Public

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

In the matter of: **Intuit Inc.**, a corporation, Respondent.	Docket No. 9408

RULE 3.43(f) REQUEST THAT OFFICIAL NOTICE BE TAKEN

Pursuant to Commission Rule 3.43(f), 16 C.F.R. §3.43(f), Complaint Counsel requests that official notice be taken of the following material facts not subject to reasonable dispute and that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned:

1. On May 6, 2019, the People of the State of California, by and through the Los Angeles City Attorney, filed a Complaint for Injunctive Relief, Restitution, and Civil Penalties for Violations of the Unfair Competition Law (Bus. & Prof. Code §§ 17200 et seq.) ("L.A. City Complaint") (attached hereto as **Attachment A**) against Intuit Inc. ("Intuit"). Among other averments, the L.A. City Complaint alleged Intuit engaged in unfair, fraudulent, and deceptive business acts and practices by: "advertising 'FREE Guaranteed' tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website." L.A. City Complaint ¶ 79(c).

2. On September 6, 2019, the People of the State of California, by and through the Santa Clara County Counsel, filed a Complaint for Violations of California False Advertising Law, Seeking Restitution, Civil Penalties, and Injunctive Relief ("Santa Clara County Complaint") (attached hereto as **Attachment B**) against Intuit. Among other averments, the Santa Clara County Complaint alleged: "Intuit deliberately implemented a scheme to draw taxpayers to TurboTax's revenue-producing URL with

false representations that they could file their taxes for free using TurboTax and then to charge taxpayers significant sums to file through additional false and misleading statements." Santa Clara Complaint ¶ 74. The Santa Clara County Complaint further alleged: "Intuit made and disseminated myriad statements that are likely to deceive members of the public on its website and in advertisements." Santa Clara Complaint ¶ 75. The Santa Clara County Complaint further alleged "Examples of Intuit's false or misleading statements include … Falsely representing in numerous television advertisements that if taxpayers used TurboTax Free Edition they would be able to file for free, including in an ad campaign using the tagline: 'Free, free free free,'" and "Falsely representing in extensive online advertisements that if taxpayers used the TurboTax Free Edition they would be able to file for free." Santa Clara Complaint ¶ 75(a).

3. On September 13, 2019, a Consolidated Class Action Complaint was filed against Intuit in the matter captioned *In re Intuit Free File Litigation*, in the United States District Court for the Northern District of California ("Consolidated Class Action Complaint") (attached hereto as **Attachment C**). Among other averments, the Consolidated Class Action Complaint alleged that: "Intuit implemented a pervasive, nationwide marketing and advertising campaign during the 2018 tax filing season promoting its offering of 'free' tax filing services, even though the vast majority of users would actually be charged to file their returns." Consolidated Class Action Complaint ¶ 83; *see also id.* ¶¶ 83–94. Count II of the Consolidated Class Action Complaint alleged fraudulent business acts and practices and deceptive advertising in violation of California Business & Professions Code § 17200, *et seq.* Specifically, the Complaint plead that:

> Intuit's deceptive advertising and fraudulent conduct included affirmative misrepresentations, active concealment of material facts, and partial representations paired with suppression of material facts. Intuit's conduct violative of the fraudulent prong includes at least the following acts and

> omissions: … In a pervasive nationwide advertising campaign, Intuit falsely advertised its TurboTax commercial website as being free, causing confusion and deceiving Class members, eligible for free tax filing, into paying Intuit for tax-filing services.

Id. ¶ 134; *see also id.* ¶¶ 129–39.

4. Between October 1, 2019 and October 23, 2020, approximately 127,000 current and former Intuit customers filed demands for individual arbitration against Intuit with the American Arbitration Association (AAA) through counsel with the firm Keller Lenkner LLC. Each arbitration claimant alleged "that while Intuit created a free tax filing service for low- and middle income taxpayers, it also steered these consumers away from the free option and toward its paid products." Declaration of Warren Postman in Support of Motion to Intervene and in Opposition to Preliminary Settlement Approval ("Postman Declaration") (attached hereto as **Attachment D**) ¶ 23, *In re Intuit Free File Litigation*, Case No. 19-cv-02546 (N.D. Cal. Nov. 30, 2020). Warren Postman, a Partner at Keller Lenkner LLC representing the individual arbitration claimants, declared that these consumers further alleged they "were lured to Intuit's website with promises of its Free Edition, only to learn later that they were ineligible for that free product and would have to pay to use TurboTax." Postman Declaration ¶ 23.

