’s citation to *Smithkline Beecham*, *supra*, in support of its position, is misplaced. *See Petition*, at 14. The corporate deposition topic challenged in that case covered the entirety of Smithkline’s responses to interrogatories and requests for production, and Smithkline’s objection to it rested solely on burden, “because it would require having a witness study the vast amount of discovery pertaining to the case.” *Smithkline Beecham*, 2000 WL 116082, at *9. To be sure, the court—noting that “answering requests for production and interrogatories customarily is performed with the assistance of counsel”—stated that “the proposed area of inquiry improperly trespasses into areas of work product and attorney-client privilege.” *Id.* But, contrary to Intuit’s claim, the court did not strike the challenged topic on that basis. Instead, it found the topic notice “[i]n its present form, * * * overbroad, unduly burdensome, and an inefficient means through which to obtain otherwise discoverable information.” *Id.* at *10. Thus, we read that court’s sweeping statement about privilege as mere dicta. At any rate, to the extent that the decision is

read (as Intuit apparently reads it) as holding that potential privilege concerns in corporate testimony about discovery responses justifies categorically striking down the entire inquiry—rather than dealing with privilege claims during the testimony on a question-by-question basis—we disagree with it as contrary to the weight of authority.

2. Overbreadth and Undue Burden

Finally, Intuit claims that IH Topic 16 is overbroad and unduly burdensome. *Petition*, at 15-16. It presses that claim even though the Commission staff already has agreed to reduce the number of interrogatory responses subject to corporate testimony—using Intuit’s own method of counting parts and subparts—from 211 interrogatories to 30. *Id.* at 15, 16. Intuit argues that, even as modified, IH Topic 16 “still lacks reasonable particularity because it does not identify with specificity the information sought,” and would be “requiring Intuit to prepare multiple corporate designees.” *Id.* at 16. We disagree.

Reasonable particularity “merely requires that the requesting party describe topics with enough specificity to enable the responding party to designate and prepare one or more deponents.” *Nippo Corp./Int’l Bridge Corp. v. AMEC Earth & Environmental, Inc.*, No. 09-CV-0956, 2009 WL 4798150, at *3 (E.D. Pa. Dec. 11, 2009); accord *Inline Packaging, LLC v. Graphic Packaging Int’l, Inc.*, No. 15-CV-3183, 2018 WL 9919939, at *8 (D. Minn. Jan. 23, 2018). Intuit fails to point to any specific interrogatory where the language is so lacking in specificity as to make Intuit unable to prepare its corporate designee for testimony. Nor has our own review of the modified interrogatories revealed any such deficiency. For example, Intuit cites as burdensome testimony on “Intuit’s use of subject advertising keywords,” *Petition*, at 16, but the original interrogatory designated only 50 such keywords (out of thousands that Intuit has used), and even that number was later reduced to only 15. See *Letter from Lois C. Greisman to Intuit Inc. c/o D. Reed Freeman, Jr.* (dated June 15, 2020), at 5.

Nor does Intuit’s complaint about having to prepare multiple corporate designees suffice to show undue burden. “Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.” *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). It is to be expected, therefore, that “[i]f a deponent is unable to testify about certain relevant areas of inquiry, the business entity must designate additional parties to satisfy a [corporate testimonial] notice.” *Smithkline Beecham*, 2000 WL 116082, at *8. Indeed, “courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.” *Texaco*, 555 F.2d at 882 (citing cases). Intuit has not shown that its preparation of multiple designees would disrupt its normal business operations, especially as the Commission staff has been receptive to reasonably accommodating the logistical needs of such witnesses. Nor has Intuit shown that the cost of such preparation is too high “relative to the financial positions” of the company—“measured against the public interest of this investigation.” *FTC v. Carter*, 464 F. Supp. 633, 641 (D.D.C. 1979), *aff’d*, 636 F.2d 781 (D.C. Cir. 1980).⁴

⁴ Intuit’s proposal that the Commission staff use the testimony of individual witnesses to obtain the information sought about its corporate interrogatory responses (*Petition*, at 16) is plainly

III. CONCLUSION

For the foregoing reasons, Intuit's petition to quash is denied.

IT IS HEREBY ORDERED THAT Intuit Inc.'s Petition to Quash in Part May 18, 2020 Civil Investigative Demand be, and hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Intuit shall comply in full with the Commission's Civil Investigative Demand no later than Tuesday, September 8, 2020, at 9:00 a.m. (Pacific Time), or at such other date, time, and location as the Commission staff may determine.

By the Commission, Commissioner Slaughter and Commissioner Wilson not participating.



April J. Tabor
Secretary



SEAL:
ISSUED: August 17, 2020

inadequate: Only the testimony of Intuit's corporate designee(s) would bind Intuit itself. *See* 16 C.F.R. § 2.7(h).

EXHIBIT 7

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January 15, 2021

VIA E-MAIL

David Gringer
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david.gringer@wilmerhale.com

Re: *The People of the State of California v. Intuit Inc.*, Los Angeles County Superior Court, Case No. 19CV354178

Dear David:

Below is a summary of the parties' discussion of discovery issues raised by the People, acting by and through the Santa Clara County Counsel, during the January 12, 2021 meet and confer call. Where appropriate, we have also included our post-meeting positions.

1. Extension of Deadlines

Summary: The parties confirmed their agreement to extend the motion to compel deadlines for both parties' recent discovery requests to allow time for the meet and confer and IDC processes.

In the interest of efficiency, the parties also agreed to defer resolution of issues related to the accessibility of Intuit's 2014 and 2015 data until the current stay in the Los Angeles City Attorney (LACA) action is lifted. Intuit noted that the data requested in the two cases may ultimately present different burdens and issues.

2. Intuit's Production of Slack Document

Summary: The People asked whether Intuit's production of Slack documents on December 7, 2020 constituted Intuit's full Slack production in response to all RFPs served by LACA to date, or whether that Slack production was responsive to only a portion of LACA's RFPs. Intuit responded that it is producing Slack documents in response to all LACA RFPs for which Intuit

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and LACA have agreed-upon search terms. Intuit also stated that it expects to complete this Slack production in the next week or two.

3. Intuit's Refusal to Produce Documents in Response to People's RFP No. 2

Summary: The People asked whether it was Intuit's position that the specific topics listed in RFP No. 2 (i.e., the advertising, marketing, design etc. of Free Edition and paid products) are not relevant or discoverable in this case.

Intuit stated that, while it does not contend that the topics identifies in RFP No. 2 are irrelevant, it believes RFP No. 2 is overbroad. Intuit stated that it would consider a narrower request that identifies documents with more specificity, and that it would not withhold documents solely on the basis that it produced them to the FTC.

The People followed up by asking whether it is Intuit's position that it is overly burdensome to identify which of its FTC interrogatory responses relate to the topics set forth in RFP No. 2. Intuit responded in the affirmative, stating that some information in its interrogatory responses is irrelevant, and that it would be burdensome to review the interrogatories because Intuit would have to redact the responses on a line-by-line basis. Intuit further stated that the documents from the FTC investigation are confidential and that production of information to the FTC does not render that information relevant to this action. Intuit did not elaborate the basis for its contention that documents from the FTC investigation are confidential.

Post-Meeting Position: The People will narrow their request in RFP No. 2 to responsive interrogatory responses (together with the corresponding interrogatory requests from the FTC) produced to the FTC in connection with its investigation of Intuit. The People contend that interrogatory responses that were produced in an investigation that overlaps significantly with the Santa Clara County action and that relate to the topics set forth in RFP No. 2 are plainly relevant. Furthermore, the protective order obviates the need for Intuit to review such responses line-by-line for confidentiality.

4. Intuit's Refusal to Produce National Data in Response to People's Interrogatory Nos. 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25

Summary: The People stated their view that national data is relevant to this action for multiple reasons, including (non-exhaustively) to show that consumers were misled by Intuit's practices, to understand and provide context for national data that Intuit cited in its submissions to the court, and to assist the People in understanding and analyzing national data in Intuit's document productions. Intuit responded that the People are only entitled to data about California consumers because data on national consumer activity is irrelevant to the People's claims regarding California consumers. Intuit further stated that the People should narrow their requests or provide a more detailed explanations of the relevance of national data.

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The People asked whether Intuit contends that California consumers saw different advertisements than consumers in other states. Intuit responded in the negative.

Post-Meeting Position: If Intuit refuses to produce this data, the parties are at an impasse and the People will seek an IDC on this issue.

5. Intuit's Responses to Interrogatory Nos. 11 and 12

Summary: The People asked whether the total federal revenue figures Intuit provided in response to Interrogatory No. 12 included the total amount upgrading customers paid to Intuit. Intuit responded that the total federal revenue figures included the total amount paid by upgrading customers for TURBOTAX PAID PRODUCTS, as defined in the People's interrogatories. Intuit stated that payments for "ancillary" products were not included. For example, Intuit explained, the amount a customer paid to use their tax refund to cover the cost of TurboTax services (to the extent such a charge exists) would not have been included in the total federal revenue figures Intuit provided. Intuit also clarified that payments for products like QuickBooks were not included in the total federal revenue amount, but that payments for TurboTax Live were included.

The People observed that the parties appeared to disagree about the scope of what was covered by Interrogatories Nos. 11 and 12, noting that the interrogatories request the total amount customers paid Intuit for tax filing services, not just the amount paid for TURBOTAX PAID PRODUCTS.

Post-Meeting Position: Intuit's decision to limit its responses to Interrogatories 11 and 12 to revenue received only for TURBOTAX PAID PRODUCTS was not appropriate. By their plain terms, those interrogatories asked for the "total money received for tax filing services" from "all PERSONS who upgraded to a TURBOTAX PAID PRODUCT" and "the amount each PERSON who upgraded to a TURBOTAX PAID PRODUCT" paid Intuit for "tax filing services." The People request that Intuit respond to the requests as written and provide revenue received for all tax filing services.

6. Intuit's Responses to Interrogatories Nos. 26 and 27

Summary: The People asked whether it is Intuit's position that the disclaimers and other qualifying language described in Nos. 26 and 27 are not relevant, and whether Intuit represents that it will not rely on any disclaimers or qualifying language that it has not produced. The People noted that, to the extent Intuit intends to rely on disclaimers as a defense, they cannot refuse to identify and describe those disclaimers to the People.

Intuit responded that it is not waiving its right to rely on any disclaimers or qualifying language. Intuit took the position that providing all responsive disclaimers and qualifying language, and providing a narrative of every advertisement that included such language, would be overly

burdensome. Intuit offered instead to provide the time frames for when certain exemplary disclaimers were used. Intuit also said it may be willing to provide additional information about specific disclaimers if the People identified the disclaimers with specificity.

The People asked whether the disclaimers and qualifying language that Intuit provided in response to Interrogatories Nos. 26 and 27 constituted a complete production of such language. Intuit could not provide a definitive answer, but stated that the disclaimers and qualifying language it provided generally represented the type of language that Intuit has used.

Post-Meeting Position: The People propose that rather than respond with every advertisement that included a disclaimer or qualifying language, which Intuit contended would be too burdensome, Intuit instead provide a complete list of disclaimers and qualifying language and the time frames in which they were included on advertisements. Notwithstanding this proposal, the People reserve the right to serve further discovery on this topic.

7. Intuit's Response to Interrogatory No. 29

Summary: The People asked if the list of documents Intuit provided in response to Interrogatory No. 29 constituted all responsive documents of which Intuit is currently aware. Intuit responded in the affirmative and stated that it is not withholding any documents of which it is aware.

8. Intuit's Refusal to Respond to Interrogatory No. 32

Summary: The People stated that none of the interrogatories renumbered by Intuit are improper compound interrogatories, explaining that they were not seeking answers to multiple questions, but rather were seeking to establish the scope of the question. The People also stated that Intuit's objection to prior interrogatories as compound interrogatories does not justify refusing to respond to Interrogatory No. 32. The People further noted that Intuit and LACA had a similar dispute regarding the renumbering of allegedly compound interrogatories and asked whether the resolution reached in that case might inform the parties' approach to resolving the dispute over Interrogatory No. 32.

Intuit reiterated its position that several of the People's interrogatories are compound and that the People should therefore provide a declaration of necessity for Interrogatory No. 32. Intuit also stated that the number of interrogatories was not the only basis for refusing to respond to Interrogatory No. 32. Intuit asserted that it was refusing to respond for the further reason that Intuit's retention policies are not a proper subject of written discovery. Intuit stated that it would be willing to address retention policies in the context of revising the ESI Protocol. Intuit also agreed to consider resolving the dispute over No. 32 in the same manner it resolved its prior dispute with LACA over the renumbering of interrogatories.

The People responded that a party's retention practices are plainly relevant. The People also asked whether Intuit had any authority for the position that a party's retention policies are not a

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proper subject of discovery and noted that Intuit's response to Interrogatory No. 32 did not include an objection on that basis. Intuit stated that it would look for authority if the People agreed to search for authority in support of retention practices being discoverable.

Post-Meeting Position: Intuit stated that it would consider the People's proposal to respond to Interrogatory No. 32 while each party reserves its objections to the numbering and renumbering of the interrogatories, a proposal adopted by Intuit and LACA in response to a similar dispute. The People await Intuit's response to this proposal.

The People also reaffirm their position that a party's retention policies are discoverable. *See, e.g., Ackerman v. PNC Bank, Nat. Ass'n*, No. CIV. 12-42, 2013 WL 9596080, at *7 (D. Minn. Apr. 10, 2013); *Progressive Cas. Ins. Co. v. F.D.I.C.*, 298 F.R.D. 417, 427 (N.D. Iowa 2014); *Sharma v. BMW of N. Am. LLC*, No. 13-CV-02274-MMC, 2016 WL 1019668, at *4 (N.D. Cal. Mar. 15, 2016).

Very truly yours,

JAMES R. WILLIAMS
County Counsel

Rachel Neil

Rachel A. Neil
Fellow

EXHIBIT 8

January 30, 2021

Matthew Benedetto

By E-mail

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Rachel Neil
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Re: TurboTax Free Filing Cases, JCCP No. 5067, Case No. 19CV354178

Dear Rachel:

I write in response to your January 15, 2021 letter, to correct your mischaracterization of certain key aspects of our January 12 meet-and-confer discussion, and to provide further information regarding the County Counsel's discovery requests.

1. Request for Production of Documents Provided to the FTC

Although Intuit appreciates the County Counsel's willingness to narrow his request in RFP No. 2 to "responsive interrogatory responses (together with the corresponding interrogatory requests from the FTC) produced to the FTC in connection with its investigation of Intuit," this does not resolve Intuit's objections. The FTC's investigation remains confidential. The County Counsel also has not met his burden of articulating how this request relates to the claims or defenses at issue in this action. Instead you rely on the skeletal, and conclusory, assertion that the FTC investigation "overlaps significantly" with your own.

As we articulated on January 12, the mere fact that information was produced to the FTC does not render it discoverable in your case. In addition to being confidential, the FTC's investigation is broader than the scope of the action brought by the County Counsel. For instance, with regard to information that Intuit is willing to share, it covers a longer time period and it is nationwide in scope, unlike your case, which is limited to California. Furthermore, the purported qualification that you are seeking documents only "that relate to the advertising, marketing, design, user experience, upgrade requirements, or monetization" of TurboTax Free Edition and paid products—presumably what you mean by "responsive" FTC interrogatory responses—is facially overbroad as it describes the entirety of Intuit's business.

The County Counsel at no point has seriously addressed Intuit's position, also set forth in the Parties' Joint Further Status Conference and Informal Discovery Conference Report of October 15, 2020, that this form of cloned discovery is presumptively overbroad and irrelevant.

It is also improper for the County Counsel to attempt to evade limitations set in the CCP on the number of permissible special interrogatories it may serve by seeking cloned discovery.

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The County Counsel has an obligation to articulate the categories of documents or information it believes are relevant to the claims and defenses *in this case*. Intuit will not withhold any documents on the basis that they were also provided to the FTC. Nor will Intuit refuse to answer an interrogatory on the ground that the FTC propounded a similar one. But the County Counsel cannot simply freeride on questions posed by the FTC to make his own case.

Addressing the final point raised in your letter regarding the FTC investigation, Intuit did not mean to suggest that the FTC's investigation was confidential only with respect to matters covered in the protective order. Rather, the scope and substance of the FTC's inquiry are not matters of public record, and the County Counsel is not entitled to discover information about that confidential proceeding merely because he is curious.

2. Nationwide Data in Response to County Counsel Interrogatory Nos. 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25

Despite the fact that the County Counsel's claims, as a matter of law, reach only (at most) consumers in California, the County Counsel continues to maintain that he is entitled to nationwide taxpayer data in response to Interrogatory Nos. 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25. You have stated that "[n]ational data regarding Intuit's Free Edition product and required upgrades is directly relevant to the People's claim, including the People's allegation that Intuit knew or should have known that their advertising was misleading," and you also noted that Intuit had, in limited instances, incorporated nationwide taxpayer figures from 2019 into its filings. Intuit has responded to each of these inadequate justifications.

During the meet and confer, you offered a new set of justifications. Specifically, you asserted that the County Counsel needs nationwide data (1) to support his allegations that consumers were misled, (2) to provide context needed to understand data that Intuit cited in its court submissions, and (3) to understand documents produced by Intuit that reference national data. Intuit explained why these new rationales did not appear to warrant nationwide discovery with regard to each interrogatory. However, Intuit expressly invited you to evaluate each of your interrogatories and identify on an interrogatory-by-interrogatory basis why nationwide data was relevant. You responded that you did not need to write an "essay" on relevance and would not do so. Nonetheless, we reiterate our offer again here.

However, the County Counsel still has not addressed the threshold issue that, as a matter of law, his claims reach only California consumers. There can be no credible claim that the volume of information that Intuit will produce about its conduct and its consumers in California will be somehow insufficient to allow you to try and make a case. Again, if the County Counsel can articulate a targeted need for specific pieces of nationwide data as they relate to particular representations made by Intuit in its filings or in documents it has produced, the County Counsel is free to serve more targeted discovery. However, to date the County Counsel has not

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articulated a valid basis for Intuit to make a blanket production of nationwide data in response to all of the identified interrogatories.

3. Intuit's Responses to County Counsel Interrogatory Nos. 11 and 12

The County Counsel's premise that Intuit "deci[ded] to limit its response to Interrogatories 11 and 12" mischaracterizes Intuit's position regarding these interrogatories. As Intuit made clear during the meet and confer, Intuit made its best effort to, as the County Counsel insists, "respond to the requests as written." To date, despite numerous requests during our meet-and-confer and in Mr. Gringer's email of January 15, 2021, you have been unable to direct Intuit to where in your requests the phrase "tax filing services" was defined. Simply insisting that Intuit respond according to the "plain terms" of your request does not render the phrase at issue any less vague or ambiguous.

Absent a definition provided by you, Intuit had no choice but to supply its own definition, consistent with how it understands the term. Intuit reasonably looked to the defined term actually used by the County Counsel in these interrogatories ("TURBOTAX PAID PRODUCTS") and interpreted the undefined phrase ("tax filing services") to have a consistent meaning. Intuit had no basis to conclude that the County Counsel intended either a broader or narrower meaning. That said, to the extent that the County Counsel believes that revenue derived from the purchases of products and services other than the TURBOTAX PAID PRODUCTS is relevant to this action, he is free to propound an interrogatory actually requesting such information.

4. Intuit's Responses to County Counsel Interrogatory Nos. 26 and 27

The County Counsel similarly mischaracterizes Intuit's position with respect to its response to Interrogatory Nos. 26 and 27. Intuit's objection is that it is overly burdensome to provide in a narrative interrogatory response a complete list of "each [] disclaimer, qualifying language, or information regarding eligibility" contained in hundreds of individual advertisements during the relevant period. While Intuit provided exemplars from the relevant time periods, Intuit has made equally clear that these exemplars may not represent every possible permutation of such disclaimers.

The County Counsel's proposal that Intuit instead provide a "complete list of disclaimers and qualifying language and the time frames in which they were included on advertisements," seems simply to restate the same request. Intuit's advertisements, and the disclaimers they contain, speak for themselves. Intuit already has produced its advertisements and related website content that contain the disclaimers at issue in these requests and will supplement its response to these interrogatories by production of writings pursuant to CCP § 2030.230.

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With regard to the exemplar disclaimers addressed in Interrogatory No. 26, Intuit agrees to supplement its response to Interrogatory No. 27 to provide the time period(s) during which those exemplars were used. In addition, if you identify specific advertisements you intend to rely on in the prosecution of your case, Intuit expressly stated in its responses that it would supplement accordingly.

5. County Counsel Interrogatory No. 32 and Document Retention Policies

With regard to the County Counsel's service of thirty-six special interrogatories in violation of CCP § 2030.030, your letter correctly notes that Intuit was able to resolve a similar dispute with the City Attorney in late 2019 through an agreement specifying a limit on the number of special interrogatories allowed by each party. Intuit will agree to a similar arrangement with the County Counsel, provided that any expanded discovery limits beyond those specified in the CCP apply on a per-side basis and that the City Attorney consents to such limits.

Intuit also reiterates its offer to provide the requested information in the single interrogatory at issue should the County Counsel wish to reopen the parties' discussion regarding the ESI Protocol. Intuit expects that the County Counsel will provide information on his own retention policies as part of that exchange. But this information is not an appropriate subject of an interrogatory, and it is telling that the only authority you could marshal for that proposition is from other jurisdictions and applies the Federal Rules of Civil Procedure, not the CCP.

Sincerely,

/s/ Matthew Benedetto

Matthew Benedetto

cc: Aaron Bloom, Office of the County Counsel, County of Santa Clara
Zoe Friedland, Office of the County Counsel, County of Santa Clara
H. Luke Edwards, Office of the County Counsel, County of Santa Clara
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EXHIBIT 9



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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SSC 17 HON. MAREN NELSON, JUDGE

TURBOTAX FREE FILING CASES	)	CASE NO. JCCP5067
)	
Included Actions:	)	INCLUDED ACTION
	)	CASE NO. 19STCV15644
THE PEOPLE OF THE STATE OF CALIFORNIA,)	
	)	INCLUDED ACTION
	)	CASE NO. 19CV354178
PLAINTIFF,)	
)	
V.)	
)	
INTUIT, INC., ET AL.,)	
)	
DEFENDANTS.)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
OCTOBER 22, 2020

APPEARANCES:

FOR PLAINTIFF: (VIA LACourtConnect)
OFFICE OF THE LOS ANGELES CITY ATTORNEY
BY: DANIELLE GOLDSTEIN, ESQ.
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(APPEARANCES CONTINUED ON NEXT PAGE.)