5. On March 5, 2021, Judge Charles R. Breyer of the United States District Court for the Northern District of California denied a Motion for Preliminary Approval of Class Action Settlement in the *In re Intuit Free File Litigation*, Case No. 19-cv-02546 (N.D. Cal. Mar. 5, 2021) (attached hereto as **Attachment E**). Among other reasons, Judge Breyer denied preliminary class settlement because "the proposed settlement provides class members with inadequate compensation." Att. E, at 2. Judge Breyer noted that, because the plaintiffs had not provided an estimate of Intuit's potential exposure in the matter, "[t]he Court is left to do a back-of-the envelope calculation: for a projected class of 19 million people, who paid an average of $100 per-year for at least one year, a

conservative estimate of Intuit's potential liability is $1.9 billion." *Id.* at 14. Judge Breyer further noted:

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

Id. at 16.

Respectfully submitted,

Dated: April 9, 2023

/s/ James Evans

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2023, I electronically filed the foregoing Rule 3.43(f) Request That Official Notice Be Taken electronically using the FTC's E-Filing system, and I caused the foregoing document to be sent via email to:

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Secretary of the Commission
Clerk of the Court

Hon. D. Michael Chappell
Chief Administrative Law Judge
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Administrative Law Judge

I further certify that on April 9, 2023, I caused the foregoing document to be served via email on:

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Attachment A

LA City Complaint

FTC Docket No. 9408

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NO FEE – CAL. GOVT. CODE § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

INTUIT INC., a Delaware Corporation; and DOES 1-50, inclusive,

Defendants.

Case No.: 19STCV15644

COMPLAINT FOR INJUNCTIVE RELIEF, RESTITUTION, AND CIVIL PENALTIES FOR VIOLATIONS OF THE UNFAIR COMPETITION LAW (BUS. & PROF. CODE §§ 17200 *ET SEQ.*)

INTRODUCTION

1. Plaintiff, the People of the State of California (the "People"), by and through Los Angeles City Attorney Michael N. Feuer, brings this action under the California Unfair Competition Law, Business and Professions Code §§ 17200 *et seq.*, against Defendants Intuit Inc. and Does 1 through 50, inclusive (collectively "Intuit" or "Defendant"), maker of the market-leading "TurboTax" electronic tax preparation and filing software. Intuit has for years defrauded the lowest earning 70 percent of American taxpayers—who are entitled under a private industry agreement with the IRS to file their taxes online for free using commercial

products—by actively undermining public access to the IRS's "Free File" program, while simultaneously employing deceptive and misleading advertising and design schemes intended to induce taxpayers into unnecessarily purchasing expensive TurboTax products. The People seek injunctive relief to stop Intuit's deceptive business practices, restitution for all Californians who at any time during the four years prior to the filing of this Complaint paid Intuit for TurboTax products when they were in fact eligible to file for free under the IRS's "Free File" program, and civil penalties to deter similar conduct in the future.

2. Since 2002, Intuit and a consortium of electronic tax filing companies have promised to provide a free version of their commercial products to low-income Americans, in exchange for the IRS's commitment to "not compete with the Consortium in providing free, online tax return preparation and filing services to taxpayers."[1] Under the IRS's "Free File" program, the lowest earning 70 percent of taxpayers based on Adjusted Gross Income ("AGI") (currently anyone with an AGI of $66,000 or less) are eligible to prepare and file their federal tax returns, no matter how complicated, through any of several commercial providers at no cost.