REPORTED BY: ESTRELLA HERMAN, CSR NO. 13865
OFFICIAL COURT REPORTER PRO TEM
JOB NO. 10078249

1 APPEARANCES (CONTINUED):

2 FOR PLAINTIFF: (VIA LACourtConnect)
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3 BY: SUSAN P. GREENBERG, DEPUTY COUNTY
COUNSEL
4 ZOE E. FRIEDLAND, DEPUTY COUNTY
COUNSEL
5 AARON BLOOM, DEPUTY COUNTY
COUNSEL
6 70 WEST HEDDING STREET, EAST WING
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7 SAN JOSE, CALIFORNIA 95110

8 FOR DEFENDANTS: (VIA LACourtConnect)
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LOS ANGELES, CALIFORNIA 90071

11 (VIA LACourtConnect)
12 WILMER CUTLER PICKERING HALE & DORR, LLP
BY: DAVID GRINGER, ESQ.
13 BETH C. NEITZEL, EQ.
1875 PENNSYLVANIA AVENUE NW
14 WASHINGTON, D.C. 20006

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INDEX
THURSDAY, OCTOBER 22, 2020

WITNESSES
NONE

EXHIBITS
NONE

1 CASE NUMBER: JCCP5067
2 CASE NAME: THE PEOPLE OF THE STATE OF CALIFORNIA
V. INTUIT, INC., ET AL.
3
4 LOS ANGELES, CALIFORNIA THURSDAY, OCTOBER 22, 2020
5 DEPARTMENT SSC 17 HON. MAREN NELSON
6 REPORTER: ESTRELLA HERMAN, CSR NO. 13865
7 TIME: 1:45 P.M.
8

9 -oOo-

10
11 (The following proceedings were held in open court.)

12 THE COURT: On the plaintiff's side, Mr. Teitelbaum,
13 you're here?

14 MR. TEITELBAUM: Yes. Good afternoon, Your Honor.

15 THE COURT: Can you hear okay?

16 MR. TEITELBAUM: I can, Your Honor. No issue.

17 THE COURT: Okay. Ms. Goldstein?

18 MS. GOLDSTEIN: Good afternoon, Your Honor. I can hear
19 you just fine. Thank you.

20 THE COURT: All right. Ms. Greenberg?

21 MS. GREENBERG: Good afternoon. I can hear, Your Honor.

22 THE COURT: All right. Ms. Greenberg, I don't have you
23 on video. Are you supposed to be on video? Oh, there you are.
24 Okay. I got you.

25 Ms. Friedland?

26 MS. FRIEDLAND: Good afternoon, Your Honor. I can hear.

27 THE COURT: Okay. Ms. Neil -- Neitzel?

28 MS. NEITZEL: Yes, Your Honor. Good afternoon. I can

1 hear.

2 THE COURT: Okay. On the defense side, Mr. Benedetto?

3 MR. BENEDETTO: Good afternoon, Your Honor. Yes, I can
4 hear.

5 THE COURT: Mr. Gringer?

6 MR. GRINGER: Good afternoon, Your Honor. I can hear as
7 well.

8 THE COURT: Okay. Now, I think I have a problem because
9 this checklist that I have has Ms. Neitzel representing both
10 the people and the defendant. It can't be both.

11 Can you tell us who you represent, please?

12 MS. NEITZEL: No, Your Honor. I am on the defense for
13 Intuit.

14 THE COURT: Okay. Thank you.

15 We do have a court reporter here. Let me ask counsel
16 about that. I have this calendared only as an IDC.
17 Ordinarily, absent consent of all counsel, IDCs are off the
18 record. Does any counsel have any different understanding?

19 MR. BENEDETTO: Your Honor, we did -- we did arrange for
20 a court reporter through the same court reporting agency, and I
21 got confirmation that the court reporter knew about the hearing
22 and was prepared to participate in it. So beyond that, I don't
23 have any other information.

24 THE COURT: No. I have -- the court reporter's here.
25 That's not a problem. The problem is that the Court's orders
26 say that informal discovery conferences are off the record. So
27 I am wondering why we have a court reporter.

28 If all counsel wish to have a court reporter, fine.

1 But if any counsel objects, I'm going to excuse the court
2 reporter.

3 MR. TEITELBAUM: Your Honor, this is Adam Teitelbaum on
4 behalf of plaintiff.

5 I believe we also have a further status conference set
6 for the same time. So I think our understanding was both the
7 further status conference and the IDC would be addressed today;
8 and that's, I believe, why we were going to use the court
9 reporter.

10 THE COURT: All right. So then let me ask you to do this
11 when you speak: Please identify yourself so that the court
12 reporter can make a good record.

13 Now, in that regard, let me tell you what I do and do
14 not have because I have no status conference statement at all.
15 And on the IDC -- strike that. I have a status conference
16 statement. Sorry. On the IDC, all that I have is what is
17 contained in the status conference report, which is part and
18 parcel of the IDC statement, and the declaration of
19 Mr. Teitelbaum. The status conference report seems to indicate
20 there should be a declaration from Mr. Benedetto, but I do not
21 have that. When was that filed?

22 MR. TEITELBAUM: Your Honor, Adam Teitelbaum again on
23 behalf of plaintiff.

24 All three documents we did file last Thursday on the
25 deadline. So we filed the joint statement, which we did intend
26 to include both the further status conference report in the IDC
27 statement, as well as my declaration in support, and as well as
28 Mr. Benedetto's declaration in support. So we filed all three

1 documents.

2 THE COURT: I have your -- I have the final status
3 conference statement, and I have your declaration. What I
4 don't have is Mr. Benedetto's.

5 And I must tell you that your further status
6 conference statement came in yesterday afternoon. I appreciate
7 the fact that it has a file stamp on it from last Thursday, but
8 we got it in the department yesterday afternoon without
9 Mr. Benedetto's declaration.

10 MR. TEITELBAUM: I apologize, Your Honor. I know we did
11 drop it off at the drop box last Thursday.

12 THE COURT: Don't apologize. I have no doubt you filed
13 them all together. I'm just telling you what the situation is.

14 MR. BLOOM: Your Honor, also, if I may just make sure
15 that you can hear me as well. Aaron Bloom, on behalf of the
16 People of the State of California. I'm not sure if I was on
17 the video.

18 THE COURT: Okay. So I can tell you, Mr. Benedetto, that
19 the -- that your declaration shows in e-court as having been
20 filed at the same time as the status conference statements.
21 And now the judicial assistant is bringing me your declaration,
22 which just apparently came into the department this afternoon.
23 So -- and it has some things in it that I haven't read
24 obviously.

25 So I don't know how helpful the Court can be here
26 today on an IDC, but let me -- I mean, I've read the status
27 conference statement. And let me just give you a couple of
28 thoughts; and then if we need to adjourn this and reconvene

1 next week, that's okay.

2 I could not ascertain from the status conference
3 statement what the scope is of the Federal Trade Commission
4 investigation. So I have no point of view about whether the
5 discovery is overlapping or not.

6 Mr. Benedetto, may I hear from you about that?

7 MR. GRINGER: Your Honor, this is David Gringer on behalf
8 of Intuit. I'm handling the Federal Trade Commission
9 investigation on behalf of Intuit, and I'm the lead attorney.

10 And, apparently, the starting point for all this was a
11 very narrow petition to quash we filed before the Commission in
12 September -- or it was made public in September. And, still, a
13 nonpublic investigation, the FTC's rules of practice, however,
14 require petitions to quash to be filed on the FTC's website.
15 What the petition to quash says -- and it's the whole -- one of
16 the premises of the petition to quash is that the investigation
17 is a broad investigation that goes beyond what the city
18 attorney's complaint has alleged.

19 You know, I think an apt description within -- you
20 know, without going too far in revealing, again, a confidential
21 investigation is it looks much more like the Santa Clara County
22 case in terms of scope. So that's a -- and has some other
23 elements with investigation, not an enforcement action. And it
24 has been going on for quite some time.

25 We're hopeful that -- or appreciative that the FTC has
26 investigated this and, you know, we'll see sort of how it all
27 plays out. But it is -- and I don't understand the city
28 attorney to truthfully be objecting to that point exactly. In

1 their status report, they say, "Well, there's stuff" -- "There
2 may be stuff that's not relevant to our MSA," but they should
3 [audio interference] anyway because it's easier for them. So
4 they know.

5 And one other point I'll make, Your Honor, and I
6 recognize we may need to adjourn until next week. And it's
7 unfortunate you're just getting Mr. Benedetto's declaration now
8 because it creates this point.

9 The city attorney and the FTC have a common interest
10 agreement by which the FTC has shared work product with the
11 city attorney. Mr. Teitelbaum seemed not to have been the
12 contact person. I think it's his supervisor, Mr. Bostrom,
13 who's been having communications with the FTC if you look at
14 that privilege log that they produced to us. I think they
15 understood long, long ago that there was an FTC investigation
16 and certainly were aware of its initial scope.

17 So there's a lot of stuff that has nothing to do with
18 the MSA and nothing to do with their case. And it's very clear
19 in the petition to quash, which they attached to their
20 declaration. And, again, I think they conceded. They said in
21 their statement we didn't justify that in the meet and confer.
22 We made exactly this point.

23 So there are lots of reasons I think, Your Honor, to
24 deny that request. Simply provide a privilege log protecting
25 these kinds of requests, the fact that they're free to ask for
26 anything specific that they think they need, and that they
27 already had what's relevant to their MSA. But I can attest to
28 you and assure you that their investigation is significantly

1 broader in scope than the city attorney's lawsuit and the even,
2 you know, sort of more circumscribed issues raised in the MSA.

3 THE COURT: All right. So let me hear from
4 Mr. Teitelbaum about that. And, in particular, would you
5 please make a representation to the Court as to when the city
6 attorney first learned of the FTC investigation.

7 MR. TEITELBAUM: Absolutely, Your Honor. Adam Teitelbaum
8 on behalf of plaintiff.

9 We certainly don't dispute that we did learn about the
10 FTC investigation early on. I'm not sure I have the exact date
11 off the top of my head, but it was at some point last year.
12 And so that point isn't in dispute, that we knew about the
13 existence of an investigation by the FTC. And as in
14 Mr. Gringer's point, there is a common interest agreement; and
15 so we do have limits on sort of the particular nature of
16 communications.

17 But what I can represent to the Court very clearly is
18 that we never learned from the FTC, or otherwise, the nature of
19 the requests they propounded or the need for the documents and
20 information that Intuit produced in response. Just a few weeks
21 ago that petition that Mr. Gringer mentioned became publically
22 recorded. And, in particular, it was Intuit's representation
23 in issue that these requests concerned the duty to disclose
24 that triggered us to feel that in order to protect our
25 interests, to respond to the MSA that addresses that very
26 issue, we should request these documents to the extent we
27 haven't already received the documents that have been produced
28 to the FTC.

1 So the point of the request being -- covering the
2 entirety of the investigation -- or, rather, the entirety of
3 the production was, number one, to initiate a meet-and-confer
4 so that if Intuit were to represent to us that it has actually
5 produced everything to us, that would, of course, be the end of
6 the issue. But the problem is that Intuit hasn't been willing
7 to tell us what it has produced to the FTC that it has not
8 produced to us. And we have no ability to have a
9 meet-and-confer about what that delta might be and to the
10 degree which that delta linked directly to the MSA.

11 THE COURT: All right. Well, I think that the Court is
12 going to have to adjourn this because you have a lengthy ruling
13 from the FTC about the production of documents and the motion
14 to quash. And so on that, I don't -- that, I need to read to
15 understand the scope of what's at least protected or not.

16 I will say that it's my expectation that the City will
17 be able to justify -- tie to the particular items in the
18 separate statement what it is asking for in connection with
19 this discovery as opposed to discovery more generally. And
20 when we reconvene, I'm sure that Mr. Teitelbaum will be able to
21 tell me that.

22 But unless counsel can tell me more generally what --
23 and I understand that maybe neither counsel's in a position to
24 do this -- what the scope of the FTC investigation is. It
25 becomes particularly important, I think, that this -- that the
26 party requesting the information, at least here, be able to tie
27 it to the particular separate statement items that are at issue
28 here. It's not to say it might not be relevant later, but

1 right now we're focused on a particular issue.

2 So I think with those things said -- and I apologize,
3 Counsel, but we just didn't get all this in a timely fashion;
4 and it's not your fault. So no counsel should feel like they
5 didn't do their job correctly. You did your job. We just have
6 a great shortage of time and resources at the minute. Which I
7 should tell counsel, in case it hasn't become obvious, it's
8 likely going to become considerably worse in light of the
9 budget constrictions that we have. So patience, everyone.

10 But let me just ask what do we have on Monday
11 afternoon? And then let's see if counsel's available on Monday
12 afternoon.

13 I don't want to put this off because I know
14 you're -- you have deadlines.

15 THE CLERK: Nothing in the afternoon, Your Honor.

16 THE COURT: Nothing in the afternoon.

17 Counsel, how's your Monday afternoon at the same time,
18 1:45?

19 MR. TEITELBAUM: Your Honor, that time works for me.
20 Again, this is Adam Teitelbaum on behalf of plaintiff.

21 THE COURT: What about your colleagues?

22 MR. TEITELBAUM: Yes, sorry. I believe that works for
23 the people in the Los Angeles office.

24 THE COURT: Okay. Mr. Benedetto or Mr. Gringer,
25 Ms. Neitzel, how does that work for you?

26 MR. GRINGER: Works well, Your Honor, for me.

27 THE COURT: Anybody --

28 MR. BENEDETTO: Yeah, same for me.

1 THE COURT: Does that work for --

2 MS. NEITZEL: For me as well.

3 THE COURT: Does that work for Santa Clara?

4 MR. BLOOM: That time works for me, Your Honor. If you
5 prefer to hear the status conference on Monday, that's fine
6 with us.

7 THE COURT: I think we should do that.

8 I didn't -- the one thing that I didn't -- counsel for
9 Santa Clara, would you give us your appearance for the record.
10 I don't think we have it.

11 MR. BLOOM: Apologies, Your Honor. Aaron Bloom on behalf
12 of the People in the Santa Clara office.

13 THE COURT: All right. You're not on my check-in list at
14 all. You should be, but you're not.

15 I think on the status conference the one thing I'd
16 like to hear from counsel about -- and I'm glad that Mr. Bloom
17 is on the line so you can think about this between now and
18 Monday -- is how, if at all, the discovery in these two cases
19 should be coordinated so that they are not duplicative. That
20 seems to be the main problem.

21 And in the status conference report, I don't have a
22 very good understanding from reading it what Santa Clara's
23 position is on that. And I do think that the manual on complex
24 litigation makes clear that these things should be coordinated.
25 This is not governed entirely by the CCP.

26 So I would like to hear from both plaintiffs about
27 what your proposal is as to how to coordinate the discovery.
28 And if that's in the status conference report --

1 MR. BLOOM: Understood, Your Honor. Aaron Bloom. I'm
2 happy to provide that on Monday.

3 I mean, just to preview the People's position, I think
4 once the stays are lifted -- or lifted to some extent such that
5 there is possible overlapping discovery, we think it will be
6 significantly easier to coordinate discovery on a going-forward
7 basis.

8 THE COURT: Well, I think the question really is going to
9 be how you propose to do that exactly. For example, are you
10 going to have a common database? Are you going to have one
11 track of depositions? Are you going to have one set of
12 interrogatories once we get past -- assuming we do get past
13 this summary judgment issue, how that's going to work?

14 That's the whole point of it being in the complex
15 courtroom -- or at least one point. And to the extent that the
16 parties have not sat down and worked that out, first question
17 is, is this the time to do that? And if it is, how are you
18 going to do it?

19 MR. BLOOM: Understood, Your Honor, thank you.

20 THE COURT: All right. So that gives you a little
21 homework between now and Monday to at least think about. And I
22 have my homework.

23 So I think all I'm supposed to have -- right? -- is
24 the status conference report and the IDC statement;
25 Mr. Teitelbaum's declaration, which my copy has ten exhibits;
26 and Mr. Benedetto's declaration that -- the copy I just got,
27 there's no tabbed exhibits, but it has exhibits attached to the
28 back of it.

1 Let me just ask the judicial assistant. Is this the
2 one you just printed off electronically?

3 THE CLERK: Yes.

4 THE COURT: Okay. So I just -- wherever the original is,
5 it's not here; but that's okay. There's not a lot of tabs, so
6 it's okay.

7 All right, everybody. Appreciate it. Thank you for
8 the patience. And we'll have a more informed discussion, I
9 think, on Monday afternoon. Thank you.

10 (Whereupon, the proceedings concluded at 2:06 p.m.)

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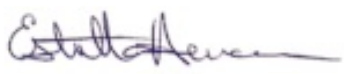
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SSC 17 HON. MAREN NELSON, JUDGE

TURBOTAX FREE FILING CASES	)	CASE NO. JCCP5067
)	
Included Actions:	)	INCLUDED ACTION
	)	CASE NO. 19STCV15644
THE PEOPLE OF THE STATE OF CALIFORNIA,	)	INCLUDED ACTION
	)	CASE NO. 19CV354178
PLAINTIFF,)	
)	
V.	)	REPORTER'S
	)	CERTIFICATE
INTUIT, INC., ET AL.,)	
)	
DEFENDANTS.)	
)	

I, ESTRELLA HERMAN, OFFICIAL PRO TEM REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES, 1 THROUGH 15, COMPRISE A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS TAKEN IN THE ABOVE-ENTITLED MATTER REPORTED BY ME ON OCTOBER 22, 2020.

DATED: FEBRUARY 9, 2021



ESTRELLA HERMAN, CSR
OFFICIAL PRO TEM COURT REPORTER
CSR NO. 13865

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EXHIBIT 10

From: [Neil, Rachel](#)
To: [Mackey, Katherine](#); [Chapin, Benjamin](#); [Gringer, David](#); [Girgenti, Matthew](#); [Benedetto, Matthew](#)
Cc: [Greenberg, Susan](#); [Bloom, Aaron](#); [Yosef Mahmood](#); [Chris Munsey](#)
Subject: RE: TurboTax Free Filing Cases - Meet and Confer Letter
Date: Thursday, August 26, 2021 3:10:00 PM
Attachments: [image001.png](#)

Counsel:

Your email states that the meet and confer process is incomplete because the People have not responded to Intuit's question regarding "what facts the County Counsel has not been able to obtain through its prior 37 interrogatories and will not be able to obtain in future discovery because of Intuit's position regarding RFP No. 2." The meet and confer process is intended to be a good faith attempt to informally resolve the issues presented by the motion. Intuit's question has no bearing on whether the FTC interrogatory requests and responses should be produced. Documents are discoverable if they contain information relevant to the claims at issue. *See Kirkland v. Superior Court*, 95 Cal. App. 4th 92, 97-98 (describing good cause in ordering production of documents and testimony submitted to the SEC). Intuit has itself described the FTC investigation as similar in scope to the People's claim and acknowledges the FTC interrogatory responses contain relevant material to the People's claims. It has not and cannot demonstrate that producing the responses would be unduly burdensome or that the responses are privileged. As a result, it has no basis to withhold the documents. Whether or not the People could serve additional different discovery that would obtain the same facts is not grounds to withhold production of relevant documents now. And, in any case, Intuit's sworn testimony is unique evidence that cannot be captured in other documents. In addition, if Intuit described its actions or conduct relating to its advertising of TurboTax differently to the FTC than to the People, that is plainly relevant, and cannot be ascertained without obtaining the interrogatory responses.

As to your second point, the People have already provided Intuit with substantial authority holding that documents and communications relating to FTC and analogous investigations can and should be produced in related litigation. Intuit has provided no authority to the contrary, relying instead on an inapplicable discussion of privileged material in *Concord Boat Corp. v. Brunswick Corp.*, 1997 WL 34854479 (E.D. Ark. June 13, 1997). The People did not specifically respond to Intuit's reference to the official information privilege because the People did not understand Intuit to be invoking that privilege, which Intuit has not previously asserted, and which by its clear terms only applies when asserted by a public entity. *See* Evid. Code section 1040; *see also* Evid. Code section 1040 Editors Notes ("Section 1040 permits the official information privilege to be invoked by the public entity or its authorized representative. Since the privilege is granted to enable the government to protect its secrets, no reason exists for permitting the privilege to be exercised by persons who are not concerned with the public interest"). If Intuit is now attempting to assert the official information privilege, it cannot do so.

Again, the parties appear to be at an impasse on both outstanding issues, having now met and conferred on both for several months with no resolution. If Intuit believes that is incorrect and that either issue can be informally resolved, please let us know times tomorrow or Monday or Tuesday of next week for a call for a final attempt to do so. Otherwise, please let us know a convenient time this week or early next week to contact the Court to obtain a hearing date for the motion to compel.

Thank you,
Rachel



Rachel Neil | Impact Fellow

Office of the County Counsel, County of Santa Clara

70 West Hedding Street, East Wing, 9th Floor | San José, CA 95110

Phone: (669) 309-3204

rachel.neil@cco.sccgov.org

From: Mackey, Katherine <Katherine.Mackey@wilmerhale.com>

Sent: Wednesday, August 25, 2021 4:42 PM

To: Neil, Rachel <rachel.neil@cco.sccgov.org>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>; Girgenti, Matthew <Matthew.Girgenti@wilmerhale.com>; Benedetto, Matthew <Matthew.Benedetto@wilmerhale.com>

Cc: Greenberg, Susan <susan.greenberg@cco.sccgov.org>; Bloom, Aaron <aaron.bloom@cco.sccgov.org>; Yosef Mahmood <yosef.mahmood@lacity.org>; Chris Munsey <chris.munsey@lacity.org>

Subject: [EXTERNAL] RE: TurboTax Free Filing Cases - Meet and Confer Letter

Counsel,

-

Intuit's position on People's Interrogatory No. 11 and People's RFP No. 2 remains unchanged. We were surprised to read in your August 20 letter that you are prepared to file a motion to compel, because the parties have not completed their meet and confer on the issue. Our August 17, 2021 letter asked what facts the County Counsel has not been able to obtain through its prior 37 interrogatories and will not be able to obtain in future discovery because of Intuit's position regarding RFP No. 2, and the County Counsel has not responded.

In addition, your August 20 letter incorrectly states that Intuit did not provide new authority with respect to People's RFP No. 2. It provided substantial new authority, including a discussion of the Official Information privilege. We look forward to a response that addresses this authority instead of pretending that it does not exist.

Thank you,

Katherine

From: Neil, Rachel <rachel.neil@cco.sccgov.org>

Sent: Friday, August 20, 2021 7:08 PM

To: Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>; Girgenti, Matthew <Matthew.Girgenti@wilmerhale.com>; Mackey, Katherine <Katherine.Mackey@wilmerhale.com>; Benedetto, Matthew <Matthew.Benedetto@wilmerhale.com>

Cc: Greenberg, Susan <susan.greenberg@cco.sccgov.org>; Bloom, Aaron <aaron.bloom@cco.sccgov.org>; Yosef Mahmood <yosef.mahmood@lacity.org>; Chris Munsey

<chris.munsey@lacity.org>

Subject: RE: TurboTax Free Filing Cases - Meet and Confer Letter

EXTERNAL SENDER

Counsel,

Please see the attached response to your August 17, 2021 letter.

Thank you,
Rachel



Rachel Neil | Fellow

Office of the County Counsel, County of Santa Clara

70 West Hedding Street, East Wing, 9th Floor | San José, CA 95110

Phone: (669) 309-3204

rachel.neil@cco.sccgov.org

From: Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>

Sent: Tuesday, August 17, 2021 7:41 AM

To: Neil, Rachel <rachel.neil@cco.sccgov.org>

Cc: Greenberg, Susan <susan.greenberg@cco.sccgov.org>; Bloom, Aaron <aaron.bloom@cco.sccgov.org>; Friedland, Zoe <zoe.friedland@cco.sccgov.org>; Yosef Mahmood <yosef.mahmood@lacity.org>; Chris Munsey <chris.munsey@lacity.org>; Benedetto, Matthew <Matthew.Benedetto@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>; Girgenti, Matthew <Matthew.Girgenti@wilmerhale.com>; Mackey, Katherine <Katherine.Mackey@wilmerhale.com>

Subject: [EXTERNAL] RE: TurboTax Free Filing Cases - Meet and Confer Letter

Counsel,

Please see the attached response to your July 22, 2021 letter.

-Ben

Benjamin Chapin | WilmerHale

+1 202 663 6443 (t)

benjamin.chapin@wilmerhale.com

From: Neil, Rachel <rachel.neil@cco.sccgov.org>

Sent: Tuesday, August 10, 2021 4:10 PM

To: Benedetto, Matthew <Matthew.Benedetto@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>;

Girgenti, Matthew <Matthew.Girgenti@wilmerhale.com>

Cc: Greenberg, Susan <susan.greenberg@cco.sccgov.org>; Bloom, Aaron <aaron.bloom@cco.sccgov.org>; Friedland, Zoe <zoe.friedland@cco.sccgov.org>; Yosef Mahmood <yosef.mahmood@lacity.org>; Chris Munsey <chris.munsey@lacity.org>

Subject: RE: TurboTax Free Filing Cases - Meet and Confer Letter

EXTERNAL SENDER

Counsel,

Please see the attached correspondence following up on our July 22, 2021 meet and confer letter.

Thank you,
Rachel



Rachel Neil | Impact Fellow

Office of the County Counsel, County of Santa Clara

70 West Hedding Street, East Wing, 9th Floor | San José, CA 95110

Phone: (669) 309-3204

rachel.neil@cco.sccgov.org

From: Neil, Rachel

Sent: Thursday, July 22, 2021 5:01 PM

To: Benedetto, Matthew <Matthew.Benedetto@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>; Chapin, Benjamin <Benjamin.Chapin@wilmerhale.com>; Girgenti, Matthew <Matthew.Girgenti@wilmerhale.com>

Cc: Greenberg, Susan <susan.greenberg@cco.sccgov.org>; Bloom, Aaron <aaron.bloom@cco.sccgov.org>; Friedland, Zoe <zoe.friedland@cco.sccgov.org>; Danielle Goldstein <danielle.goldstein@lacity.org>; Yosef Mahmood <yosef.mahmood@lacity.org>; Chris Munsey <chris.munsey@lacity.org>

Subject: TurboTax Free Filing Cases - Meet and Confer Letter

Counsel,

Please see the attached meet and confer correspondence.

Thank you,
Rachel

Rachel Neil | Impact Fellow

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EXHIBIT 11

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June 21, 2021

Matthew Benedetto
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Matthew.Benedetto@wilmerhale.com

Re: *The People of the State of California v. Intuit Inc.*, Los Angeles County Superior Court,
Case No. 19CV354178

Dear Matt et al.:

In advance of our June 23, 2021 meet and confer call, below is some information about the People's positions regarding the issues discussed during the June 1, 2021 informal discovery conference. The People understand that, pursuant to the parties' agreement, the deadline to file a motion to compel is tolled by the ongoing meet and confer process.

National Data

The People's position is that the national data requested in interrogatories 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25 is relevant under Cal. Code. Civ. P. § 2017.010. Given that Intuit has not articulated any burden associated with producing this information, we continue to believe it must be produced. During our meet and confer call, we would like to clarify whether Intuit is, in fact, relying on a burdensomeness objection. If so, we would like to understand the burdens associated with each request, including the reasons any subset of the information sought could impose an incremental burden, which subsets are more limited in the burden they impose, and any subsets for which the information is readily available.

FTC Interrogatories

The People's position is that the interrogatories and interrogatory responses related to the FTC's investigation of Intuit are relevant and should be produced. The Court expressed a potential concern with requiring parties to produce documents from a government investigation in civil discovery that the government agency would not produce to the public. After examining the applicable caselaw, however, it is clear that these documents must be produced. In the

Re: *The People of the State of California v. Intuit Inc.*, Los Angeles County Superior Court,
Case No. 19CV354178

Date: June 21, 2021

Page 2

interest of facilitating our meet and confer, below is a discussion of some relevant caselaw. If you have authority to the contrary, please provide us with the citations so we can review it.

Courts routinely grant motions to compel documents and communications related to FTC investigations despite statutes governing the FTC's confidentiality obligations. *See, e.g., ConsumerInfo.com Inc. v. One Technologies LP*, No. 09-3783, 2010 WL 11507581 (C.D. Cal. May 4, 2010) (granting motion to compel all communications between ConsumerInfo and the FTC and all discovery "prepared or received by ConsumerInfo in the FTC Action," including deposition transcripts and declarations); *Concord Boat Corp. v. Brunswick Corp.*, No. 95-781, 1997 WL 34854479 (E.D. Ark. June 13, 1997) (rejecting defendant's argument that FTC transcripts should not be produced because they were made "during the course of a confidential investigation" and holding that there is "no applicable privilege to prevent their disclosure" and they are not "immune from discovery").

Parties have tried and failed to make similar confidentiality arguments in analogous contexts. For instance, courts have rejected the argument that CID depositions taken during a DOJ investigation are immune from discovery. *See In re Passenger Computer Reservation Systems Antitrust Litigation*, 116 F.R.D. 390 (C.D. Cal 1996). Like the FTC statutes cited by Intuit, statutory provisions make clear that CID investigative files are confidential and barred from public disclosure by the government, including an exemption from public disclosure under FOIA. *See* 15 U.S.C. §§ 1313(c), 1314(g). Nevertheless, that information is "discoverable in subsequent litigation." *Id.* at 393. As one court explained, "Congress could have created [] a privilege" allowing defendants to withhold this information during civil discovery, but "it did not do so." *Id.*; *see also In re Domestic Air Transportation Antitrust Litigation*; 142 F.R.D. 354, 355 (N.D. Ga. 1992) (holding that transcripts related to a confidential DOJ investigation "may not be withheld" in civil discovery). Courts have stressed that while parties are "protected from having their CID-related materials disclosed to anyone *by the DOJ*," they are not allowed to withhold relevant investigatory information from "a party that has brought an action against a subject of a CID." *In re NASDAQ Market-Makers Antitrust Litigation*, 929 F. Supp. 723, 726 (S.D.N.Y. 1996) (emphasis added) (holding that confidential CID materials, including the answers to CID interrogatories, are discoverable).

Similarly, the "law is well settled that the documents and transcripts of statements provided to securities regulators in connection with an investigation related to the same or similar misconduct at issue, are discoverable in subsequent civil litigation proceedings." *Production of Regulatory Investigation Documents in FINRA Arbitration*, 26 No. 3 PIABA B.J. 413 (2019). In fact, courts specifically reject the notion that a statutory provision deeming SEC documents and transcripts "non-public," 17 CFR § 203.2, somehow creates a "privilege or other policy consideration that protects" these documents and statements "from discovery in subsequent proceedings involving the same or similar issues." *Id.*; *see also Kirkland v. Superior*

Re: *The People of the State of California v. Intuit Inc.*, Los Angeles County Superior Court,
Case No. 19CV354178

Date: June 21, 2021

Page 3

Court, 115 Cal. Rpt. 2d 279, 285 (Cal. Ct. App. 2002) (explaining that “to the extent there is any privilege, it belongs to the SEC,” not the investigated party) (internal citation omitted); *Baxter v. A.R. Baron & Co.*, 1996 WL 709624, at *1 (S.D.N.Y. Dec. 10, 1996) (rejecting argument that privacy and confidentiality interests exempt SEC transcripts from civil discovery and explaining that “merely because these transcripts are the product of an SEC investigation” they are not “somehow imbued with a patina of ‘confidentiality’ that entitles them to special protection from discovery.”).

These cases make clear that statutes and regulations preventing the FTC from disclosing certain investigatory materials do not allow Intuit to withhold that information during civil discovery. As discussed during the IDC, 15 U.S.C. § 57b-2(c)(1) allows an investigated entity to mark certain information as confidential and prevents the FTC from disclosing that information. Similarly, 15 U.S.C. § 46(f) prevents the FTC from disclosing privileged trade secret or commercial financial information obtained during the course of an investigation. Finally, the FTC can decline to make public through a FOIA request material obtained either voluntarily or pursuant to compulsory process during an investigation. 16 C.F.R. § 4.10(a)(8). But courts have repeatedly held that exemptions to public records laws do not constitute discovery privileges. *See Marylander v. Superior Court*, 81 Cal.App.4th 1119, 1125, 97 (2000) (explaining that the “exemptions contained in the Public Records Act simply do not apply to the issue whether records are privileged *in pending litigation* so as to defeat *a party’s* right to *discovery*.”) (emphasis in original); *see also Vinzant v. United States*, No. 06-10561, 2010 WL 2674609 at *9 (E.D. La. June 30, 2010) (holding that parties may not “employ FOIA exemptions as discovery exemptions”).

In sum, none of these provisions create a privilege exempting relevant information related to an FTC investigation from civil discovery, and courts have been clear that such an immunity does not exist absent a clear statutory mandate. *See Los Angeles Unified School Dist. v. Trustees of Southern Cal. IBEW-NECA Pension Plan*, 187 Cal.App.4th 621 (2010) (noting that “California courts have repeatedly held that statutes which simply characterize information as ‘confidential’ or otherwise limits its public disclosure do not create an absolute privilege . . . Rather, the language or structure of the statute must evince a legislative intent to bar disclosure even in the context of litigation.”).

Very truly yours,

JAMES R. WILLIAMS
County Counsel

Zoe E. Friedland
Zoe Friedland
Deputy County Counsel

EXHIBIT 12

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June 25, 2021

VIA E-MAIL

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Re: *The People of the State of California v. Intuit Inc.*, Los Angeles County Superior Court, Case No. 19CV354178

Dear Mr. Benedetto:

Below is a summary of the parties' discussion during the June 23, 2021 meet and confer call. The discussion was guided by the meet and confer correspondence sent by the People, acting by and through the Santa Clara County Counsel, ("the People") on June 21, 2021.

1. National Data (People's Interrogatories 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25)

In response to the People's questions about the burden on Intuit of responding to People's Interrogatories 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25 on a nationwide basis, Intuit stated that Tax Years 2014 and 2015 presented a significant burden because data from that time period is no longer hosted by Intuit and would have to be retrieved from archives. Intuit stated that the burden of providing responses with respect to subsequent years would also be non-negligible.

The People asked how the burden of responding on a nationwide basis compared to the burden of responding with California data only. Intuit responded that the former would be "more involved" because nationwide data is by definition broader than California data, and that ensuring the accuracy of the nationwide data would be more time consuming.

The People asked whether there was any additional burden associated with responding with California-specific data as opposed to national data. Intuit responded that pulling California data was not any more burdensome than pulling national data.

The People asked whether it is Intuit's position that the burden of responding to each of the interrogatories in question is the same. Intuit responded that it did not know because it had not evaluated the burden of the individual interrogatories. The People requested an estimate of the amount of time it would take Intuit to respond to the interrogatories on a nationwide basis. Intuit estimated that it would take approximately four weeks.

The People requested that Intuit provide estimates of the burden associated with each individual disputed interrogatory. Intuit promised to consider this request and asked that the People provide a list of the specific interrogatories that they consider most important. The People agreed to consider this request.

2. FTC Interrogatory Responses (People's RFP No. 2)

Intuit argued that federal statutes that prohibit federal agencies like the FTC from publicly disclosing information obtained during an investigation also, as a matter of public policy, shield the investigated entity from having to produce through civil discovery documents that it submitted during the federal agency's investigation. Intuit further argued that discovery is particularly inappropriate with respect to Intuit's responses to FTC interrogatories because those responses contain Intuit attorneys' arguments and advocacy before the FTC. Intuit agreed that the FTC interrogatory responses are not subject to any privilege.

The People noted that courts have compelled production in civil discovery of interrogatory responses to an agency and asked whether Intuit had any contrary authority to support its position that such responses are not discoverable. Intuit pointed to a single case, *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 34854479, at *3 (E.D. Ark. June 13, 1997). The People stated that *Concord Boat* is inapposite because it involved a claim of attorney work product privilege, whereas Intuit is not asserting any privilege with respect to the FTC interrogatories. Intuit agreed that it was not asserting any privilege with respect to the FTC interrogatory responses but maintained its position that the responses are shielded from discovery.

Very truly yours,

JAMES R. WILLIAMS
County Counsel

Rachel Neil

Rachel A. Neil
Fellow

EXHIBIT 13

July 9, 2021

Matthew Benedetto

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Rachel A. Neil
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San Jose, California 95110

Re: *The People of the State of California v. Intuit Inc.*, Los Angeles County Superior Court,
Case No. 19CV354178

Dear Ms. Neil:

Thank you for your June 25, 2021 letter summarizing the parties' June 23 meet and confer. In certain places, your letter omitted or mischaracterized Intuit's position, and I write below to correct or complete the record.

**1. Nationwide Data (People's Interrogatory Nos. 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25)
("Nationwide Data Interrogatories")**

In addition to the points included in your summary of our discussion of the Nationwide Data Interrogatories, we said that the most efficient approach to resolving the dispute would be to discuss the relevance of the Nationwide Data Interrogatories on an individual basis. We said that this would be in keeping with the Court's guidance to the County Counsel to focus on how useful the requested information would be to the County Counsel's claims.¹

We also provided more detail about the burden associated with responding to the Nationwide Data Interrogatories. We explained that producing data from 2014 and 2015 would be particularly burdensome because this data is not hosted by Intuit and would need to be restored from its archive. We also explained that producing data for years after 2015 would be burdensome because it is hosted in different locations and because it has to be first collected at the taxpayer level, then re-compiled in a form that would be comprehensible and useful in discovery, and then checked for accuracy. This process is burdensome and expensive both in terms of the number of people who would need to be involved and the time that it would take to accomplish. We also explained that pulling nationwide data at the taxpayer level was exponentially more burdensome than pulling California-only data because of the difference in population size.

¹ IDC Tr. 20:27-21:3.

Rachel A. Neil
July 9, 2021
Page 2

You asked whether Intuit could differentiate the burden in responding to individual Nationwide Data Interrogatories. We said that we were not prepared to describe the burden of responding to each individual interrogatory because the parties had not previously discussed this issue. However, we explained that, if the County Counsel could identify which Nationwide Data Interrogatories were most important, Intuit would better be able to assess the associated burden and evaluate a potential compromise.

You asked about the burden associated with extracting the number of people who filed federal income taxes using Free Edition in any given year. We explained that, based on past experience, the process required several steps: first, collecting the data at the taxpayer level, which would take several weeks of work from Intuit employees; and second, joining together multiple datasets, which would also take several weeks.

We also said that a motion to compel production of all data requested in the Nationwide Data Interrogatories poses risk because the People have made no showing of an individualized need for the data, because of the Court's apparent view that the information requested in the Nationwide Interrogatories is only marginally relevant, and because of the burden imposed on Intuit to respond to all of the Interrogatories.²

2. FTC Interrogatories and Responses (People's RFP No. 2)

Intuit explained that its position is unchanged that the FTC Interrogatories and its Responses are not discoverable. We said that the statutes that establish confidentiality obligations for federal agencies—including the FTC—create a policy in favor of non-disclosure of information provided to those agencies in connection with investigations. Because a civil litigant is barred by statute from obtaining discovery materials directly from the FTC, the litigant should not, as a matter of policy, be able to use the civil discovery process to undermine the FTC Act's confidentiality protections.

We said that the People's RFP No. 2 is also improper because Intuit's interrogatory responses contain not only factual information, but also attorney advocacy, which reveals counsel's view of the case. This kind of information is meaningfully different from deposition testimony and cloned document requests, which contain underlying facts but not attorney advocacy. As we explained, this distinguishes the discovery sought by the People's RFP No. 2 from the discovery at issue in many of the cases cited in the People's June 21 letter. Intuit's position is supported by the reasoning in *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 34854479, at *3 (E.D. Ark. June 13, 1997), in which the court denied a motion to compel white

² See *id.* 19:7-21:5.

Rachel A. Neil
July 9, 2021
Page 3

papers, which, like Intuit's responses to the FTC Interrogatories, contained not only underlying facts, but also attorney advocacy.

Notwithstanding Intuit's objections to producing the FTC Interrogatories and Responses, Intuit reiterated that it would not withhold any information because it was provided to the FTC.

Sincerely,

/s/ Matthew Benedetto
Matthew Benedetto

cc: Zoe Friedland, Office of the County Counsel, County of Santa Clara
H. Luke Edwards, Office of the County Counsel, County of Santa Clara
Susan Greenberg, Office of the County Counsel, County of Santa Clara
Greta Hansen, Office of the County Counsel, County of Santa Clara
Aaron Bloom, Office of the County Counsel, County of Santa Clara
Rachel Neil, Office of the County Counsel, County of Santa Clara
Anthony Lopresti, Office of the County Counsel, County of Santa Clara
Kavita Narayan, Office of the County Counsel, County of Santa Clara
Kathleen Kenealy, Office of the Los Angeles City Attorney
Danielle Goldstein, Office of the Los Angeles City Attorney
Michael Bostrom, Office of the Los Angeles City Attorney
Yosef Mahmood, Office of the Los Angeles City Attorney

EXHIBIT 14

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July 22, 2021

VIA E-MAIL

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Re: *The People of the State of California v. Intuit Inc.*, Los Angeles County Superior Court, Case No. 19CV354178

Dear Mr. Benedetto:

I write to follow up on the parties' June 23, 2021 meet and confer call, the June 25, 2021 discovery correspondence sent by the People, acting by and through the Santa Clara County Counsel, ("the People") and Intuit's July 9, 2021 letter. The People understand that, pursuant to the parties' agreement, the deadline to file a motion to compel on any outstanding discovery disputes remains tolled in light of the ongoing meet and confer process.

1. National Data (People's Interrogatories 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25)

In the interest of compromise, the People propose that Intuit respond to People's Interrogatories 1, 7, 9, 11, 13, and 23 on a nationwide basis, excluding Tax Years 2014 and 2015 and thereby eliminating the burden associated with retrieving archived data. The People would forgo moving to compel on People's interrogatories 3, 4, 24, and 25, while reserving the right to pursue additional discovery on the subjects covered by those interrogatories as discovery progresses.

If Intuit is unwilling to agree to this compromise, please provide individual estimates of the number of hours of work required for Intuit to respond to each of People's Interrogatories 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25 on a nationwide basis, as well as any reductions to those hours of work if tax years 2014 and 2015 are excluded.

2. FTC Interrogatory Responses (People's RFP No. 2)

The People's position with respect to RFP No. 2 remains unchanged. As we stated during the parties' June 23, 2021 meet and confer call, *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 34854479, at *3 (E.D. Ark. June 13, 1997), does not apply to the present circumstance because Intuit has not invoked attorney work product privilege. We request that Intuit provide any additional authority it has in support of its position that Intuit's responses to FTC interrogatories are categorically shielded from discovery.

Very truly yours,

JAMES R. WILLIAMS
County Counsel

Rachel Neil

Rachel A. Neil
Fellow

EXHIBIT 15

August 17, 2021

Matthew Benedetto

By E-Mail

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Rachel A. Neil
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Re: *The People of the State of California v. Intuit Inc.*, Los Angeles County Superior Court, Case No. 19CV354178

Dear Ms. Neil:

I write in response to your July 22, 2021 letter concerning the County Counsel's requests for nationwide data and the FTC's Interrogatories to Intuit and Intuit's Responses thereto.

1. Nationwide Data (People's Interrogatory Nos. 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25) ("Nationwide Data Interrogatories")

Intuit appreciates the County Counsel's willingness to narrow his requests for nationwide data. Though your July 22, 2021 letter again fails to articulate the relevance of the Nationwide Data Interrogatories on an individual basis and only marginally reduces the burden on Intuit of collecting, compiling, and analyzing the requested data, Intuit believes that this dispute can be resolved without unnecessary motion practice. To that end, in the interest of reaching a compromise, Intuit agrees to respond to Interrogatory Nos. 1, 7, 9, 13, and 23, excluding Tax Years 2014 and 2015. However, Intuit declines to provide the nationwide data sought in Interrogatory No. 11 because the only possible relevance of this data would be to calculate restitution and any restitution sought by the County Counsel is necessarily limited to California consumers, rendering nationwide data irrelevant.

Intuit will serve supplemental responses to Interrogatory Nos. 1, 7, 9, 13, and 23 by September 8, 2021.

2. FTC Interrogatories and Responses (People's Request for Production No. 2)

Intuit maintains its position that Interrogatories served by the FTC as part of an investigation of Intuit and Intuit's responses to those Interrogatories are not discoverable, particularly since Intuit is not withholding *any* information or facts merely because they are part of its responses to the FTC.

Rachel A. Neil
August 17, 2021
Page 2

As Intuit has previously explained, the statutes that establish confidentiality obligations for the FTC create a policy in favor of non-disclosure of information provided to those agencies in connection with investigations. Because a civil litigant is barred by statute from obtaining discovery materials directly from the FTC, the litigant should not, as a matter of policy, be able to use the civil discovery process to undermine the FTC Act's confidentiality protections. California law contains a similar protection for confidential materials that have been shared with public agencies. *See* Cal. Evid. Code § 1040. The official information privilege requires courts confronted with the question of whether materials exempted from disclosure under public records laws should be produced in civil discovery to apply a balancing test, weighing the necessity for preserving the confidentiality of the information against the necessity for disclosure in the interest of justice. *See Marylander v. Superior Court*, 81 Cal. App. 4th 1119, 1128 (2000); *see also Los Angeles Unified School Dist. v. Trustees of Southern Cal. IBEW-NECA Pension Plan*, 187 Cal. App. 4th 621, at 631-32 (2010); *De Soto v. Sears Roebuck & Co*, No. RG03096692, 2004 WL 5762675 (Cal. Super. Ct. Apr. 22, 2004) (explaining that the policies underlying the official information privilege protect private litigants attempting to keep their communications with a federal agency confidential). Judge Nelson has already indicated that she takes seriously the policy considerations underlying the FTC's confidentiality rules and the official information privilege and would be reluctant to grant a motion to compel production of the FTC Interrogatories and Responses.¹

The reasoning in *Concord Boat Corp. v. Brunswick Corp.*, which draws a distinction between purely factual information produced in the context of a confidential investigation and materials that would provide an improper and unfair view into a party's litigation strategy, provides further support for Judge Nelson's conclusion. No. LR-C-95-781, 1997 WL 34854479, at *6 (E.D. Ark. June 13, 1997). Just like the white papers at issue in *Concord Boat*, the FTC Interrogatories and Responses contain attorney advocacy and convey Intuit's attorneys' strategy in responding to the allegations against Intuit, a factor which weighs heavily in Intuit's favor in the balancing test required by Section 1040.