3. But only a tiny fraction of eligible taxpayers actually benefit from the IRS and private industry's "Free File" agreement. While *more than 100 million taxpayers* were eligible to file for free through the Free File program in fiscal year 2018, fewer than 2.5 million—***less than 2.5 percent*** of eligible taxpayers—actually did so.

4. This abysmal participation rate is attributable, at least in part, to Intuit's deliberate efforts to hide the availability of its high-quality Free File product (called TurboTax "*Freedom* Edition"), while at the same time aggressively marketing as "Free" an inferior, watered-down version of their software that is useless to all but those with the simplest of tax returns (similarly—and confusingly—called TurboTax "*Free* Edition"). Worse still, after luring low-income consumers to begin preparing their returns with the limited-functionality "Free Edition" software, and even after those consumers input information revealing themselves to be eligible for TurboTax's full-featured Free File product, Intuit then manipulates them into paying

[1] Internal Revenue Service, "Free Online Electronic Tax Filing Agreement" (Oct. 30, 2002), sec. II, 67 Fed. Reg. 67,247, 67,249 (Nov. 4, 2002) ("2002 Free File Agreement").

for product upgrades and upsells—marketing tactics that are specifically prohibited from being used on Free Filers under the terms of the IRS agreement.

5. As discussed in greater detail below, Intuit's unfair and deceptive business practices have real world implications. To cite just one example, upon information and belief, Intuit deceived a California resident into unnecessarily spending $169—more than 1% of her $14,500 annual salary—on a TurboTax product, when she was clearly eligible for free tax preparation and filing. It is doubtless that thousands, if not millions, of consumers have been similarly harmed.

PARTIES

6. Plaintiff People is the sovereign power of the State of California designated by the Unfair Competition Law, Business and Professions Code §§ 17200 *et seq.* (the "UCL"), to be the complaining party in civil law enforcement actions brought under that statute. *See* Bus. & Prof. Code § 17204. The People have an interest in ensuring that the individuals and entities doing business in this state do not deceive consumers, particularly those who are economically disadvantaged and underserved.

7. Defendant Intuit Inc. is a Delaware Corporation with its principal place of business in Mountain View, California. Intuit is the maker of "TurboTax," a series of widely used electronic tax preparation and filing software products and services, and is a member of the "Free File Alliance," a nonprofit coalition of 12 tax software companies under an agreement with the IRS to provide free electronic tax services to eligible American taxpayers. In fiscal year 2018, Intuit reported revenue of nearly $6 billion, up 15 percent from fiscal year 2017, of which approximately $2.5 billion resulted from its consumer-facing business.[2]

8. The true names and capacities of the defendants sued herein as Does 1 through 50, inclusive, are unknown to the People. The People therefore sue these defendants by such fictitious names. When the true names and capacities of these defendants have been ascertained, the People will seek leave of this Court to amend this Complaint to insert in lieu of such fictitious names the true names and capacities of the fictitiously named defendants. The

[2] Intuit Inc., Annual Report (Form 10-K), at 32 (Aug. 31, 2018).

People are informed and believe, and thereon allege, that these defendants participated in, and in some part are responsible for, the unfair and fraudulent acts alleged herein. Does 1 through 50 include unknown individuals who conspired with Intuit concerning the unfair and fraudulent acts alleged herein. Does 1 through 50 also include agents of Intuit acting within the course and scope of their duties. Each reference in this Complaint to Intuit or Defendant is also a reference to all defendants sued as Does.

9. The People allege that, in addition to acting on its own behalf, all of the acts and omissions described in this Complaint by Defendant were duly performed by, and attributable to, all defendants, each acting as agent, employee, alter ego, joint enterprise and/or under the direction and control of the others, and such acts and omissions were within the scope of such agency, employment, alter ego, joint enterprise, direction, and/or control. Any reference in this Complaint to any acts of Defendant shall be deemed to be the acts of each defendant acting individually, jointly, or severally. At all relevant times, each defendant had knowledge of and agreed to both the objectives and course of action, and took the acts described in this Complaint pursuant to such agreements, resulting in the unfair and fraudulent acts described herein.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action pursuant to Article VI, section 10 of the California Constitution.