Notwithstanding Intuit's objections to producing the FTC Interrogatories and Responses, Intuit reiterates again that it will not withhold any information because it was provided to the FTC.

¹ IDC Tr. 30:28-31:3.

Rachel A. Neil
August 17, 2021
Page 3

Please explain what facts, if any, you believe that you have been unable to obtain or would be unable to obtain through the 37 Interrogatories that you have already served or in future discovery in this case.

Sincerely,

/s/ Matthew Benedetto

Matthew Benedetto

cc: Aaron Bloom, Office of the County Counsel, County of Santa Clara
H. Luke Edwards, Office of the County Counsel, County of Santa Clara
Zoe Friedland, Office of the County Counsel, County of Santa Clara
Susan Greenberg, Office of the County Counsel, County of Santa Clara
Greta Hansen, Office of the County Counsel, County of Santa Clara
Anthony Lopresti, Office of the County Counsel, County of Santa Clara
Kavita Narayan, Office of the County Counsel, County of Santa Clara
Yosef Mahmood, Office of the Los Angeles City Attorney
Chris Munsey, Office of the Los Angeles City Attorney

EXHIBIT 16

**CONFIDENTIAL – FILED UNDER
SEAL PURSUANT TO
PROTECTIVE ORDER AND
WITHOUT ANY FURTHER
SEALING ORDER REQUIRED**

EXHIBIT 17

**CONFIDENTIAL – FILED UNDER
SEAL PURSUANT TO
PROTECTIVE ORDER AND
WITHOUT ANY FURTHER
SEALING ORDER REQUIRED**

EXHIBIT 18

**CONFIDENTIAL – FILED UNDER
SEAL PURSUANT TO
PROTECTIVE ORDER AND
WITHOUT ANY FURTHER
SEALING ORDER REQUIRED**

**Exhibit D to the Parties' Joint
Stipulation and [Proposed] Order
Concerning the Sealing of the Joint
Briefing Statement on People's Motion
to Compel and Related Documents**

CONFIDENTIAL

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Attorneys for Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

TURBOTAX FREE FILING CASES

JCCP No. 5067

Included Action:

Included Action Case No. 19CV354178

THE PEOPLE OF THE STATE OF
CALIFORNIA, acting by and through Santa
Clara County Counsel James R. Williams,

**DECLARATION OF DAVID GRINGER
IN SUPPORT OF DEFENDANT INTUIT
INC.'S OPPOSITION TO PEOPLE'S
MOTION TO COMPEL RESPONSES TO
PEOPLE'S REQUEST FOR
PRODUCTION NO. 2 AND PEOPLE'S
SPECIAL INTERROGATORY NO. 11**

Plaintiff,

v.

INTUIT INC., a Delaware Corporation; and
DOES 1-50, inclusive,

Judge: Hon. Maren Nelson
Dept.: 17
Hearing Date: November 12, 2021
Hearing Time: 10:00 AM
Complaint filed: September 6, 2019
Trial Date: Not Yet Set

Defendants.

CONFIDENTIAL

DECLARATION OF DAVID GRINGER

I, David Gringer, declare as follows:

1. I am a partner at the law firm of Wilmer Cutler Pickering Hale and Dorr LLP, counsel of record for Defendant Intuit Inc. in the above-captioned JCCP action.

2. I submit this declaration in support of Intuit's Opposition to the People's Motion to Compel Responses to People's Request for Production No. 2 and People's Special Interrogatory No. 11.

3. I have personal knowledge of the facts stated in this declaration.

4. I am also the counsel of record for Intuit in the FTC's non-public investigation of Intuit.

5. Although there is overlap between the subject matter of the County Counsel's allegations against Intuit and the subject matter of the FTC's non-public investigation, the FTC's investigation also covers matters that are outside the scope of the County Counsel's allegations against Intuit, including matters that I believe (though I cannot know for certain) reflect the FTC's investigation of other companies, and not Intuit itself.

6. In connection with the County Counsel's allegations against Intuit and pursuant to the FTC's compulsory process, Intuit has provided its responses to 37 multipart interrogatories propounded by the FTC. All interrogatories seek information on a nationwide basis, and are not focused or in any way specific to the State of California or Intuit's practices therein.

7. Intuit has marked its responses to the FTC's interrogatories as "confidential."

8. In addition to reciting the facts that are necessary to respond to the FTC's interrogatories, Intuit's responses repeatedly advocate Intuit's positions, including positions informed by the work of experts on contested issues that are common to the FTC's investigation and the County Counsel's allegations. In doing so, they provide insight into Intuit's defense counsel's thinking and strategy in this case. This is particularly true since I am also counsel for Intuit in this case, as is WilmerHale.

CONFIDENTIAL

1 9. I am aware of no factual inconsistency or inconsistent statements between Intuit's
2 responses to the FTC's interrogatories, which Intuit provided to the FTC by and through its
3 counsel, and its statements to the County Counsel, made by and through that same counsel.

4 10. Attached hereto as **Exhibit A** is a true and correct copy of Intuit's January 7, 2021
5 letter to the County Counsel.

6 11. Attached hereto as **Exhibit B** is a true and correct copy of a letter that Intuit
7 received from the County Counsel on January 11, 2021.

8 12. Attached hereto as **Exhibit C** is a true and correct copy of Intuit's Responses and
9 Objections to Plaintiff's First Set of Special Interrogatories, which Intuit served on the County
10 Counsel on December 7, 2020.

11 13. Attached hereto as **Exhibit D** are true and correct copies of screenshots taken
12 from Intuit's TurboTax software showing the upgrade prompt that some users who were
13 ineligible for Free Edition would have seen in Tax Year 2018.

14 14. Attached hereto as **Exhibit E** is a true and correct copy of a letter that Intuit
15 received from the County Counsel on March 8, 2021.

16 15. Attached hereto as **Exhibit F** is a true and correct copy of Intuit's April 1, 2021
17 response to the County Counsel's March 8, 2021 letter.

18 I declare under penalty of perjury, under the laws of the State of California, that the
19 foregoing is true and correct and that this Declaration was executed as of the date shown below
20 at Brooklyn, NY.

21
22 Dated: October 13, 2021

/s/ David Gringer
David Gringer

EXHIBIT A

January 7, 2021

David Gringer

By E-mail

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+1 202 663 6363 (f)
david.gringer@wilmerhale.com

Aaron Bloom
Office of the County Counsel
County of Santa Clara
70 West Hedding Street
East Wing, 9th Floor
San José, California 95110

Re: TurboTax Free Filing Cases, JCCP No. 5067, Case No. 19CV354178

Dear Mr. Bloom:

I write regarding the responses and objections of the Santa Clara County Counsel to Intuit's first set of Requests for Production.

By way of background, the County Counsel filed his lawsuit in September 2019, making a series of accusations about Intuit's advertising and marketing practices. Intuit believes that those allegations were borrowed almost exclusively from ProPublica stories about Intuit earlier that year. Those stories are widely recognized to have been, at best, misleading. The IRS issued a comprehensive report systematically debunking ProPublica's theories. ProPublica itself has since issued corrections. Thus, when discovery in this case opened, Intuit served targeted Requests for Production seeking documents in the County Counsel's possession that would support the allegations in the complaint or, as Intuit believes, illustrate the absence of support for those allegations. These requests are straightforward and should have been easy for the County Counsel to respond to promptly. The County Counsel nonetheless sought and received an extension to respond to the Requests; that request was conditioned on the County Counsel's agreement to make a significant production by December 16, 2020 (the extended due date for a response). However, on December 16, the County Counsel produced only 87 documents. These documents are largely publicly-available files that bear little to no relation to the theories espoused in the complaint. None would be admissible as evidence in contested litigation. As of today, the County Counsel has collected and reviewed no emails, and cannot provide a date certain by which it intends to complete its document production.

This is not discovery in good faith; particularly in light of what plaintiffs concede to be Intuit's "voluminous" production of documents and information. Beyond the overall context, and the topics already raised for discussion for our meet-and-confer call scheduled for January 12, 2021, pursuant to my December 30, 2020 email, Intuit would also like to address the issues set forth below. To ensure that our conversation is as productive as possible, please provide written responses in advance of that date.

Aaron Bloom
January 7, 2021
Page 2

First, as identified in my email of December 22, 2020, the County Counsel has failed to provide “the specific Request number(s) to which [each] DOCUMENT responds,” as required by General Instruction No. 4 and the CCP. *See* CCP § 2031.280(a). The parties’ good faith disagreement over this provision of the Code’s applicability to pre-2020 Requests served on Intuit does not excuse the County Counsel from compliance. We expect the County Counsel to comply with a rule that he concedes applies to him.

Second, the County Counsel objects to many of Intuit’s requests “to the extent [they] seek[] confidential, proprietary, or personal information of a non-party that cannot be disclosed.” That objection is untenable given the Court’s entry of the Amended Stipulation and Protective Order. Please confirm whether the County Counsel intends to withhold or is withholding any documents based upon this objection.

Third, in response to RFP No. 6, seeking “all notes, recordings, logs, or other documents relating to interviews conducted with nonparties” related to this action, the County Counsel responded that, after a “reasonable search and diligent inquiry,” you identified “no other *nonprivileged* documents responsive to the non-withdrawn portion of this Request within their possession, custody, or control.” Please confirm whether you have identified documents that you believe to be privileged that are responsive to this request or whether there are no responsive documents.

Fourth, in response to RFP No. 8, seeking all documents produced in response to a subpoena issued in this action or voluntarily by a nonparty that relates to the allegations in this action, the County Counsel objected to the extent Intuit’s request “seeks documents produced in response to subpoenas issued by any party other than” your office. This objection is neither clear nor is it a valid basis to withhold documents in your possession, custody, or control. Please confirm whether the County Counsel intends to withhold documents on this basis.

Fifth, in response to RFP No. 10, the County Counsel objected to Intuit’s request for screenshots or internet website printouts from the Internal Revenue Service, TurboTax, or other providers of online tax preparation services in County Counsel’s possession, custody, or control, on the grounds that such documents were “already in Intuit’s possession, [are] publicly available, ha[ve] already been produced by Intuit . . . , or [are] otherwise equally or more readily accessible to Intuit.” Such objection is beside the point and would also apply to thousands of documents that have already been requested of Intuit. Intuit’s request is focused on the County Counsel’s *possession* and potential use of such documents. Please confirm that the County Counsel does not intend to withhold documents on these grounds.

The County Counsel also objected to RFP No. 10 on the ground that it seeks documents relating to “providers of online tax preparation services” other than Intuit “to the extent that information is neither relevant to this Action nor reasonably calculated to lead to the discovery of

Aaron Bloom
January 7, 2021
Page 3

admissible evidence.” Such an objection is meritless. The advertising and marketing practices in the online tax preparation industry are at issue in this action; indeed your complaint makes repeated reference to Intuit’s practices as they compare to those of its competitors, and alleges that Intuit was motivated by a desire to keep its prices above those of its competitors. *See, e.g.*, Compl. ¶¶ 33, 34. Please confirm that the County Counsel is not withholding any documents on the basis of this objection.

Sixth, the County Counsel has objected to RFP Nos. 51, 52, and 53 on, among other grounds, the assertion that these requests “seek[] documents that are neither relevant to this Action nor reasonably calculated to lead to the discovery of admissible evidence” and “seek[] information relating to a time period not relevant to the issues in this case and not reasonably calculated to lead to the discovery of admissible evidence.” These objections are also meritless. These RFPs are relevant to identify prior inconsistent statements by the County Counsel concerning the scope of the false advertising claims at issue in this litigation and for potential impeachment at trial.

Seventh, with respect to RFP No. 57, Intuit is entitled to know what standards, if any, the County Counsel uses to evaluate whether advertisements are deceptive and how Intuit’s advertisements are measured against those standards. If the County Counsel has no such standards, that is relevant too, and the County Counsel must so state.

Eighth, with respect to RFP No. 58, the documents Intuit seeks relating to the County Counsel’s consideration of whether to file this action, including potential revenue to be obtained, are relevant because the County Counsel has repeatedly asserted that he is acting in the public interest and in the interest of Intuit’s customers. Intuit is entitled to discovery regarding whether that is accurate, or whether instead the litigation is motivated by financial concerns. This concern should not come as a surprise. For example, in their joint response to Intuit’s petition for coordination in this matter, plaintiffs explicitly requested that judgment in each underlying action be entered in the court in which it was originally filed because civil penalties are allocated depending on the location where judgment is entered and entering judgment in only one county would “depriv[e] either the [] County Counsel or the [] City Attorney of resources to pursue future consumer protection enforcement efforts.” People’s Resp. to Def. Pet. for Coordination at 4 (Oct. 28, 2019); *see also* Dec. 18, 2019 Hr’g Tr. at 9:4–11 (Mr. Bloom requesting that, upon judgment in coordinated action, “the case be transferred back to the original county they were filed [in] for judgment” to ensure civil penalties “benefit the taxpayers who ultimately paid for those enforcement actions”).

Ninth, RFP No. 66 seeks a copy of what the County Counsel refers to as the “TurboTax Free Edition website” on page 3 of his opposition to Intuit’s demurrer. The County Counsel objects to this request on the grounds that “it seeks information that is already in Intuit’s possession, is publicly available, has already been produced by Intuit in this Action, or is

Aaron Bloom
January 7, 2021
Page 4

otherwise equally or more readily accessible to Intuit.” However, to its knowledge, Intuit does not have a “Free Edition website,” and regardless is entitled to receive a copy of whatever “website” the County Counsel was referring to when he made this representation to the Court. The objection that the County Counsel need not “create new documents” is also without merit, unless you are prepared to concede—contrary to your representations to the Court—that there is no “Free Edition website.” In lieu of a copy, however, Intuit is willing to accept a sworn declaration describing with specificity what, if anything, the County Counsel was referencing on page 3 of his demurrer opposition.

Tenth, RFP No. 68 seeks documents sufficient to show each time Intuit informed a “low-income filer[], eligible for TurboTax Free File, that they needed to pay to ‘accurately report’ their taxes,” as the County Counsel asserted on page 7 of his opposition to Intuit’s demurrer. The County Counsel objects to this request, among other grounds, to the extent that it seeks information that is already in Intuit’s possession, has already been produced by Intuit, or is otherwise equally or more readily accessible to Intuit. The County Counsel further objects on the grounds that the he is not obligated to create new documents in response to a request for production and that the request overbroad and unduly burdensome to the extent it seeks documents that were produced by Intuit or filed in any other proceeding to which Intuit is a party and are not otherwise in the County Counsel’s custody or control. However, Intuit is unaware of what documents the County Counsel referenced in his submission to the Court and the County Counsel has not agreed to produce any documents in response to this request, even subject to his objections. We presume you are in possession of documents sufficient to support this representation. If so, those documents must be produced to Intuit. If the County Counsel possesses no such documents, he must so state.

Eleventh, given the County Counsel’s responses that he has no documents responsive to Requests 11, 19, 20, 21, 41, 43, and 47, please explain your basis for the allegations set forth in paragraphs 55, 56, and 66 of your Complaint.

In addition, Intuit reserves all rights pending its review of the County Counsel’s completed document production.

We look forward to discussing these issues during our January 12, 2021 meet and confer.

Aaron Bloom
January 7, 2021
Page 5

Sincerely,

/s/ David Gringer

/

David Gringer

cc: Zoe Friedland, Office of the County Counsel, County of Santa Clara
H. Luke Edwards, Office of the County Counsel, County of Santa Clara
Susan Greenberg, Office of the County Counsel, County of Santa Clara
Greta Hansen, Office of the County Counsel, County of Santa Clara
Kavita Narayan, Office of the County Counsel, County of Santa Clara
Rachel Neil, Office of the County Counsel, County of Santa Clara
Adam Teitelbaum, Office of the Los Angeles City Attorney
Danielle Goldstein, Office of the Los Angeles City Attorney

EXHIBIT B

**OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA**

County Government Center
70 West Hedding Street
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San José, California 95110-1770

(408) 299-5900
(408) 292-7240 (FAX)

Via email

David Gringer
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Robert M. Coelho
Tony LoPresti
Steve Mitra
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Douglas M. Press
Gita C. Suraj
ASSISTANT COUNTY COUNSEL

January 11, 2021

Re: *TurboTax Free Filing Cases*, JCCP No. 5067, Case No. 19CV354178

Dear David et al.:

As requested, we respond to Intuit's Thursday January 7, 2021 meet and confer correspondence regarding the People's response to Intuit's first set of requests for production.

In response to Intuit's introductory statements, we disagree with Intuit's description of the People's allegations, ProPublica's reporting, and the IRS's supposed response, but having already responded to these same arguments in response to Intuit's demurrer, do not rehash them here.

To briefly clarify the history of these requests for production and the grounds for the short extension request by the People, Intuit served 71 requests for production. Several of the requests covered topics that were stayed per the Court's order and were ultimately withdrawn by Intuit. Based on when they were served, the remaining responses were due immediately following the Thanksgiving holiday. The People requested a short two-week extension to respond to avoid the Thanksgiving holiday. We expected this would be noncontroversial given that Intuit had complained on several occasions, including at the October 26, 2020 Further Status Conference, that the People had inadvertently initially provided Intuit an extension date to respond to the People's interrogatories that fell around the same time (which we corrected almost immediately upon realizing). Instead, Intuit attempted to impose conditions on the People's

Letter to David Gringer et al.

Re: *TurboTax Free Filing Cases*, JCCP No. 5067, Case No. 19CV354178

Date: January 11, 2021

Page 2

response, including that we provide a “significant production that same day.” We informed Intuit that we disagreed with Intuit’s response and attempted conditions but that we nonetheless did not “intend to rely solely on objections for most of the requests for production, and d[id] anticipate producing at least a portion of the responsive non-privileged documents by the requested extension date, December 16.” We asked Intuit again if it agreed to the extension, and noted we were fine otherwise raising to the Court. Intuit then agreed to the extension.

On December 16, 2021, we responded, did not rely solely or even primarily on objections, and produced close to 1,000 pages of documents. The documents were a meaningful portion of our responsive, non-privileged documents, and were called for by Intuit’s requests. We disagree that the documents bear little or no relation to the theories espoused in the complaint, and Intuit’s blanket statement that none would be admissible is plainly incorrect. Intuit’s unsupported assertion that we have not collected or reviewed any emails by the production date is again wrong. We have moved with good faith and effort to complete our review, and as we noted in our January 8, 2021 letter, anticipate completing our production this month, just slightly over a month after the initial response. We further note that Intuit still not completed its production of documents in response to 2019 requests for production in this action.

On the other points raised by Intuit:

First, as you know, we have not refused to provide the request numbers to which the produced documents respond, but since Intuit has not done so for its 2020 document productions, simply noted that the obligation is reciprocal. And in an effort to resolve this given Intuit’s unwillingness to do so, we only asked that Intuit at this stage provide request numbers to which the documents produced by Intuit on December 7, 2020 respond (a fraction of the documents produced by Intuit in 2020 which Intuit should have categorized by request) and for future responses for the outstanding requests.¹ If you have an objection to that proposal we are happy to discuss on the meet and confer.

Second, we disagree with Intuit’s statement that the Amended Stipulation and Protective Order render the People’s objection on third party privacy grounds untenable. However, we are not intending to withhold any documents based on this objection.

Third, in response to RFP No. 6 seeking all notes, recordings, logs, or other documents relating to interviews conducted with nonparties, we are withholding work product and privileged information generated following the complaint.

Fourth, in response to RFP No. 8 seeking all documents produced in response to a subpoena issued in this action, we do not understand what is unclear about our objections to

¹ While the People do not insist that Intuit categorize its pre-December 7, 2020 document productions at this time, they reserve all rights on this issue, including the right to request that Intuit identify discrete documents within those prior productions.

Letter to David Gringer et al.

Re: *TurboTax Free Filing Cases*, JCCP No. 5067, Case No. 19CV354178

Date: January 11, 2021

Page 3

producing documents produced in response to a subpoena by another party in this action, and an objection that documents are available from other more convenient sources (here whoever served the subpoena) is valid. *See* Cal. Code Civ. Proc. § 2031.060(f). However, we are not aware that we are in possession of any documents produced in response to a subpoena in this action and so are not intending to withhold any documents on that basis.

Fifth, in response to RFP No. 10 seeking all screen shots or internet website printouts from the IRS, TurboTax, or other providers of online tax preparation services, again the fact that documents are available from other more convenient sources is a valid objection. *See* Cal. Code Civ. Proc. § 2031.060(f). Screenshots of Intuit's website are self-evidently more accessible to Intuit than the People. Nonetheless, to resolve this matter, we will not withhold the screenshots of Intuit's website in the People's possession, custody, or control.

On Intuit's contention that all screenshots or printouts the People possess of any websites of other tax providers is discoverable, nothing in your letter establishes that all screen shots or internet website printouts from all other online tax preparation services are relevant or discoverable. However, in an effort to compromise, we will not withhold screenshots or printouts of the websites or other tax providers in the People's possession, custody, or control based on our relevance objection so long as the screenshots or printouts concern the advertising of those companies' online tax preparation products.

Sixth, you have provided no basis for why RFP Nos. 51, 52, and 53, which collectively seek all briefs filed, experts reports served, and depositions taken by SCCC from 2010 to the present in cases involving false advertising, the UCL, or the CLRA, are appropriate. They are not. The purported relevance of the requests, to identify supposed inconsistent statements about the scope of the false advertising claims at issue in this litigation, neither makes sense nor demonstrates how information about unrelated cases is likely to lead to discovery of admissible evidence. And you do not provide any response to the overbreadth and burden objections for the requests, which span 10 years, would require voluminous responses, and for which you have not provided and cannot provided a basis to demonstrate are connected to this litigation.

Seventh, RFP No. 57, which seeks any guidelines used or considered by SCCC in assessing if advertisements are deceptive, seeks quintessentially privileged and attorney work product information, our law office's analysis of false advertising law. Intuit is not entitled to our legal product, just as we are not entitled to Wilmer Hale's or Intuit's privileged or work product information.

Eighth, RFP No. 58, which seeks all documents and communications relating to our consideration of whether to file this action, again seeks quintessentially privileged and attorney work product information.

Ninth, for RFP No. 66, seeking a copy of what the People refer to as the TurboTax Free Edition website on page 3 of the People's opposition to Intuit's demurrer, Intuit has a website

Letter to David Gringer et al.

Re: *TurboTax Free Filing Cases*, JCCP No. 5067, Case No. 19CV354178

Date: January 11, 2021

Page 4

which contains advertisements for and links to access the TurboTax Free Edition. The sentence of the demurrer opposition you quote cites to a paragraph in the complaint referencing the URL for the front page of that website—turbtax.intuit.com. See Complaint ¶¶ 43-44. The content of this website is easily accessible to Intuit, which owns it. This effort to generate controversy because of an alleged inability to understand the plain meaning of a sentence in an already decided demurrer is not worth the parties' time.

Tenth, in RFP No. 68, Intuit seeks documents sufficient to show each time Intuit informed a “low-income filer, eligible for TurboTax Free File, that they needed to pay to ‘accurately report their taxes,’” quoting a portion of a sentence in the People’s demurrer opposition. The quoted sentence in the opposition, that the “People assert that Intuit violated the FAL when it falsely informed low-income filers, eligible for TurboTax Free File, that they needed to pay to ‘accurately report their taxes (Compl. ¶¶ 7, 48),” cites the paragraphs in the complaint supporting this sentence, including an image of the screen shown to tax filers, including low-income tax filers who used the TurboTax Free Edition, and informing them they needed to upgrade and pay to “accurately report.” The People also produced this screen. Intuit does not (and cannot) dispute that the image is accurate since it produced the same image in its documents. However, RFP No. 68, requesting documents sufficient to show each low-income taxpayer who was shown this screen, is both not an appropriate document request (*see* Cal. Code Civ. Proc. § 2031.010), and also seeks information far more accessible to Intuit, which is in possession of the complete list of taxpayers to whom it showed the required upgrade screen.

Eleventh, in response to your request that we explain the basis of our allegations for certain paragraphs in the complaint, you have served document requests and not interrogatories. We have responded to those requests appropriately.

We look forward to connecting tomorrow.

Very truly yours,

JAMES R. WILLIAMS
County Counsel



AARON H. BLOOM
Deputy County Counsel

AHB:ahb

EXHIBIT C

E-Served: Dec 7 2020 7:51PM PST Via Case Anywhere

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12 *Attorneys for Defendant*

13
14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF LOS ANGELES**

16 TURBOTAX FREE FILING CASES

JCCP No. 5067

17 Included Action:

Included Action Case No. 19CV354178

18 THE PEOPLE OF THE STATE OF
19 CALIFORNIA, acting by and through Santa
Clara County Counsel James R. Williams,

**DEFENDANT INTUIT INC.'S
RESPONSES AND OBJECTIONS TO
PLAINTIFF'S SPECIAL
INTERROGATORIES (SET 1)**

20 Plaintiff,

21 v.

Judge: Hon. Maren Nelson
Dept.: 17

22 INTUIT INC., a Delaware Corporation; and
23 DOES 1-50, inclusive,

Complaint filed: September 6, 2019
Trial Date: Not Yet Set

24 Defendants.
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28 **DEFENDANT INTUIT'S RESPONSES AND OBJECTIONS TO
PLAINTIFF'S FIRST SET OF SPECIAL INTERROGATORIES**

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DEFENDANT INTUIT INC.’S RESPONSES AND OBJECTIONS
TO PLAINTIFF’S FIRST SET OF SPECIAL INTERROGATORIES

PROPOUNDING PARTY: THE PEOPLE OF THE STATE OF CALIFORNIA
RESPONDING PARTY: INTUIT INC.
SET NUMBER: ONE (1)

Pursuant to California Code of Civil Procedure (“CCP”) §§ 2030.010 *et seq.*, Defendant Intuit Inc., by and through counsel, hereby provides its objections and responses to Plaintiff’s First Set of Special Interrogatories (Nos. 1-32, as numbered by Plaintiff) (the “Interrogatories”).

GENERAL OBJECTIONS

1. The General Objections, set forth herein, are continuing objections to each specific interrogatory that follows, whether or not the General Objections are referenced in the specific response.

2. Intuit’s objections herein shall not waive or prejudice any further objections it may later assert. The failure to make a particular objection in a given response should not be construed as a waiver of that objection. Intuit reserves the right to supplement, amend, or qualify these objections.

3. Intuit objects to the Interrogatories, Definitions, and Instructions to the extent that they seek to impose obligations on Intuit in excess of those set forth in the CCP, the Los Angeles County Superior Court Local Civil Rules, the Court’s orders in this action, or any other applicable order, rule, or law.

4. Intuit objects to the Interrogatories to the extent that they seek information or documents protected from disclosure by any privilege, protection, or immunity, including the attorney-client privilege, the attorney work product protection, or any other privilege, immunity, principle, doctrine, or rule of confidentiality, or any disclosure which is not permitted by federal, state, or any other applicable law or regulation. Any Specific Objections on the grounds of privilege are provided for emphasis and clarity only, and the absence of such a specific objection

1 shall not be interpreted as evidence that Intuit does not object to a specific interrogatory on the
2 basis of an applicable privilege, immunity, or protection. Intuit will not produce any documents
3 or information that are protected from disclosure by any privilege, protection, or immunity,
4 including the attorney-client privilege, the attorney work product protection, or any other
5 privilege, immunity, principle, doctrine, or rule of confidentiality, or any disclosure which is not
6 permitted by federal, state, or any other applicable law or regulation, and will redact any such
7 information that is included in documents produced in response to these Interrogatories. If any
8 protected information or material is disclosed, such disclosure is not intentional and shall not be
9 deemed a waiver of any privilege or protection.

10 5. Intuit objects to the Interrogatories to the extent that they seek confidential,
11 proprietary, or personal information of a non-party, the disclosure of which is not permitted by
12 reason of contract, privacy laws, or other binding legal obligation. Specific Objections that an
13 interrogatory seeks confidential, proprietary, or personal information of a non-party, the
14 disclosure of which is not permitted by reason of contract, privacy laws, or other binding legal
15 obligation, are provided for emphasis and clarity only. The absence of such a specific objection
16 shall not be interpreted as evidence that Intuit does not object to a specific interrogatory on the
17 basis that it seeks confidential, proprietary, or personal information of a non-party, the disclosure
18 of which is not permitted by reason of contract, privacy laws, or other binding legal obligation.
19 Intuit states that, to the extent it identifies documents or information that are responsive to an
20 interrogatory but contain or constitute confidential, proprietary, or personal information of a non-
21 party, the disclosure of which is not permitted by reason of contract, privacy laws, or other
22 binding legal obligation, that it will not produce such documents or information and will redact
23 any such information that is included in documents produced in response to these Interrogatories.

24 6. Intuit objects to the Interrogatories to the extent that they purport to impose on
25 Intuit a duty to search for, secure, and produce documents or things not within its possession,
26 custody, or control. Specific objections or statements that Intuit will only search for and produce
27

1 documents that are within its possession, custody, or control are provided for emphasis and
2 clarity only, and the absence of such a specific objection or statement shall not be interpreted as
3 evidence that Intuit will produce documents or things that are not within its possession, custody,
4 or control.

5 7. Intuit objects to the Interrogatories to the extent that they purport to seek
6 discovery of documents or information that are in the possession, custody, or control of Intuit's
7 affiliates or subsidiaries having corporate identities separate and distinct from Intuit and are not
8 in Intuit's possession, custody, or control.

9 8. To the extent that the Interrogatories require the disclosure of protected material,
10 including but not limited to trade secrets, confidential information, proprietary information, or
11 any information implicating privacy interests, Intuit's response and production shall be subject to
12 the Protective Order entered in this action and properly designated as such.

13 9. Intuit objects to the Interrogatories to the extent that they purport to require Intuit
14 to create or generate documents that do not currently exist.

15 10. Intuit objects to each of the Interrogatories to the extent that it seeks an
16 interpretation of documents that are readily accessible to Plaintiff.

17 11. Intuit objects to the Interrogatories to the extent they seek information or
18 documents that are unreasonably cumulative or duplicative, including unreasonably cumulative
19 or duplicative of material already in the possession of Plaintiff, primarily or exclusively within
20 Plaintiff's knowledge or control, or obtainable from other sources that are less burdensome or
21 less expensive.

22 12. Intuit objects to the Interrogatories to the extent they are unduly burdensome,
23 oppressive, or expensive, taking into account the needs of the case, the amount in controversy,
24 limitations on the parties' resources, and the importance of the issues at stake in the litigation.

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1 PRODUCT offered by Intuit. To the extent “TurboTax Free File” is intended to refer to the
2 TURBOTAX FREE FILE PRODUCT, as defined, Intuit objects to its inclusion in the definition
3 TURBOTAX PRODUCT(S) since that software is donated by Intuit to the IRS Free File
4 program.

5 28. Intuit objects to the definition of the term “TURBOTAX FREE FILE
6 PRODUCT” as overbroad, vague, and ambiguous to the extent it purports to include any product
7 other than TurboTax Freedom Edition, TurboTax Free File Program, and IRS Free File Program
8 Delivered by TurboTax, as there are no “other” products donated by Intuit to the IRS Free File
9 program. Intuit further objects to this definition to the extent it refers to “TurboTax Free File,”
10 which is not a name by which Intuit’s donated software has ever been offered by the IRS. Intuit
11 further objects to this definition to the extent the phrase “TURBOTAX PRODUCT that YOU
12 offer or have offered as part of the IRS Free File Program” is factually inaccurate. The
13 TURBOTAX FREE FILE PRODUCT, as defined, is software donated by Intuit to the IRS Free
14 File program and is not “offer[ed]” by Intuit.

15 29. Intuit objects to the definition of the phrase “TURBOTAX FREE EDITION” on
16 the grounds that it is overbroad, unduly burdensome, and oppressive, seeks information that is
17 irrelevant to the subject matter of this litigation, does not describe the information sought with
18 sufficient particularity, and seeks to impose obligations beyond those imposed by the law. Intuit
19 further objects to this definition to the extent it includes “TurboTax Absolute Zero” as a
20 TURBOTAX PRODUCT. AbsoluteZero was not a separate TURBOTAX PRODUCT. It was a
21 limited-time promotional offer through which consumers could prepare and file their state
22 return(s) for free in addition to the free federal return already offered as part of TurboTax Free
23 Edition. Intuit further objects to this definition to the extent it purports to include other,
24 unrelated promotional offers through which customers could receive a “free” version of a
25 TURBOTAX PRODUCT. Intuit will interpret the term TURBOTAX FREE EDITION to refer
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1 to “TurboTax Free Edition,” including when such TURBOTAX PRODUCT was bundled with a
2 free state return as part of the AbsoluteZero promotion.

3 30. Intuit objects to the definition of the term “TURBOTAX PAID PRODUCT(S)”
4 on the grounds that it is overbroad, vague, and ambiguous to the extent it suggests any consumer
5 “must” pay Intuit money to use one of its commercial TurboTax products. More than 115,000
6 Californians filed their taxes for free using a “TURBOTAX PAID PRODUCT” in 2019, as
7 defined, including tens of thousands of military servicemembers. Intuit will interpret the term
8 “TURBOTAX PAID PRODUCT(S)” to refer to TurboTax Deluxe, TurboTax Deluxe Live,
9 TurboTax Premier, TurboTax Premier Live, TurboTax Self-Employed, TurboTax Self-
10 Employed Live, and TurboTax Home & Business, regardless of whether consumers paid money
11 to use such products.

12 31. Intuit objects to the definition of the term “REQUIRED UPGRADE MESSAGE”
13 on the grounds that it is overbroad, vague, and ambiguous to the extent it suggests that Intuit
14 presents USERS with a message that they “must purchase a PRODUCT upgrade.” In the event a
15 customer begins her tax return in a TURBOTAX PRODUCT that does not support her tax needs,
16 TurboTax presents the USER with the option to upgrade to a more inclusive TURBOTAX
17 PRODUCT at a clearly disclosed price.

18 32. Intuit objects to the definition of the phrase “COVERED PERIOD” on the
19 grounds that it is overbroad, unduly burdensome, and oppressive, and is not limited to a
20 reasonable or relevant time period. Specifically, Intuit objects to the extent the Interrogatories
21 request information regarding TAX YEAR 2014, because the COVERED PERIOD begins more
22 than four months after the deadline for taxpayers to file their TAX YEAR 2014 tax returns.

23 33. Intuit objects to the definition of the term “ADVERTISEMENT” on the grounds
24 that it is overbroad, unduly burdensome, vague, and ambiguous to the extent it includes “any
25 statement made in connection with the sale of goods or services.” Intuit will interpret the term
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1 “ADVERTISEMENT” to mean an advertisement placed as part of a commercial marketing
2 campaign to promote its TURBOTAX PRODUCTS.

3 34. Intuit objects to the definition of the term “DOCUMENT” on the grounds that it is
4 overbroad, unduly burdensome, and oppressive, seeks information that is irrelevant to the subject
5 matter of this litigation, does not describe the information sought with sufficient particularity,
6 and seeks to impose obligations beyond those imposed by the law.

7 **OBJECTIONS TO INSTRUCTIONS**

8 35. Intuit objects to Instruction 2 to the extent it purports to impose obligations on
9 Intuit in excess of those set forth in the Code of Civil Procedure, the Los Angeles County
10 Superior Court Local Civil Rules, the Court’s orders in this Litigation, or any other applicable
11 order, rule, or law. Intuit further objects to Instruction 2 on the grounds that it is overbroad,
12 unduly burdensome, nor reasonably calculated to lead to the discovery of admissible evidence to
13 the extent it seeks to impose an obligation on Intuit to provide information not in Intuit’s
14 possession, custody, or control, including information concerning “representatives” and
15 “attorneys.” Intuit further objects to Instruction 2 to the extent that it seeks disclosure of
16 documents protected from disclosure by any privilege, protection, or immunity, including the
17 attorney-client privilege, the attorney work product protection, or any other privilege, immunity,
18 principle, doctrine, or rule of confidentiality. Intuit will construe the terms of the Interrogatories
19 to request that Intuit use reasonable diligence to locate responsive non-privileged information,
20 based upon inquiry of those persons who reasonably may be expected to possess such
21 information and on examination of those sources that reasonably may be expected to yield such
22 information.

23 36. Intuit objects to Instruction 3 to the extent it seeks to impose obligations on Intuit
24 in excess of those set forth in the CCP, the Los Angeles County Superior Court Local Civil
25 Rules, the Court’s orders in this litigation, or any other applicable order, rule, or law.

1 purports to seek information for the entirety of the TAX YEAR 2014 filing season,¹ whereas the
2 COVERED PERIOD begins September 6, 2015. Intuit accordingly limits its response for TAX
3 YEAR 2014 to the portion of the filing season included in the COVERED PERIOD.

4 Subject to and without waiving the foregoing General and Specific Objections, Intuit
5 responds that [REDACTED] California residents accessed and used TURBOTAX FREE EDITION during
6 the portion of the filing season for TAX YEAR 2014 within the COVERED PERIOD. [REDACTED]
7 California residents accessed and used TURBOTAX FREE EDITION during the filing season
8 for TAX YEAR 2015, [REDACTED] California residents accessed and used TURBOTAX FREE
9 EDITION during the filing season for TAX YEAR 2016. [REDACTED] California residents
10 accessed and used TURBOTAX FREE EDITION during the filing season for TAX YEAR 2017,
11 [REDACTED] California residents accessed and used TURBOTAX FREE EDITION during the
12 filing season for TAX YEAR 2018, and [REDACTED] California residents accessed and used
13 TURBOTAX FREE EDITION during the filing season for TAX YEAR 2019.²

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16 ¹ The phrase “filing season” used herein generally refers to the period when customers can
17 prepare and (after the IRS opens for tax filings in January) file their tax returns using a
18 TURBOTAX PRODUCT. This period typically spans from December of the TAX YEAR to
19 Tax Day the subsequent year. Some taxpayers also may file their tax returns until October 15 of
20 the subsequent year if they requested an extension from the IRS, and such returns are included in
21 Intuit’s responses to the Interrogatories, where applicable. Thus, Intuit’s reference to “the filing
22 season for TAX YEAR 2015” refers to the period during which taxpayers could use a
23 TURBOTAX PRODUCT to prepare and file their TAX YEAR 2015 returns, generally from
24 December 2015 to October 15, 2016.

25 ² Intuit’s response to Interrogatory No. 1 is underinclusive to the extent Intuit does not maintain
26 data in the ordinary course of business in a format permitting a response for customers who
27 began a return in TURBOTAX FREE EDITION in TAX YEARS 2014 and 2015 but did not
complete a return in any TURBOTAX PRODUCT. Next, it is underinclusive in TAX YEARS
2016 to 2019 because customers who abandon their tax return may not proceed far enough into
the product for Intuit to determine their state of residence. Intuit has not provided data for
customers without a state of residence. Intuit’s response is further underinclusive in all tax years
to the extent Intuit does not maintain data in the ordinary course of business in a format
permitting a response for customers who begin their return in a TURBOTAX PAID PRODUCT,
downgrade to TURBOTAX FREE EDITION, and ultimately complete their return in
TURBOTAX FREE EDITION.

1 EDITION during the filing season for TAX YEAR 2018, and [REDACTED] California residents
2 used TURBOTAX FREE EDITION during the filing season for TAX YEAR 2019.³

3 **SPECIAL INTERROGATORY NO. 3**

4 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
5 PERSONS who filed federal income tax returns, but not state income tax returns, using the
6 TURBOTAX FREE EDITION.

7 **RESPONSE TO SPECIAL INTERROGATORY NO. 3**

8 In addition to the forgoing General Objections, Objections to Definitions, and Objections
9 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
10 overbroad, unduly burdensome, oppressive, outside the scope of permissible discovery, nor
11 reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks
12 information about PERSONS who reside outside the State of California. Intuit will respond to
13 this Interrogatory with information relating to customers who resided in California at the time
14 that they printed or filed their tax return using a TURBOTAX PRODUCT. Intuit further objects
15 to this Interrogatory as overbroad, unduly burdensome, and oppressive to the extent it purports to
16 seek information for the entirety of the TAX YEAR 2014 filing season. Intuit accordingly limits
17 its response for TAX YEAR 2014 to the portion of the filing season included in the COVERED
18 PERIOD.

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21 ³ Intuit's response to Interrogatory No. 2 is underinclusive to the extent Intuit does not maintain
22 data in the ordinary course of business in a format permitting a response for customers who
23 began a return in TURBOTAX FREE EDITION in TAX YEARS 2014 and 2015 but did not
24 complete a return in any TURBOTAX PRODUCT. Next, it is underinclusive in TAX YEARS
25 2016 to 2019 because customers who abandon their tax return may not proceed far enough into
26 the product for Intuit to determine their state of residence. Intuit has not provided data for
27 customers without a state of residence. Intuit's response is further underinclusive in all tax years
to the extent Intuit does not maintain data in the ordinary course of business in a format
permitting a response for customers who begin their return in a TURBOTAX PAID PRODUCT,
downgrade to TURBOTAX FREE EDITION, and ultimately complete their return in
TURBOTAX FREE EDITION.

1 Subject to and without waiving the foregoing General and Specific Objections, Intuit
2 responds that [REDACTED] California residents filed a federal income tax return, but not a state income
3 tax return, using TURBOTAX FREE EDITION during the portion of the filing season for TAX
4 YEAR 2014 within the COVERED PERIOD, [REDACTED] California residents did so during the filing
5 season for TAX YEAR 2015, [REDACTED] California residents did so during the filing season for
6 TAX YEAR 2016, [REDACTED] California residents did so during the filing season for TAX YEAR
7 2017, [REDACTED] California residents did so during the filing season for TAX YEAR 2018, and 8,198
8 California residents did so during the filing season for TAX YEAR 2019.

9 **SPECIAL INTERROGATORY NO. 4**

10 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
11 PERSONS who filed both federal and state income tax returns using the TURBOTAX FREE
12 EDITION.

13 **RESPONSE TO SPECIAL INTERROGATORY NO. 4**

14 In addition to the forgoing General Objections, Objections to Definitions, and Objections
15 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
16 overbroad, unduly burdensome, oppressive, outside the scope of permissible discovery, nor
17 reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks
18 information about PERSONS who reside outside the State of California. Intuit will respond to
19 this Interrogatory with information relating to customers who resided in California at the time
20 that they printed or filed their tax return using a TURBOTAX PRODUCT. Intuit further objects
21 to this Interrogatory as overbroad, unduly burdensome, and oppressive to the extent it purports to
22 seek information for the entirety of the TAX YEAR 2014 filing season. Intuit accordingly limits
23 its response for TAX YEAR 2014 to the portion of the filing season included in the COVERED
24 PERIOD.

25 Subject to and without waiving the foregoing General and Specific Objections, Intuit
26 responds that [REDACTED] California residents filed both a federal and state income tax return using

1 TURBOTAX FREE EDITION during the portion of the filing season for TAX YEAR 2014
2 within the COVERED PERIOD, ██████ California residents did so during the filing season
3 for TAX YEAR 2015, ██████ California residents did so during the filing season for TAX
4 YEAR 2016, ██████ California residents did so during the filing season for TAX YEAR
5 2017, ██████ California residents did so during the filing season for TAX YEAR 2018, and
6 ██████ California residents did so during the filing season for TAX YEAR 2019.

7 For the avoidance of doubt, all customers identified in this interrogatory response paid
8 absolutely nothing to use TURBOTAX FREE EDITION.

9 **SPECIAL INTERROGATORY NO. 5**

10 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
11 PERSONS in California who filed federal income tax returns, but not state income tax returns,
12 using the TURBOTAX FREE EDITION.

13 **RESPONSE TO SPECIAL INTERROGATORY NO. 5**

14 In addition to the forgoing General Objections, Objections to Definitions, and Objections
15 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
16 overbroad, unduly burdensome, and oppressive to the extent it purports to seek information for
17 the entirety of the TAX YEAR 2014 filing season. Intuit accordingly limits its response for
18 TAX YEAR 2014 to the portion of the filing season included in the COVERED PERIOD. Intuit
19 further objects to this Interrogatory as overbroad, vague, and ambiguous to the extent the phrase
20 “PERSONS in California” is not defined. Intuit will interpret “PERSONS in California” to refer
21 to customers who resided in California at the time that they printed or filed their tax return using
22 a TURBOTAX PRODUCT.

23 Subject to and without waiving the foregoing General and Specific Objections, Intuit
24 responds that ██████ California residents filed a federal income tax return, but not a state income
25 tax return, using TURBOTAX FREE EDITION during the portion of the filing season for TAX
26 YEAR 2014 within the COVERED PERIOD, ██████ California residents did so during the filing

1 season for TAX YEAR 2015, [REDACTED] California residents did so during the filing season for
2 TAX YEAR 2016, [REDACTED] California residents did so during the filing season for TAX YEAR
3 2017, [REDACTED] California residents did so during the filing season for TAX YEAR 2018, and [REDACTED]
4 California residents did so during the filing season for TAX YEAR 2019.

5 **SPECIAL INTERROGATORY NO. 6**

6 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
7 PERSONS in California who filed both federal and state income tax returns using the
8 TURBOTAX FREE EDITION.