11. This Court has personal jurisdiction over Defendant because Intuit's principal place of business is in California, and Intuit purposefully avails itself of California markets.

12. Venue is proper in this Court pursuant to Code of Civil Procedure § 393 because violations of law that occurred in the City and County of Los Angeles are part of the cause upon which the People seek recovery of restitution and penalties imposed by statute.

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GENERAL ALLEGATIONS

I. The IRS's Free File Program

A. To Fight for Its Survival and Stave Off Public Sector Competition, Intuit Promised to Provide Free Tax Filing Services to Low-Income Americans.

13. Intuit has long been the market leader in the online tax preparation software industry, today with reportedly an approximately 60 percent market share. According to Intuit's website, "[m]ore federal returns are prepared with TurboTax than any other tax preparation provider, totaling over 36 million federal tax returns from last year alone."[3]

14. In the early 2000s, already facing competitive pressures from various state governments beginning to offer their own free online tax services to state taxpayers, Intuit was highly motivated to prevent the federal government from doing the same. As Intuit explained in its Form 10-K SEC filing for fiscal year 2004 describing "risks that could affect future results," "[a]gencies of the U.S. government have made several attempts during the two most recent presidential administrations to offer taxpayers a form of free tax preparation software and filing service."[4]

15. Ultimately, however, the federal government did not develop its own free online federal tax filing service. Instead, on October 30, 2002, the IRS entered into the "Free Online Electronic Tax Filing Agreement" ("Free File Agreement") with a consortium of electronic tax preparation companies, including Intuit, which had organized into a non-profit called the "Free File Alliance, LLC" for purposes of entering into the agreement.[5]

16. Under the terms of the Free File Agreement, which was established pursuant to public rulemaking and published in the Federal Register on November 4, 2002 (67 Fed. Reg. 67,247), Free File Alliance members agreed to offer free online tax return preparation and filing services to at least 60 percent of taxpayers in the aggregate—though individual Alliance members remained free to impose their own eligibility criteria, such as based on age, income, or

[3] https://turbotax.intuit.com/personal-taxes/online/e-file-taxes/ (last accessed May 6, 2019).
[4] Intuit Inc., Annual Report (Form 10-K), at 38 (Sept. 24, 2004).
[5] The Free File Alliance, LLC subsequently changed its name to Free File, Inc.

state residency. In exchange, the IRS pledged to "not compete with the [Free File Alliance] in providing free, online tax return preparation and filing services to taxpayers."[6]

17. In 2005, the IRS and the Free File Alliance renewed the Free File Agreement for another four years, with some modifications. Most significantly, the 2005 Agreement expanded the scope of guaranteed coverage to the lowest earning 70 percent of taxpayers based on AGI and underscored that, "to serve the greater good and to ensure the long-term stability of the Alliance, the scope of this program is focused on covering the taxpayers least able to afford e-filing their returns on their own."[7]

18. The IRS and the Free File Alliance also entered into a Memorandum of Understanding ("MOU") implementing the Free File Agreement. The MOU again emphasized the Free File program's objective of providing services to "the taxpayers least able to afford efiling their returns on their own" and reiterated that, "[i]n recognition of this commitment, the federal government has pledged to not enter the tax preparation software and e-filing services marketplace."[8]

19. Since 2005, the Free File Agreement and implementing MOU have been continuously renewed, with some amendments. The Seventh MOU was effective March 6, 2015 for a five-year term but was superseded by the operative Eighth MOU on October 31, 2018. The Eighth MOU currently remains in effect and expires October 31, 2021.[9]

20. Although the Free File program was envisioned to offer free online tax filing services to the lowest-earning 70 percent of Americans, the program has fallen far short of its objectives. The IRS reported last year that in its entire 16-year existence, only 51.1 million

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[6] 2002 Free File Agreement, sec. II.

[7] Internal Revenue Service, "Free Online Electronic Tax Filing Agreement" (Oct. 30, 2005) ("2005 Free File Agreement"), sec. I.C.