9 **RESPONSE TO SPECIAL INTERROGATORY NO. 6**

10 In addition to the forgoing General Objections, Objections to Definitions, and Objections
11 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
12 overbroad, unduly burdensome, and oppressive to the extent it purports to seek information for
13 the entirety of the TAX YEAR 2014 filing season. Intuit accordingly limits its response for
14 TAX YEAR 2014 to the portion of the filing season included in the COVERED PERIOD. Intuit
15 further objects to this Interrogatory as overbroad, vague, and ambiguous to the extent the phrase
16 “PERSONS in California” is not defined. Intuit will interpret “PERSONS in California” to refer
17 to customers who resided in California at the time that they printed or filed their tax return using
18 a TURBOTAX PRODUCT.

19 Subject to and without waiving the foregoing General and Specific Objections, Intuit
20 responds that [REDACTED] California residents filed both a federal and state income tax return using
21 TURBOTAX FREE EDITION during the portion of the filing season for TAX YEAR 2014
22 within the COVERED PERIOD, [REDACTED] California residents did so during the filing season
23 for TAX YEAR 2015, [REDACTED] California residents did so during the filing season for TAX
24 YEAR 2016, [REDACTED] California residents did so during the filing season for TAX YEAR
25 2017, [REDACTED] California residents did so during the filing season for TAX YEAR 2018, and
26 [REDACTED] California residents did so during the filing season for TAX YEAR 2019.

1 For the avoidance of doubt, all customers identified in this interrogatory response paid
2 absolutely nothing to use TURBOTAX FREE EDITION.

3 **SPECIAL INTERROGATORY NO. 7**

4 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
5 PERSONS identified in response to Special Interrogatory No. 1 who were presented with a
6 REQUIRED UPGRADE MESSAGE.

7 **RESPONSE TO SPECIAL INTERROGATORY NO. 7**

8 In addition to the forgoing General Objections, Objections to Definitions, and Objections
9 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
10 overbroad, unduly burdensome, and oppressive to the extent it seeks a response for TAX
11 YEARS 2014 and 2015, for which Intuit does not maintain data in the ordinary course of
12 business in a format permitting a response.

13 Subject to and without waiving the foregoing General and Specific Objections, Intuit
14 responds that during the filing season for TAX YEAR 2016, [REDACTED] California residents
15 identified in response to Special Interrogatory No. 1 were presented with a REQUIRED
16 UPGRADE MESSAGE. During the filing season for TAX YEAR 2017, [REDACTED] California
17 residents identified in response to Special Interrogatory No. 1 were presented with a REQUIRED
18 UPGRADE MESSAGE. During the filing season for TAX YEAR 2018, [REDACTED] California
19 residents identified in response to Special Interrogatory No. 1 were presented with a REQUIRED
20 UPGRADE MESSAGE. During the filing season for TAX YEAR 2019, [REDACTED] California
21 residents identified in response to Special Interrogatory No. 1 were presented with a REQUIRED
22 UPGRADE MESSAGE.

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1 **RESPONSE TO SPECIAL INTERROGATORY NO. 9**

2 In addition to the forgoing General Objections, Objections to Definitions, and Objections
3 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
4 overbroad, unduly burdensome, and oppressive to the extent it seeks a response for TAX
5 YEARS 2014 and 2015, for which Intuit does not maintain data in the ordinary course of
6 business in a format permitting a response.

7 Subject to and without waiving the foregoing General and Specific Objections, Intuit
8 responds that during the filing season for TAX YEAR 2016, [REDACTED] California residents
9 identified in response to Special Interrogatory No. 7 upgraded to a TURBOTAX PAID
10 PRODUCT and filed an income tax return using that or another TURBOTAX PAID PRODUCT.
11 During the filing season for TAX YEAR 2017, [REDACTED] California residents identified in
12 response to Special Interrogatory No. 7 upgraded to a TURBOTAX PAID PRODUCT and filed
13 an income tax return using that or another TURBOTAX PAID PRODUCT. During the filing
14 season for TAX YEAR 2018, [REDACTED] California residents identified in response to Special
15 Interrogatory No. 7 upgraded to a TURBOTAX PAID PRODUCT and filed an income tax return
16 using that or another TURBOTAX PAID PRODUCT. During the filing season for TAX YEAR
17 2019, [REDACTED] California residents identified in response to Special Interrogatory No. 7 upgraded
18 to a TURBOTAX PAID PRODUCT and filed an income tax return using that or another
19 TURBOTAX PAID PRODUCT.

20 Intuit further responds that not all consumers who upgraded to a TURBOTAX PAID
21 PRODUCT and filed an income tax return using that or another TURBOTAX PAID PRODUCT
22 did, in fact, pay to file with that TURBOTAX PAID PRODUCT, as many consumers file for free
23 in a TURBOTAX PAID PRODUCT via a credit or promotion. This includes members of the
24 military who are able to use, depending on the TAX YEAR, either a subset or all TURBOTAX
25 PAID PRODUCTS to file their taxes for free.

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1 did, in fact, pay to file with that TURBOTAX PAID PRODUCT, as many consumers file for free
2 in a TURBOTAX PAID PRODUCT via a credit or promotion. This includes members of the
3 military who are able to use, depending on the TAX YEAR, either a subset or all TURBOTAX
4 PAID PRODUCTS to file their taxes for free.

5 **SPECIAL INTERROGATORY NO. 11**

6 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the total money
7 YOU received for tax filing services from all PERSONS who upgraded to a TURBOTAX PAID
8 PRODUCT within the meaning of Special Interrogatory No. 9.

9 **RESPONSE TO SPECIAL INTERROGATORY NO. 11**

10 In addition to the forgoing General Objections, Objections to Definitions, and Objections
11 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
12 overbroad, unduly burdensome, and oppressive to the extent it seeks a response for TAX
13 YEARS 2014 and 2015, for which Intuit does not maintain data in the ordinary course of
14 business in a format permitting a response. Intuit further objects to this Interrogatory as vague
15 and ambiguous to the extent the phrase “tax filing services” is not defined. Intuit will interpret
16 that phrase to mean TURBOTAX PAID PRODUCTS. Intuit further objects to this Interrogatory
17 as overbroad, unduly burdensome, oppressive, outside the scope of permissible discovery, nor
18 reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks
19 information about PERSONS who reside outside the State of California. Intuit will respond to
20 this Interrogatory with information relating to customers who resided in California at the time
21 that they printed or filed their tax return using a TURBOTAX PRODUCT.

22 Subject to and without waiving the foregoing General and Specific Objections, Intuit
23 responds that during the filing season for TAX YEAR 2016, it received [REDACTED] for the
24 service of filing a federal income tax return for California residents who upgraded to a
25 TURBOTAX PAID PRODUCT within the meaning of Special Interrogatory No. 9. During the
26 filing season for TAX YEAR 2017, Intuit received [REDACTED] for the service of filing a federal
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1 income tax return for California residents who upgraded to a TURBOTAX PAID PRODUCT
2 within the meaning of Special Interrogatory No. 9. During the filing season for TAX YEAR
3 2018, Intuit received [REDACTED] for the service of filing a federal income tax return for
4 California residents who upgraded to a TURBOTAX PAID PRODUCT within the meaning of
5 Special Interrogatory No. 9. During the filing season for TAX YEAR 2019, Intuit received
6 [REDACTED] for the service of filing a federal income tax return for California residents who
7 upgraded to a TURBOTAX PAID PRODUCT within the meaning of Special Interrogatory
8 No. 9.

9 **SPECIAL INTERROGATORY NO. 12**

10 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the amount each
11 PERSON who upgraded to a TURBOTAX PAID PRODUCT within the meaning of Special
12 Interrogatory No. 10 paid YOU for tax filing services.

13 **RESPONSE TO SPECIAL INTERROGATORY NO. 12**

14 In addition to the forgoing General Objections, Objections to Definitions, and Objections
15 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
16 overbroad, unduly burdensome, and oppressive to the extent it seeks a response for TAX
17 YEARS 2014 and 2015, for which Intuit does not maintain data in the ordinary course of
18 business in a format permitting a response. Intuit further objects to this Interrogatory as vague
19 and ambiguous to the extent the phrase “tax filing services” is not defined. Intuit will interpret
20 that phrase to mean TURBOTAX PAID PRODUCTS. Intuit further objects to this Interrogatory
21 as overbroad, unduly burdensome, oppressive, outside the scope of permissible discovery, nor
22 reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks
23 information about PERSONS who reside outside the State of California. Intuit will respond to
24 this Interrogatory with information relating to customers who resided in California at the time
25 that they printed or filed their tax return using a TURBOTAX PRODUCT.

1 Subject to and without waiving the foregoing General and Specific Objections, Intuit
2 responds to this Interrogatory by production of writings pursuant to CCP § 2030.210(a)(2). See
3 INTUIT-FFA-LACA-000523770.

4 **SPECIAL INTERROGATORY NO. 13**

5 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
6 PERSONS identified in response to Special Interrogatory No. 7 who did not file their taxes using
7 a TURBOTAX PRODUCT.

8 **RESPONSE TO SPECIAL INTERROGATORY NO. 13**

9 In addition to the forgoing General Objections, Objections to Definitions, and Objections
10 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
11 overbroad, unduly burdensome, and oppressive to the extent it seeks a response for TAX
12 YEARS 2014 and 2015, for which Intuit does not maintain data in the ordinary course of
13 business in a format permitting a response.

14 Subject to and without waiving the foregoing General and Specific Objections, Intuit
15 responds that during the filing season for TAX YEAR 2016, [REDACTED] California residents
16 identified in response to Special Interrogatory No. 7 did not file their taxes using a TURBOTAX
17 PRODUCT. During the filing season for TAX YEAR 2017, [REDACTED] California residents
18 identified in response to Special Interrogatory No. 7 did not file their taxes using a TURBOTAX
19 PRODUCT. During the filing season for TAX YEAR 2018, [REDACTED] California residents
20 identified in response to Special Interrogatory No. 7 did not file their taxes using a TURBOTAX
21 PRODUCT. During the filing season for TAX YEAR 2019, [REDACTED] California residents
22 identified in response to Special Interrogatory No. 7 did not file their taxes using a TURBOTAX
23 PRODUCT.

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1 **SPECIAL INTERROGATORY NO. 14**

2 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
3 PERSONS identified in response to Special Interrogatory No. 8 who did not file their taxes using
4 a TURBOTAX PRODUCT.

5 **RESPONSE TO SPECIAL INTERROGATORY NO. 14**

6 In addition to the forgoing General Objections, Objections to Definitions, and Objections
7 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
8 overbroad, unduly burdensome, and oppressive to the extent it seeks a response for TAX
9 YEARS 2014 and 2015, for which Intuit does not maintain data in the ordinary course of
10 business in a format permitting a response.

11 Subject to and without waiving the foregoing General and Specific Objections, Intuit
12 responds that during the filing season for TAX YEAR 2016, [REDACTED] California residents
13 identified in response to Special Interrogatory No. 8 did not file their taxes using a TURBOTAX
14 PRODUCT. During the filing season for TAX YEAR 2017, [REDACTED] California residents
15 identified in response to Special Interrogatory No. 8 did not file their taxes using a TURBOTAX
16 PRODUCT. During the filing season for TAX YEAR 2018, [REDACTED] California residents
17 identified in response to Special Interrogatory No. 8 did not file their taxes using a TURBOTAX
18 PRODUCT. During the filing season for TAX YEAR 2019, [REDACTED] California residents
19 identified in response to Special Interrogatory No. 8 did not file their taxes using a TURBOTAX
20 PRODUCT.

21 **SPECIAL INTERROGATORY NO. 15**

22 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
23 PERSONS who accessed or used a TURBOTAX COMMERCIAL PRODUCT after selecting or
24 clicking on a PROMPT or ADVERTISEMENT stating “File for \$0.”

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RESPONSE TO SPECIAL INTERROGATORY NO. 15

In addition to the forgoing General Objections, Objections to Definitions, and Objections to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory on the grounds that it contains “subparts, or a compound, conjunctive, or disjunctive question” in violation of CCP § 2030.060(f) to the extent it requests information relating to the number of PERSONS who selected or clicked on both “a PROMPT or ADVERTISEMENT stating ‘File for \$0.’” Intuit will treat Interrogatory No. 15 as representing two different interrogatories—one requesting the number of PERSONS who accessed or used a TURBOTAX COMMERCIAL PRODUCT after selecting or clicking on a PROMPT stating “File for \$0” and one requesting the number of PERSONS who accessed or used a TURBOTAX COMMERCIAL PRODUCT after selecting or clicking on an ADVERTISEMENT stating “File for \$0”—for purposes of calculating the number of interrogatories propounded by Plaintiff and will provide separate objections to each different interrogatory, as follows:

**SPECIAL INTERROGATORY NO. 15.A (RENUMBERED
INTERROGATORY NO. 15) – NUMBER OF PERSONS WHO ACCESSED
OR USED A TURBOTAX COMMERCIAL PRODUCT AFTER
SELECTING OR CLICKING ON A PROMPT STATING “FILE FOR \$0”**

In addition to the forgoing General Objections, Objections to Definitions, and Objections to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as overbroad, unduly burdensome, oppressive, outside the scope of permissible discovery, nor reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks information about PERSONS who reside outside the State of California. Intuit will respond to this Interrogatory with information relating to customers who resided in California at the time that they printed or filed their tax return using a TURBOTAX PRODUCT. Intuit further objects to this Interrogatory as overbroad, vague, and ambiguous to the extent the phrase “accessed or used” is not defined. Intuit will interpret the phrase “accessed or used the a TURBOTAX

1 COMMERCIAL PRODUCT” to refer to PERSONS identified in Intuit’s records as having
2 logged-in and used (whether or not they completed their return with) a TURBOTAX
3 COMMERCIAL PRODUCT. Intuit further objects to this Interrogatory as overbroad, unduly
4 burdensome, and oppressive to the extent it purports to seek information for the entirety of the
5 TAX YEAR 2014 filing season. Intuit further objects to this Interrogatory to the extent it
6 requests information that Intuit does not have in its possession, custody, or control.

7 Subject to and without waiving the foregoing General and Specific Objections, Intuit
8 responds that it did not track consumer interaction with individual PROMPTS on the
9 TURBOTAX WEBSITE, including those that stated, “File for \$0.” Intuit accordingly does not
10 have information responsive to this Interrogatory in its possession, custody, or control.

11 **SPECIAL INTERROGATORY NO. 15.B (RENUMBERED**
12 **INTERROGATORY NO. 16) – NUMBER OF PERSONS WHO ACCESSED**
13 **OR USED A TURBOTAX COMMERCIAL PRODUCT AFTER**
14 **SELECTING OR CLICKING ON AN ADVERTISEMENT STATING**
15 **“FILE FOR \$0”**

16 In addition to the forgoing General Objections, Objections to Definitions, and Objections
17 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
18 overbroad, unduly burdensome, oppressive, outside the scope of permissible discovery, nor
19 reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks
20 information about PERSONS who reside outside the State of California. Intuit will respond to
21 this Interrogatory with information relating to customers who resided in California at the time
22 that they printed or filed their tax return using a TURBOTAX PRODUCT. Intuit further objects
23 to this Interrogatory as overbroad, vague, and ambiguous to the extent the phrase “accessed or
24 used” is not defined. Intuit will interpret the phrase “accessed or used the a TURBOTAX
25 COMMERCIAL PRODUCT” to refer to PERSONS identified in Intuit’s records as having
26 logged-in and used (whether or not they completed their return with) a TURBOTAX

1 COMMERCIAL PRODUCT. Intuit further objects to this Interrogatory as overbroad, unduly
2 burdensome, and oppressive to the extent it purports to seek information for the entirety of the
3 TAX YEAR 2014 filing season. Intuit further objects to this Interrogatory as overbroad, unduly
4 burdensome, and oppressive, and to the extent it requests information that Intuit does not have in
5 its possession, custody, or control.

6 Intuit continues to assess the feasibility and burden associated with this Interrogatory,
7 which calls for information in a manner inconsistent with how the information is kept in Intuit’s
8 normal course of business. If Intuit determines that it is able to identify responsive information
9 without undue burden and expense, Intuit will promptly supplement its response.

10 **SPECIAL INTERROGATORY NO. 16**

11 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of
12 PERSONS identified in response to Special Interrogatory No. 15 who were presented with a
13 REQUIRED UPGRADE MESSAGE.

14 **RESPONSE TO SPECIAL INTERROGATORY NO. 16**

15 In addition to the forgoing General Objections, Objections to Definitions, and Objections
16 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory on
17 the grounds that it contains “subparts, or a compound, conjunctive, or disjunctive question” in
18 violation of CCP § 2030.060(f) to the extent it requests information relating to the number of
19 PERSONS presented with a REQUIRED UPGRADE MESSAGE who clicked on both “a
20 PROMPT or ADVERTISEMENT stating ‘File for \$0.’” Intuit will treat Interrogatory No. 16 as
21 representing two different interrogatories—one requesting the number of PERSONS who were
22 presented with a REQUIRED UPGRADE MESSAGE after selecting or clicking on a PROMPT
23 stating “File for \$0” and one requesting the number of PERSONS who were presented with a
24 REQUIRED UPGRADE MESSAGE after selecting or clicking on an ADVERTISEMENT
25 stating “File for \$0”—for purposes of calculating the number of interrogatories propounded by
26 Plaintiff and will provide separate objections to each different interrogatory, as follows:

1 overbroad, unduly burdensome, oppressive, outside the scope of permissible discovery, nor
2 reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks
3 information about PERSONS who reside outside the State of California. Intuit will respond to
4 this Interrogatory with information relating to customers who resided in California at the time
5 that they printed or filed their tax return using a TURBOTAX PRODUCT. Intuit further objects
6 to this Interrogatory as overbroad, unduly burdensome, and oppressive to the extent it purports to
7 seek information for the entirety of the TAX YEAR 2014 filing season. Intuit further objects to
8 this Interrogatory as overbroad, unduly burdensome, and oppressive, and to the extent it requests
9 information that Intuit does not have in its possession, custody, or control.

10 Intuit continues to assess the feasibility and burden associated with this Interrogatory,
11 which calls for information in a manner inconsistent with how the information is kept in Intuit's
12 normal course of business. If Intuit determines that it is able to identify responsive information
13 without undue burden and expense, Intuit will promptly supplement its response.

14 **SPECIAL INTERROGATORY NO. 17**

15 Identify the time periods in which some portion of the PERSONS who attempted to
16 access, or did access, a TURBOTAX COMMERCIAL PRODUCT or who visited the
17 TURBOTAX WEBSITE were presented with the following language: "Don't worry about
18 pulling out your wallet—look for the payment option to deduct the cost from your federal
19 refund."

20 **RESPONSE TO SPECIAL INTERROGATORY NO. 17**

21 In addition to the forgoing General Objections, Objections to Definitions, and Objections
22 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory on
23 the grounds that it contains "subparts, or a compound, conjunctive, or disjunctive question" in
24 violation of CCP § 2030.060(f) to the extent it requests information relating to time periods
25 during which PERSONS who "attempted to access, or did access, a TURBOTAX
26 COMMERCIAL PRODUCT or who visited the TURBOTAX WEBSITE" were presented with

1 the specified language. Intuit will treat Interrogatory No. 17 as representing two different
2 interrogatories—one requesting the time periods during which PERSONS who attempted to
3 access, or did access, a TURBOTAX COMMERCIAL PRODUCT were presented with the
4 specified language, and one requesting the time periods during which PERSONS who visited the
5 TURBOTAX WEBSITE were presented with the specified language—for purposes of
6 calculating the number of interrogatories propounded by Plaintiff and will provide separate
7 objections to each different interrogatory, as follows:

8 **SPECIAL INTERROGATORY NO. 17.A (RENUMBERED**
9 **INTERROGATORY NO. 19) – TIME PERIOD DURING WHICH**
10 **TURBOTAX COMMERCIAL PRODUCT USERS WERE PRESENTED**
11 **WITH THE SPECIFIED LANGUAGE**

12 In addition to the forgoing General Objections, Objections to Definitions, and Objections
13 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
14 overbroad, unduly burdensome, oppressive, outside the scope of permissible discovery, nor
15 reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks
16 information about PERSONS who reside outside the State of California. Intuit will respond to
17 this Interrogatory with information relating to customers who resided in California at the time
18 that they printed or filed their tax return using a TURBOTAX PRODUCT. Intuit further objects
19 to this Interrogatory as overbroad, unduly burdensome, oppressive, nor reasonably calculated to
20 lead to the discovery of admissible evidence to the extent it is not limited to the COVERED
21 PERIOD. Intuit further objects to this Interrogatory as overbroad, vague, and ambiguous
22 because the phrase “attempted to access” is not defined.

23 Subject to and without waiving the foregoing General and Specific Objections, Intuit
24 responds that the phrase, “Don’t worry about pulling out your wallet—look for the payment
25 option to deduct the cost from your federal refund,” was displayed to some portion of the
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1 customers who accessed a TURBOTAX COMMERCIAL PRODUCT during the filings seasons
2 for TAX YEARS 2016 to 2019.

3 Intuit further responds that it offers California residents using TURBOTAX
4 COMMERCIAL PRODUCTS the option to pay by deducting their TurboTax charges it from
5 their federal tax refund. This convenience is included as part of the “Premium Services” bundle,
6 together with other valuable services including: (1) Audit Defense, which offers taxpayers
7 dedicated expert representation in the event they are audited by the IRS for a limited period of
8 time; (2) Full Identity Restoration, which offers a Dedicated Resolution specialist who will assist
9 the taxpayer (or taxpayers, if filing jointly) in the event she experiences personal identity fraud;
10 (3) Identity Theft Monitoring, which notifies the taxpayer (or taxpayers, if filing jointly) if
11 suspicious activity related to her personal identity is detected online, and a Dedicated Restoration
12 Specialist who can help the taxpayer react quickly to protect her identity; (4) Priority Care,
13 which shortens the wait time for the taxpayer to connect to a TurboTax specialist on demand;
14 and (5) Identity Loss Insurance, which reimburses the taxpayer up to \$250,000 for stolen funds
15 plus up to \$1,000,000 to pay for legal fees and expenses with a \$0 deductible if she faces
16 financial loss caused by identity theft.

17 **SPECIAL INTERROGATORY NO. 17.B (RENUMBERED**
18 **INTERROGATORY NO. 20) – TIME PERIOD DURING WHICH**
19 **VISITORS TO THE TURBOTAX WEBSITE WERE PRESENTED WITH**
20 **THE SPECIFIED LANGUAGE**

21 In addition to the forgoing General Objections, Objections to Definitions, and Objections
22 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
23 overbroad, unduly burdensome, oppressive, outside the scope of permissible discovery, nor
24 reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks
25 information about PERSONS who reside outside the State of California. Intuit will respond to
26 this Interrogatory with information relating to customers who resided in California at the time
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1 that they printed or filed their tax return using a TURBOTAX PRODUCT. Intuit further objects
2 to this Interrogatory as overbroad, unduly burdensome, oppressive, nor reasonably calculated to
3 lead to the discovery of admissible evidence to the extent it is not limited to the COVERED
4 PERIOD. Intuit further objects to this Interrogatory as overbroad, vague, and ambiguous
5 because the phrase “attempted to access” is not defined.

6 Subject to and without waiving the foregoing General and Specific Objections, Intuit
7 responds that the phrase, “Don’t worry about pulling out your wallet—look for the payment
8 option to deduct the cost from your federal refund,” was not used on the TURBOTAX
9 WEBSITE during the COVERED PERIOD.

10 **SPECIAL INTERROGATORY NO. 18**

11 Identify the time periods in which some portion of the PERSONS who attempted to
12 access, or did access, a TURBOTAX COMMERCIAL PRODUCT or who visited the
13 TURBOTAX WEBSITE were presented with language, other than the language identified in
14 Special Interrogatory No. 17, that informed the PERSON that they could deduct the cost of
15 upgrading to a TURBOTAX COMMERCIAL PRODUCT from a federal tax refund.

16 **RESPONSE TO SPECIAL INTERROGATORY NO. 18**

17 In addition to the forgoing General Objections, Objections to Definitions, and Objections
18 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory on
19 the grounds that it contains “subparts, or a compound, conjunctive, or disjunctive question” in
20 violation of CCP § 2030.060(f) to the extent it requests information relating to time periods
21 during which PERSONS who “attempted to access, or did access, a TURBOTAX
22 COMMERCIAL PRODUCT or who visited the TURBOTAX WEBSITE” were presented with
23 language that informed the PERSON that they could deduct the cost of upgrading to a
24 TURBOTAX COMMERCIAL PRODUCT form a federal tax refund other than the language
25 specified in Renumbered Interrogatory Nos. 19-20. Intuit will treat Interrogatory No. 18 as
26 representing two different interrogatories—one requesting the time periods during which

1 PERSONS who attempted to access, or did access, a TURBOTAX COMMERCIAL PRODUCT
2 were presented with the specified language, and one requesting the time periods during which
3 PERSONS who visited the TURBOTAX WEBSITE were presented with the specified
4 language—for purposes of calculating the number of interrogatories propounded by Plaintiff and
5 will provide separate objections to each different interrogatory, as follows:

6 **SPECIAL INTERROGATORY NO. 18.A (RENUMBERED**
7 **INTERROGATORY NO. 21) – TIME PERIOD DURING WHICH**
8 **TURBOTAX COMMERCIAL PRODUCT USERS WERE PRESENTED**
9 **WITH THE SPECIFIED LANGUAGE**

10 In addition to the forgoing General Objections, Objections to Definitions, and Objections
11 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
12 overbroad, unduly burdensome, oppressive, outside the scope of permissible discovery, nor
13 reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks
14 information about PERSONS who reside outside the State of California. Intuit will respond to
15 this Interrogatory with information relating to customers who resided in California at the time
16 that they printed or filed their tax return using a TURBOTAX PRODUCT. Intuit further objects
17 to this Interrogatory as overbroad, unduly burdensome, oppressive, nor reasonably calculated to
18 lead to the discovery of admissible evidence to the extent it is not limited to the COVERED
19 PERIOD. Intuit further objects to this Interrogatory as overbroad, vague, and ambiguous to the
20 extent the phrase “attempted to access” is not defined.

21 Subject to and without waiving the foregoing General and Specific Objections, Intuit
22 responds that PERSONS who accessed a TURBOTAX COMMERCIAL PRODUCT were
23 presented with language, other than the language identified in Renumbered Interrogatory Nos.
24 19-20, that informed the PERSON that they could deduct the cost of upgrading to a
25 TURBOTAX COMMERCIAL PRODUCT from a federal tax refund during the entire
26 COVERED PERIOD.

1 Intuit further responds that it offers California residents using TURBOTAX
2 COMMERCIAL PRODUCTS the option to pay their TurboTax fee by deducting it from their
3 federal tax refund. This convenience is included as part of the “Premium Services” bundle,
4 together with other valuable services including: (1) Audit Defense, which offers taxpayers
5 dedicated expert representation in the event they are audited by the IRS for a limited period of
6 time; (2) Full Identity Restoration, which offers a Dedicated Resolution specialist who will assist
7 the taxpayer (or taxpayers, if filing jointly) in the event she experiences personal identity fraud;
8 (3) Identity Theft Monitoring, which notifies the taxpayer (or taxpayers, if filing jointly) if
9 suspicious activity related to her personal identity is detected online, and a Dedicated Restoration
10 Specialist who can help the taxpayer react quickly to protect her identity; (4) Priority Care,
11 which shortens the wait time for the taxpayer to connect to a TurboTax specialist on demand;
12 and (5) Identity Loss Insurance, which reimburses the taxpayer up to \$250,000 for stolen funds
13 plus up to \$1,000,000 to pay for legal fees and expenses with a \$0 deductible if she faces
14 financial loss caused by identity theft.

15 **SPECIAL INTERROGATORY NO. 18.B (RENUMBERED**
16 **INTERROGATORY NO. 22) – TIME PERIOD DURING WHICH**
17 **VISITORS TO THE TURBOTAX WEBSITE WERE PRESENTED WITH**
18 **THE SPECIFIED LANGUAGE**

19 In addition to the forgoing General Objections, Objections to Definitions, and Objections
20 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
21 overbroad, unduly burdensome, oppressive, outside the scope of permissible discovery, nor
22 reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks
23 information about PERSONS who reside outside the State of California. Intuit will respond to
24 this Interrogatory with information relating to customers who resided in California at the time
25 that they printed or filed their tax return using a TURBOTAX PRODUCT. Intuit further objects
26 to this Interrogatory as overbroad, unduly burdensome, oppressive, nor reasonably calculated to

1 lead to the discovery of admissible evidence to the extent it is not limited to the COVERED
2 PERIOD. Intuit further objects to this Interrogatory as overbroad, vague, and ambiguous to the
3 extent the phrase “attempted to access” is not defined.

4 Subject to and without waiving the foregoing General and Specific Objections, Intuit
5 responds that PERSONS who visited the TURBOTAX WEBSITE were presented with language,
6 other than the language identified in Renumbered Interrogatory Nos. 19-20, that informed the
7 PERSON that they could deduct the cost of upgrading to a TURBOTAX COMMERCIAL
8 PRODUCT from a federal tax refund during the entire COVERED PERIOD.

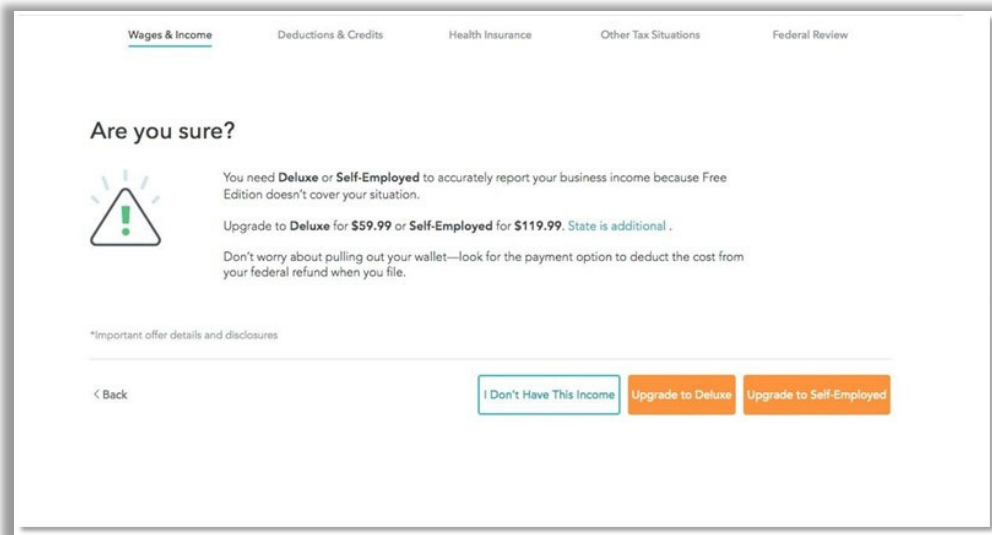
9 Intuit further responds that it offers California residents using TURBOTAX
10 COMMERCIAL PRODUCTS the option to pay their TurboTax fee by deducting it from their
11 federal tax refund. This convenience is included as part of the “Premium Services” bundle,
12 together with other valuable services including: (1) Audit Defense, which offers taxpayers
13 dedicated expert representation in the event they are audited by the IRS for a limited period of
14 time; (2) Full Identity Restoration, which offers a Dedicated Resolution specialist who will assist
15 the taxpayer (or taxpayers, if filing jointly) in the event she experiences personal identity fraud;
16 (3) Identity Theft Monitoring, which notifies the taxpayer (or taxpayers, if filing jointly) if
17 suspicious activity related to her personal identity is detected online, and a Dedicated Restoration
18 Specialist who can help the taxpayer react quickly to protect her identity; (4) Priority Care,
19 which shortens the wait time for the taxpayer to connect to a TurboTax specialist on demand;
20 and (5) Identity Loss Insurance, which reimburses the taxpayer up to \$250,000 for stolen funds
21 plus up to \$1,000,000 to pay for legal fees and expenses with a \$0 deductible if she faces
22 financial loss caused by identity theft.

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1 on its website—was immediately presented with a prompt explaining that she was ineligible for
2 Free Edition. In TAX YEAR 2018, for example, the top of the prompt stated, “Because you
3 have 1099-MISC income, you’ll need to upgrade to accurately report it.”⁴

4 TurboTax provided the customer with a comparison chart detailing her options for
5 upgrading to TurboTax Deluxe or TurboTax Premier, if she elected to continue with TurboTax
6 and needed to report the tax information contained on her 1099-MISC or 1099-K. The
7 comparison chart indicates that a consumer cannot “Report multiple sources of income—
8 includ[ing] 1099-MISC, 1099-K, and more” in Free Edition, but that she can do so using the
9 TurboTax Deluxe or Self-Employed products. The prompt then went on to clearly disclose the
10 price of each offering in bold font immediately below the orange call-to-action buttons.

11 Consumers who clicked the “Keep Free” button were then presented with an “Are you
12 sure?” screen, which explained again that an upgrade was required “because Free Edition doesn’t
13 cover your situation.”⁵ The prompt further provided the option for the customer to either
14 upgrade or to indicate that she did not, in fact, have reportable income on a 1099-MISC or 1099-
15 K.



26 ⁴ INTUIT-FFA-LACA-000036702.

27 ⁵ INTUIT-FFA-LACA-000036700.

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Beginning in TAX YEAR 2019, Intuit stopped using any buttons that say, “Keep Free.”

Intuit further responds it did not track consumer interaction with any PROMPT located on a REQUIRED UPGRADE MESSAGE entitled “Keep Free.” Intuit accordingly does not have information responsive to this Interrogatory in its possession, custody, or control.

SPECIAL INTERROGATORY NO. 20 (RENUMBERED INTERROGATORY NO. 24)

For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of PERSONS identified in response to Special Interrogatory No. 19 who during the same tax year paid for a TURBOTAX COMMERCIAL PRODUCT.

RESPONSE TO SPECIAL INTERROGATORY NO. 20 (RENUMBERED INTERROGATORY NO. 24)

In addition to the forgoing General Objections, Objections to Definitions, and Objections to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as overbroad, outside the scope of permissible discovery, nor reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks a response as to consumers who reside outside of California. Intuit will only respond to this Interrogatory with information relating to customers who resided in California at the time that they printed or filed their tax return using a TURBOTAX PRODUCT. Intuit further objects to this Interrogatory as overbroad, unduly burdensome, and oppressive to the extent it purports to seek information for the entirety of the TAX YEAR 2014 filing season. Intuit further objects to this Interrogatory to the extent it requests information that Intuit does not have in its possession, custody, or control.

Subject to and without waiving the foregoing General and Specific Objections, Intuit responds that, because it does not have information in its possession, custody, or control responsive to Renumbered Interrogatory No. 23, it is unable to provide information responsive to this Interrogatory.

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RESPONSE TO SPECIAL INTERROGATORY NO. 22 (RENUMBERED INTERROGATORY NO. 26)

In addition to the forgoing General Objections, Objections to Definitions, and Objections to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as overbroad, outside the scope of permissible discovery, nor reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks a response as to consumers who reside outside of California. Intuit will only respond to this Interrogatory with information relating to customers who resided in California at the time that they printed or filed their tax return using a TURBOTAX PRODUCT. Intuit further objects to this Interrogatory as overbroad, unduly burdensome, and oppressive to the extent it purports to seek information for the entirety of the TAX YEAR 2014 filing season. Intuit further objects to this Interrogatory to the extent it requests information that Intuit does not have in its possession, custody, or control.

Subject to and without waiving the foregoing General and Specific Objections, Intuit responds that, because it does not have information in its possession, custody, or control responsive to Renumbered Interrogatory No. 23, it is unable to provide information responsive to this Interrogatory.

SPECIAL INTERROGATORY NO. 23 (RENUMBERED INTERROGATORY NO. 27)

For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, state the number of PERSONS who used the TURBOTAX FREE EDITION to file their income tax return after being presented with a REQUIRED UPGRADE MESSAGE.

RESPONSE TO SPECIAL INTERROGATORY NO. 23 (RENUMBERED INTERROGATORY NO. 27)

In addition to the forgoing General Objections, Objections to Definitions, and Objections to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as overbroad, outside the scope of permissible discovery, nor reasonably calculated to lead to the

1 discovery of admissible evidence to the extent it seeks a response as to consumers who reside
2 outside of California. Intuit will only respond to this Interrogatory with information relating to
3 customers who resided in California at the time that they printed or filed their tax return using a
4 TURBOTAX PRODUCT. Intuit further objects to this Interrogatory as overbroad, undue
5 burdensome, and oppressive to the extent it seeks a response for TAX YEARS 2014 and 2015,
6 for which Intuit does not maintain data in the ordinary course of business in a format permitting
7 a response.

8 Subject to and without waiving the foregoing General and Specific Objections, Intuit
9 responds that during the filing season for TAX YEAR 2016, [REDACTED] California residents used
10 TURBOTAX FREE EDITION to file their income tax return after being presented with a
11 REQUIRED UPGRADE MESSAGE, [REDACTED] California residents did so during the filing season
12 for TAX YEAR 2017, [REDACTED] California residents did so during the filing season for TAX
13 YEAR 2018, and [REDACTED] California residents did so during the filing season for TAX YEAR
14 2019.

15 Intuit further responds that consumers may go on to file their taxes for free using
16 TURBOTAX FREE EDITION after being presented a REQUIRED UPGRADE MESSAGE for
17 a number of reasons. For example, customers may explore the TurboTax product by indicating
18 they have types of income when they do not in fact have that income. Customers may also
19 inadvertently click on a button indicating they have Form 1099-MISC income, for example, and
20 decline the offered upgrade after reading the explanation on the REQUIRED UPGRADE
21 MESSAGE of why if they did have Form 1099-MISC income they are not eligible to continue in
22 TURBOTAX FREE EDITION. Similarly, some customers who are presented with a
23 REQUIRED UPGRADE MESSAGE after TurboTax determines they are eligible for a tax
24 deduction or credit that requires the filing of a form not supported by TURBOTAX FREE
25 EDITION may elect not to upgrade.

1 deduction or credit for which they were eligible and used TURBOTAX FREE EDITION to file
2 their tax returns during the filing season for TAX YEAR 2016, [REDACTED] California residents did so
3 during the filings season for TAX YEAR 2017, [REDACTED] California residents did so during the
4 filings season for TAX YEAR 2018, and [REDACTED] California residents did so during the filings
5 season for TAX YEAR 2019.

6 Intuit further responds that it promptly provides a consumer with a REQUIRED
7 UPGRADE MESSAGE when, based on information provided by the consumer, the software
8 determines that she is eligible for a tax deduction or credit that requires a tax form not supported
9 by TURBOTAX FREE EDITION. The REQUIRED UPGRADE MESSAGE provides the cost
10 of the recommended TURBOTAX PAID PRODUCT and the reason for the recommended
11 upgrade.

12 **SPECIAL INTERROGATORY NO. 25 (RENUMBERED INTERROGATORY**
13 **NO. 29)**

14 For each of TAX YEARS 2014, 2015, 2016, 2017, 2018, and 2019, of the PERSONS
15 identified in response to Special Interrogatory No. 23, state the number of PERSONS who
16 received the REQUIRED UPGRADE MESSAGE after the relevant TurboTax program or
17 software determined that the PERSON could not report all required financial information for
18 their income tax return using the IRS tax forms supported by the TURBOTAX FREE EDITION.

19 **RESPONSE TO SPECIAL INTERROGATORY NO. 25 (RENUMBERED**
20 **INTERROGATORY NO. 29)**

21 In addition to the forgoing General Objections, Objections to Definitions, and Objections
22 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
23 overbroad, unduly burdensome, and oppressive to the extent it seeks a response for TAX
24 YEARS 2014 and 2015, for which Intuit does not maintain data in the ordinary course of
25 business in a format permitting a response. Intuit further objects to this Interrogatory as vague
26 and ambiguous to the extent the phrase “all required financial information” is not defined. Intuit

1 will interpret that phrase to mean income or other financial information required to be reported
2 on a federal income tax return, other than a tax deduction or tax credit. Intuit further objects to
3 this Interrogatory as overbroad, vague, and ambiguous to the extent consumers may view
4 multiple different REQUIRED UPGRADE MESSAGES during their use of the TURBOTAX
5 FREE EDITION and still complete their tax return in TURBOTAX FREE EDITION. Intuit
6 accordingly includes in its response to this Interrogatory any customer who viewed at least one
7 REQUIRED UPGRADE MESSAGE related to income or other financial information required to
8 be reported on their income tax returns other than a tax deduction or tax credit.

9 Subject to and without waiving the foregoing General and Specific Objections, Intuit
10 responds that, of the PERSONS identified in response to Renumbered Interrogatory No. 27,
11 [REDACTED] California residents viewed a REQUIRED UPGRADE MESSAGE related to income or
12 other financial information required to be reported on their income tax returns other than a tax
13 deduction or tax credit and used TURBOTAX FREE EDITION to file their tax returns during
14 the filing season for TAX YEAR 2016, [REDACTED] California residents did so during the filings
15 season for TAX YEAR 2017, [REDACTED] California residents did so during the filings season for
16 TAX YEAR 2018, and [REDACTED] California residents did so during the filings season for TAX
17 YEAR 2019.

18 **SPECIAL INTERROGATORY NO. 26 (RENUMBERED INTERROGATORY**
19 **NO. 30)**

20 If YOU contend that YOUR ADVERTISEMENTS contained any disclaimers, qualifying
21 language, or information regarding eligibility that disclosed that some PERSONS would not be
22 able to file for free using the TURBOTAX FREE EDITION, state with specificity the basis for
23 YOUR contention and the content of each such disclaimer, qualifying language, or information
24 regarding eligibility.

1 and were repeated throughout the website. During the filing season for TAX YEAR 2018, for
2 example, TurboTax's Products and Pricing page,⁶ where consumers could review the full suite of
3 commercial TURBOTAX PRODUCTS and select which product they wish to use, provided
4 several short, clear disclosures that TURBOTAX FREE EDITION is for "simple tax returns."⁷

The screenshot displays the TurboTax website interface. At the top, there is a navigation bar with the TurboTax logo, a 'Start for Free' button, and a 'Sign In' button. Below the navigation bar, a banner for 'turbotaxlive' features a CPA and the text 'Do your taxes with a real CPA'. The main content area is titled 'America's #1 brand of tax software' and lists four product editions: Free Edition, Deluxe (Most Popular), Premier, and Self-Employed. Each edition includes a brief description, pricing, a 'Start for Free' button, and a star rating with the number of reviews. Below the product list, a detailed section for 'File for \$0' is shown, featuring a large 'FREE guaranteed' graphic and a list of five benefits: free filing of simple federal and state tax returns, coverage of W-2 income and tax credits, jumpstart with previous year's return, audit support guarantee, and 24/7 customer support.

⁶ Intuit, *TurboTax Products and Pricing*, <https://turbotax.intuit.com/personal-taxes/online/> [<https://web.archive.org/web/20190429224230/https://turbotax.intuit.com/personal-taxes/online/>] (page archived on Apr. 29, 2019).

⁷ Prior to the 2017 tax reform, Intuit maintained a similar disclosure on its TurboTax website that its Free product applied to filers with a 1040EZ/A. *See, e.g.*, INTUIT-FFA-LACA-000105190 (screen shot of products page with Free Edition "Simple tax returns (1040EZ/1040A)" disclosure); Intuit, TurboTax Website Landing Page, <https://turbotax.intuit.com/> [<https://web.archive.org/web/20180105033618/https://turbotax.intuit.com/>] (page archived on Jan. 5, 2018) ("Forms 1040EZ/1040A, limited time only. Returns must be filed before offer ends").

1 Consumers also could easily access additional details if they clicked the “See why it’s free”
2 disclosure, which was provided by a hyperlink displayed in distinct blue font. Similar
3 disclosures could be found on the homepage of the TurboTax website,⁸ as well as on the landing
4 page for TURBOTAX FREE EDITION.⁹ In addition to its marketing pages, the TURBOTAX
5 WEBSITE also included numerous TurboTax Blog posts and Support FAQs (viewed millions of
6 times a year) that described the eligibility criteria for Free Edition. For instance, in a Support
7 FAQ entitled “Is TurboTax Free Edition right for me?,” Intuit explained that “Free Edition is an
8 online-only product that supports simple tax returns that can be filed on Form 1040 without any
9 attached schedules,” and went on to explain the specific tax situations covered by the “Free”
10 offer.¹⁰

11 **SPECIAL INTERROGATORY NO. 27 (RENUMBERED INTERROGATORY**
12 **NO. 31)**

13 Identify the time period each of the disclaimers, qualifying language, or information
14 regarding eligibility identified in Special Interrogatory No. 26 was visible to PERSONS who
15 viewed ADVERTISEMENTS for the TURBOTAX FREE EDITION.

16 **RESPONSE TO SPECIAL INTERROGATORY NO. 27 (RENUMBERED**
17 **INTERROGATORY NO. 31)**

18 In addition to the forgoing General Objections, Objections to Definitions, and Objections
19 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
20 overbroad, vague, and ambiguous to the extent that the terms “disclaimers,” “qualifying
21 language,” and “information about eligibility” are undefined and fail to identify the information
22 sought with reasonable particularity. Intuit further objects to this Interrogatory as overbroad,
23 unduly burdensome, oppressive, nor reasonably calculated to lead to the discovery of admissible
24

25 ⁸ INTUIT-FFA-LACA-000102862.

26 ⁹ See, e.g., INTUIT-FFA-LACA-000000945.

27 ¹⁰ TurboTax, *Is TurboTax Free Edition Right for Me*, <https://ttlc.intuit.com/community/choosing-a-product/help/is-turbotax-free-edition-right-for-me/00/26236> (last accessed Nov. 3, 2020).

1 evidence to the extent it is not limited to the COVERED PERIOD and to the extent that it
2 requests that Intuit identify the time period each of the “disclaimer, qualifying language, or
3 information regarding eligibility” was visible in at least hundreds of individual
4 ADVERTISEMENTS across multiple marketing channels. Intuit also objects to the
5 Interrogatory as a premature contention interrogatory.

6 Intuit further objects to this Interrogatory because Plaintiff has failed to identify the
7 specific ADVERTISEMENTS it alleges were false or misleading. Furthermore, Intuit states that
8 each of its ADVERTISEMENTS speaks for itself.

9 Subject to and without waiving the foregoing General and Specific Objections, Intuit
10 responds that it included disclaimers, qualifying language, or information regarding customers’
11 eligibility to use TURBOTAX FREE EDITION in its ADVERTISEMENTS for that product
12 during the COVERED PERIOD. Intuit further responds that it is willing to meet and confer to
13 discuss the set of ADVERTISEMENTS “each” disclaimer, qualifying language, and/or
14 information regarding eligibility, which Plaintiff claims are deceptive.

15 **SPECIAL INTERROGATORY NO. 28 (RENUMBERED INTERROGATORY**
16 **NO. 32)**

17 If any of the disclaimers, qualifying language, or information regarding eligibility YOU
18 identified in Special Interrogatory No. 26 was accessed through a hyperlink or icon, state the
19 number of PERSONS during each tax year who clicked on each such hyperlink or icon.

20 **RESPONSE TO SPECIAL INTERROGATORY NO. 28 (RENUMBERED**
21 **INTERROGATORY NO. 32)**

22 In addition to the forgoing General Objections, Objections to Definitions, and Objections
23 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
24 overbroad, vague, and ambiguous to the extent that the terms “disclaimers,” “qualifying
25 language,” and “information about eligibility” are undefined and fail to identify the documents
26 sought with reasonable particularity. Intuit further objects that the term “icon” is vague,

1 ambiguous, and fails to identify the information sought with reasonable particularity. Intuit
2 further objects to this Interrogatory as overbroad, outside the scope of permissible discovery, nor
3 reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks a
4 response as to consumers who reside outside of California. Intuit further objects to this
5 Interrogatory as overbroad, unduly burdensome, oppressive, nor reasonably calculated to lead to
6 the discovery of admissible evidence to the extent it is not limited to the COVERED PERIOD
7 and to the extent it requests that Intuit “state the number of PERSONS during each tax year who
8 clicked on such hyperlinks[s] or icon[s]” for at least hundreds of individual
9 ADVERTISEMENTS across multiple marketing channels. Intuit further objects to this
10 Interrogatory to the extent it requests information that Intuit does not have in its possession,
11 custody, or control. Intuit also objects to the Interrogatory as a premature contention
12 interrogatory.

13 Intuit further objects to this Interrogatory because Plaintiff has failed to identify the
14 specific ADVERTISEMENTS it alleges were false or misleading.

15 Subject to and without waiving the foregoing General and Specific Objections, Intuit
16 responds that it does not track the number of customers who access individual disclaimers,
17 qualifying language, and/or information regarding eligibility that may be accessed by clicking a
18 hyperlink or icon located on the TURBOTAX WEBSITE, and accordingly does not have
19 responsive information in its possession, custody, or control.

20 **SPECIAL INTERROGATORY NO. 29 (RENUMBERED INTERROGATORY**
21 **NO. 33)**

22 Identify all documents, including without limitation studies, reports, and correspondence
23 in Intuit’s possession, custody, or control, that analyze or discuss the efficacy or clarity of each
24 of the disclaimers, qualifying language, or information regarding eligibility identified in Special
25 Interrogatory No. 26.

1 service) minus detractors (consumers who are dissatisfied or would not recommend a service),
2 the sum of which measures customer satisfaction.”¹¹

3 According to one study, TurboTax’s overall NPS was 54, placing it well above average in
4 the “Software and Apps” industry, which is remarkable given that doing their taxes is not
5 something most people enjoy.¹² Intuit’s post-filing customer surveys are even more positive—in
6 2019, for example, Intuit’s data showed an NPS score of 81 for customers who prepared and
7 filed their taxes for free, and an NPS score of 67 among those customers who paid to use
8 TurboTax.¹³ High satisfaction ratings, particularly among those customers who paid to file their
9 taxes suggest that customers find the information on TurboTax’s website (and other marketing
10 material) informative and do not feel misled about the nature or terms of the offers conveyed.

11 Similarly, TurboTax has many repeat customers who continue to use the service year
12 after year, despite the wide variety of options taxpayers have for filing their taxes. In fact,
13 Intuit’s business model depends on repeat business, as returning customers are the single largest
14 source of business for TurboTax. Documents in the record show, for example, that Intuit
15 maintains an approximately 80% customer retention rate, and that rate is *highest among its*
16 *paying consumers*.¹⁴ A large majority of consumers who file for free using TURBOTAX FREE
17 EDITION likewise return year after year.

18 **SPECIAL INTERROGATORY NO. 30 (RENUMBERED INTERROGATORY**
19 **NO. 34)**

20 Identify all applications, software, and platforms that YOUR employees use to chat,
21 message, email, or otherwise communicate with other Intuit employees including without
22 limitation email programs and messaging platforms such as Slack.

24 _____
25 ¹¹ *FTC v. DIRECTV, Inc.*, No. 15-cv-01129-HSG, 2018 U.S. Dist. LEXIS 139192, at *58 n.17
(N.D. Cal. Aug. 16, 2018).

26 ¹² See INTUIT-FFA-LACA-000523787.

27 ¹³ See INTUIT-FFA-LACA-000523789.

¹⁴ INTUIT-FFA-LACA-000518361, at -368 to -370.

1 COVERED PERIOD through November 2018, and its employees used Slack from November
2 2018 through the end of the COVERED PERIOD.

3 **SPECIAL INTERROGATORY NO. 32 (RENUMBERED INTERROGATORY**
4 **NO. 36)**

5 Identify any applicable retention policy for each application, software, and platform
6 identified in Special Interrogatory No. 30.

7 **RESPONSE TO SPECIAL INTERROGATORY NO. 32 (RENUMBERED**
8 **INTERROGATORY NO. 36)**

9 In addition to the forgoing General Objections, Objections to Definitions, and Objections
10 to Instructions, which are incorporated herein by reference, Intuit objects to this Interrogatory as
11 exceeding the 35 specially prepared interrogatories allowed by CCP § 2030.030(a)(1). Intuit
12 objects that this Interrogatory is actually the thirty-sixth separate interrogatory propounded by
13 Plaintiff, and Plaintiff has not provided the declaration required by CCP § 2030.050. Therefore,
14 no response is required. Intuit further objects to this Interrogatory as vague and ambiguous,
15 particularly to the extent that the terms “retention policy,” “application,” “software,” and
16 “platform” are undefined and fail to identify the documents sought with reasonable particularity.
17 Intuit further objects to this Interrogatory as overbroad, unduly burdensome, oppressive, nor
18 reasonably calculated to lead to the discovery of admissible evidence to the extent it is not
19 limited to the COVERED PERIOD.

20 Based on the foregoing General and Specific Objections, Intuit does not intend to provide
21 detailed information in response to this Interrogatory.

22 Intuit avers generally that it has complied with all retention obligations in conjunction
23 with the above-captioned lawsuit.

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Dated: December 7, 2020

FOR DEFENDANT,

By: /s/ Matthew Benedetto
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Attorneys for Defendant

EXHIBIT D

Based on your tax situation, you need to upgrade to TurboTax Deluxe



Why do I need to upgrade?

Schedule S is a new tax form provided by the IRS to report your additional tax payments, which you are required to report. This tax form is not available in Free Edition, but is covered in Deluxe.

What's included with Deluxe?

- We've got you covered**—Deluxe includes all of the new IRS tax schedules and helps you accurately complete your taxes
- Deduction finder**—we'll search 550+ deductions and credits to get you your biggest tax refund guaranteed.
- One-on-one help**—get answers to your product and support questions from a TurboTax specialist

Continue with **Deluxe*** for **\$59.99** and pick up right where you left off. State is additional.

Don't worry about paying out your wallet—look for the payment option to adjust the cost from your federal refund when you file.

Learn more about the benefits of TurboTax.

[Back](#)

[This Doesn't Apply to Me](#)

Based on your tax situation, you need to upgrade to TurboTax Deluxe



Why do I need to upgrade?

Schedule B is a new tax form provided by the IRS to report your interest and dividends income, which you are required to report. This tax form is not available in Free Edition, but is covered in Deluxe.

What's included with Deluxe?

- We've got you covered**—Deluxe includes all of the new IRS tax schedules and helps you accurately complete your taxes.
- Deduction finder**—we'll search 350+ deductions and credits to get you your biggest tax refund. Guaranteed.
- One-on-one help**—get answers to your product and support questions from a TurboTax specialist.

Continue with **Deluxe** for **\$59.99** and pick up right where you left off. State is added.

Don't worry about pulling out your wallet—look for the payment option to deduct the cost from your federal refund when you file.

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< Back

File Upgrade Later

Based on your tax situation, you need to upgrade to TurboTax Deluxe

Your current product



Required to claim this tax break



Does not cover the new Schedule B tax form

Covers **interest and dividends income** which is reported on the new Schedule B tax form.

See more details here

\$59.99 (excl. tax)

Basic software

Don't worry about buying our software!—look for the payment option to deduct the cost from your federal refund when you file.

See more details here

< Back

Upgrade Later

EXHIBIT E

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March 8, 2021

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Re: *The People of the State of California v. Intuit Inc.*, Los Angeles County Superior Court,
Case No. 19CV354178

Dear Mr. Benedetto:

I write in response to your March 2, 2021 letter. The People disagree that the parties have not already met and conferred on the issues identified in your letter. The right to discovery in civil litigation is very broad and extends to relevant matter that “appears reasonably calculated to lead to the discovery of admissible evidence.” CCP § 2017.010. As explained via previous correspondence and during our January 12, 2021 meet and confer call, the requests for national data in response to Interrogatory Nos. 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25 are relevant for multiple reasons.

The interrogatories in question seek basic information about TurboTax Free Edition, the use of required upgrade messages, and related customer behavior. The type of information sought includes, for example:

- the number of people who accessed Free Edition;
- the number of people who filed federal tax returns with Free Edition;
- the number of people who filed federal and state tax returns with Free Edition;
- the number of people who accessed Free Edition and were presented with a required upgrade message;
- the number of people who accessed Free Edition but ultimately filed with a paid product after receiving a required upgrade message;
- the total money Intuit received from the aforementioned customers; and
- the number of people who were presented with a required upgrade message but ultimately filed with Free Edition.

Re: : *The People of the State of California v. Intuit Inc.*, Los Angeles County Superior Court,
Case No. 19CV354178
Date: March 8, 2021
Page 2

National data responsive to these interrogatories is relevant to showing, among other things, that consumers were misled by Intuit's practices to believe that they could file for free with TurboTax Free Edition when they could not and that, based on data in Intuit's possession, Intuit knew or should have known that its advertising and marketing practices were misleading customers. Intuit agrees that it used the same basic advertising across the country, and the People understand from Intuit's document production that it tracked nationally the number of individuals who accessed Free Edition, how many of those customers received a required upgrade message, how many of that subset of customers ultimately paid to upgrade, and how much money Intuit received from these customers. This sort of information is relevant to whether Intuit knew or should have known that its national advertising of free tax filing services was misleading ineligible members of the public into thinking they could file for free with TurboTax Free Edition, and the degree to which Intuit had a financial incentive to mislead the public.

The People's interrogatories about the number of people nationwide who filed federal tax returns with the Free Edition and who filed federal and state tax returns with the Free Edition also seek the same type of information Intuit provided in submissions to the court, so Intuit cannot plausibly dispute their relevance. For example, Intuit has represented to the Court that, in 2019, approximately 12 million people nationally filed their taxes for free using a commercial TurboTax product. Joint Initial Status Conference Statement at 9, 11. Intuit has also represented to the Court that "28 percent . . . of taxpayers eligible to use Free Edition prepared and filed their federal and state tax returns using TurboTax Free Edition in 2019." Intuit's Separate Statement of Undisputed Material Facts in Support of Motion for Summary Adjudication at 21.

And given that Intuit has placed at issue the number of people nationally who filed for free using the TurboTax Free Edition, the other interrogatories—for example those requesting information on how many people who accessed Free Edition were presented with a required upgrade, and how many accessed but ultimately filed with a paid product after receiving the required upgrade message—are also plainly relevant because they provide important context for the numbers presented by Intuit and will assist the People in analyzing the significance of these figures. Furthermore, the People's interrogatories concerning the number of people who filed with Free Edition despite receiving required upgrade messages will shed light on how many Free Edition filers claimed by Intuit were unable to claim certain tax deductions or fully report their financial information.

The requested national data is further relevant to assisting the People in understanding and analyzing the considerable national data included in Intuit's document productions to date.

Re: : *The People of the State of California v. Intuit Inc.*, Los Angeles County Superior Court,
Case No. 19CV354178
Date: March 8, 2021
Page 3

Finally, as explained in the People's January 3, 2021 letter, national data is particularly relevant given Intuit's representation that it cannot provide comprehensive state-specific data because some customers do not proceed far enough into the product for Intuit to determine their state of residence.

As for Interrogatory No. 32, Intuit has provided no valid basis for its refusal to respond. The People's January 15, 2021 letter cited several cases that have treated a parties' retention policies as discoverable. Intuit has failed to cite any contrary authority despite the People's request, during the January 12, 2021 meet and confer call, that Intuit provide authority for its refusal to respond. Given Intuit's failure to support its position, the parties are at an impasse. The ESI Protocol has no bearing on Intuit's obligation to respond to a properly served interrogatory.

Please let us know by March 15, 2021 whether you intend to respond to these interrogatories or agree to an IDC. In addition, during the parties' January 12, 2021 meet and confer Intuit represented that it would complete its production of responsive Slack documents within a week or two. It has now been eight weeks. Please complete the production by March 15, 2021 or provide an explanation of the continued delay and an updated date by which that production will be completed.

Very truly yours,

JAMES R. WILLIAMS
County Counsel

Rachel Neil

Rachel Neil
Fellow

EXHIBIT F

April 1, 2021

Matthew Benedetto

By E-Mail

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Rachel Neil
Office of the County Counsel
County of Santa Clara
70 West Hedding Street
East Wing, 9th Floor
San José, California 95110

Re: TurboTax Free Filing Cases, JCCP No. 5067, Case No. 19CV354178

Dear Ms. Neil:

I write in response to your letters of March 8 and March 24, 2021, regarding Intuit's responses to the County Counsel's interrogatories seeking nationwide data (Nos. 1, 3, 4, 7, 9, 11, 13, 23, 24, and 25) and Interrogatory No. 32, which seeks information regarding Intuit's document retention policies.

Unfortunately, the County Counsel continues to resist providing any justification for, or limitations on, the specific data he seeks. This is despite Intuit's repeated offer to fairly evaluate, on a case-by-case basis, any explanation you might offer regarding how information about consumers who reside outside California could be relevant to this matter brought on behalf of California residents. Your March 8 letter, for instance, merely summarizes the relevant interrogatories and then recycles the same general assertions that Intuit already has addressed.

Notwithstanding the County Counsel's refusal to specifically justify these requests, Intuit hereby addresses the contention that nationwide data is "particularly relevant" because Intuit's responses to these interrogatories did not include customers for whom Intuit did not know their state of residence. *See* Ltr. from R. Neil to M. Benedetto at 3 (Mar. 8, 2021). As Intuit previously explained, some customers do not proceed far enough into the TurboTax product experience for Intuit to capture their state of residence, *see* Ltr. from M. Benedetto to A. Bloom at 1 (Jan. 8, 2021), so it is possible that some of those customers *may* have been California residents, though we do not know whether any are, in fact California residents. In the interest of resolving this dispute, Intuit will agree to supplement its responses to Interrogatory Nos. 1, 3, 4, 7, 9, 11, 13, and 23-25 to include those customers for whom its data has no state of residence, to the extent it is not unduly burdensome to do so, and only if the County Counsel will agree to stipulate that such supplementation would fully resolve the dispute with regard to these requests. Please advise whether you agree to this proposed resolution.

With regard to Interrogatory No. 32, discovery about a party's document retention policies is not "relevant to the subject matter involved in the pending action or to the determination of any motion made in that action." CCP § 2017.010. Rather, such process-

Ms. Neil
April 1, 2021
Page 2

directed discovery typically is denied absent a threshold showing that the responding party has engaged in some form of discovery abuse. *See, e.g., Cableview Comm'n of Jacksonville, Inc. v. Time Warner Cable Se., LLC*, No. 3:13-cv-306-J-34JRK, 2015 WL 12838175, at *6 (M.D. Fla. May 4, 2015) (holding that the “discoverability of document retention policies hinges upon whether spoliation is actually at issue” and denying motion to compel production of same); *Martin v. Allstate Ins. Co.*, 292 F.R.D. 361, 363-64 (N.D. Tex. 2013) (denying “non-merits based discovery concerning Defendant’s document preservation and production policies” as “irrelevant and harassing because there is no evidence to suggest that it has lost or destroyed any documents in this case”); *see also India Brewing, Inc. v. Miller Brewing Co.*, 237 F.R.D. 190, 192 (E.D. Wis. 2006) (denying plaintiff’s motion to compel production of a document retention policy on the ground that it was not relevant to a claim or defense). The County Counsel has made no such showing here, nor could he, and Intuit is prepared to stand on this objection. Moreover, the County Counsel has exceeded the number of interrogatories permitted under the Code, *see* CCP § 2030.030, and it also has Intuit’s responses to the 58 interrogatories served by the City Attorney.

Nonetheless, Intuit has offered on three separate occasions to provide the County Counsel with the requested information in connection with the ESI Protocol. The County Counsel has rejected those offers without explanation. We reiterate that request again and continue to believe that this dispute can be resolved without burdening the Court.

Finally, to ensure the parties’ disputes are perfected before any IDC is requested before Judge Nelson, Intuit proposes that the parties first complete their meet-and-confer discussions regarding the issues identified in Intuit’s March 29, 2021 letter concerning the County Counsel’s discovery responses before contacting the Court about an IDC.

Sincerely,

/s/ Matthew Benedetto

Matthew Benedetto

cc: Aaron Bloom, Office of the County Counsel, County of Santa Clara
Zoe Friedland, Office of the County Counsel, County of Santa Clara
H. Luke Edwards, Office of the County Counsel, County of Santa Clara
Susan Greenberg, Office of the County Counsel, County of Santa Clara
Greta Hansen, Office of the County Counsel, County of Santa Clara
Kavita Narayan, Office of the County Counsel, County of Santa Clara
Adam Teitelbaum, Office of the Los Angeles City Attorney
Danielle Goldstein, Office of the Los Angeles City Attorney

**Exhibit E to the Parties' Joint
Stipulation and [Proposed] Order
Concerning the Sealing of the Joint
Briefing Statement on People's Motion
to Compel and Related Documents**

CONFIDENTIAL

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Attorneys for Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

TURBOTAX FREE FILING CASES

JCCP No. 5067

Included Action:

Included Action Case No. 19CV354178

THE PEOPLE OF THE STATE OF
CALIFORNIA, acting by and through Santa
Clara County Counsel James R. Williams,

**DECLARATION OF MICHAEL
BORDONARO IN SUPPORT OF
DEFENDANT INTUIT INC.'S
OPPOSITION TO PEOPLE'S MOTION
TO COMPEL RESPONSES TO
PEOPLE'S REQUEST FOR
PRODUCTION NO. 2 AND PEOPLE'S
SPECIAL INTERROGATORY NO. 11**

Plaintiff,

v.

INTUIT INC., a Delaware Corporation; and
DOES 1-50, inclusive,

Judge: Hon. Maren Nelson
Dept.: 17
Hearing Date: November 12, 2021
Hearing Time: 10:00 AM
Complaint filed: September 6, 2019
Trial Date: Not Yet Set

Defendants.

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DECLARATION OF MICHAEL BORDONARO

I, Michael Bordonaro, declare as follows:

1. I am the Director of Consumer Strategy & Analytics at Intuit Inc. I have worked at Intuit for 16 years, in a variety of roles focused on strategy and analytics and the use of data in support of the same. If called and sworn to testify, I could and would testify to the following facts.

2. Throughout my time at Intuit, I have used Intuit’s normal course of business data to inform strategic decision-making in different areas including marketing and business development. As a result of this experience, I am familiar with the data that Intuit collects, how this data is stored and organized, and the complexities of using this data to answer questions about the usage of Intuit’s products.

3. I understand that the Santa Clara County Counsel (“Plaintiff”) is seeking, on a nationwide basis, the total monetary sum Intuit received from customers who started using TurboTax Free Edition, who were presented with an upgrade message, who upgraded to a TurboTax Paid Product, and who filed their returns using that product, on a yearly basis from 2016 to 2019.

4. Intuit does not maintain a single dataset that connects data identifying customers who began in TurboTax Free Edition and subsequently upgraded to a TurboTax paid product with the revenue that TurboTax received from individual customers.

[REDACTED]

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1 8. The process for retrieving, compiling, analyzing, and auditing this data, as set
2 forth in the following paragraphs, requires significant technical and data-analytics expertise and
3 is time- and resource-intensive, so rather than handling this process internally, Intuit would
4 typically have to retain an outside consulting firm (“Consulting Firm”) to perform this and
5 similar tasks. Intuit could only perform this task by taking significant resources away from its
6 normal business operations.

7 9. The Consulting Firm charges, on average, \$400 per hour for work of this type.

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
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19 [REDACTED]
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22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 16. Developing the code to merge, process, and analyze the data that Plaintiff seeks
27 will take at least six to eight hours of work.

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1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 18. This takes at least six to eight hours of work.

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 20. This takes at least twelve additional hours.

15 21. At Consulting Firm's rate of \$400 per hour, the process set forth above costs
16 Intuit approximately \$16,000. If Intuit were required to perform this work itself, it would cost
17 substantially more in lost employee time.

18 22. Even this estimate represents the best-case scenario, in which each step of the
19 process proceeds smoothly and without any unexpected difficulties. In my experience working
20 with data for litigation-related topics, this is rarely the case. Because the process is complicated
21 and rarely proceeds without unexpected difficulties and multiple iterations, it is just as likely that
22 each step would take twice as long, requiring approximately 80 hours and costing Intuit more
23 than double the estimate above.

24 23. In addition, these estimates do not account for the cost of the time attorneys spend
25 asking and answering questions and ensuring that the numbers make sense. They also do not
26 account for the foundation of work that has been done by attorneys, Consulting Firm, and Intuit

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28

1 over the past two years to ensure that the relevant data is available and that Consulting Firm
2 understands the factors that are relevant to performing this and similar analyses.

3
4 I declare under penalty of perjury, under the laws of the State of California, that the
5 foregoing is true and correct and that this Declaration was executed as of the date shown below
6 at San Diego, California.

7 Dated: October 13, 2021

8 *Michael Bordonaro*
9 /s/ Michael Bordonaro (Oct 13, 2021 13:53 PDT)
10 Michael Bordonaro