[8] Internal Revenue Service, "First Memorandum of Understanding on Service Standards and Disputes, Between the Internal Revenue Service and Free File Alliance, LLC," art. II; *see also* Internal Revenue Service, "Seventh Memorandum of Understanding on Service Standards and Disputes, Between the Internal Revenue Service and Free File, Incorporated" ("Seventh MOU"), art. 2; Internal Revenue Service, "Eighth Memorandum of Understanding on Service Standards and Disputes, Between the Internal Revenue Service and Free File, Incorporated" ("Eighth MOU"), art. 2.

[9] Throughout this Complaint, the terms "Free File Agreement" and "MOU" refer, respectively, to the operative versions of the Free File Agreement and MOU in effect at the relevant time, while "Free File program" is used to refer to the program as a whole.

federal tax returns have actually been filed using Free File products, representing only 3 percent of all people eligible to use Free File.[10] In fiscal year 2018, more than 100 million taxpayers were eligible to file for free with Free File products, but only about 2.5 million—***less than 2.5 percent*** of eligible taxpayers—actually did so.[11]

21. Intuit has been a participant in the Free File program throughout its existence and has a strong commercial interest in keeping the program grossly underutilized and in making the program—in its current anemic form—permanent.

22. In its respective Form 10-K annual reports for the 2014, 2015, and 2016 fiscal years, for example, Intuit expressly acknowledged that "*the Free File Alliance has kept the federal government from being a direct competitor to Intuit's tax offerings*," while acknowledging that "governmental encroachment at both the federal and state levels may present a continued competitive threat to our business for the foreseeable future."[12]

23. In more recent Form 10-K annual reports for fiscal years 2017 and 2018, Intuit similarly disclosed that it faces intense "competitive challenges from government entities that offer publicly funded electronic tax preparation and filing services with no fees to individual taxpayers."[13] In describing the company's strategic risk factors, Intuit explained in those SEC reports, and reiterated again in its most recent Form 10-Q for the quarterly period ending January 31, 2019: "Our consumer tax business also faces significant competition from the public sector…. If the Free File Program were to be terminated and the IRS were to enter the software development and return preparation space, *the federal government would become a*

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[10] *See* Internal Revenue Service, "Tax Time Guide: Try Money-Saving IRS Free File" (Mar. 1, 2018), *available at* https://www.irs.gov/newsroom/tax-time-guide-try-money-saving-irs-free-file; Office of Sen. Elizabeth Warren, "Tax Maze: How the Tax Prep Industry Blocks Government from Making Tax Day Easier" (Apr. 4, 2016), at 1, *available at* https://www.warren.senate.gov/files/documents/Tax_Maze_Report.pdf.

[11] Internal Revenue Service, "National Taxpayer Advocate delivers annual report to Congress: Addresses impact of shutdown; urges more funding for IT modernization" (Feb. 12, 2019), *available at* https://www.irs.gov/newsroom/national-taxpayer-advocate-delivers-annual-report-to-congress-addresses-impact-of-shutdown-urges-more-funding-for-it-modernization.

[12] Intuit Inc., Annual Report (Form 10-K), at 14 (Sept. 1, 2016) (emphasis added); Intuit Inc., Annual Report (Form 10-K), at 14 (Sept. 1, 2015); Intuit Inc., Annual Report (Form 10-K), at 16 (Sept. 12, 2014).

[13] Intuit Inc., Annual Report (Form 10-K), at 9 (Aug. 31, 2018); Intuit Inc., Annual Report (Form 10-K), at 9 (Sept. 1, 2017).

publicly funded direct competitor of the U.S. tax services industry and of Intuit. Government funded services that curtail or eliminate the role of taxpayers in preparing their own taxes could potentially have *material and adverse revenue implications*."[14]

24. In an effort to enshrine the Free File program in federal law, Intuit has expended considerable resources lobbying Congress. In 2017 and 2018, Intuit reportedly spent nearly $5 million on Congressional lobbying activities; the bill it lobbied for most frequently was H.R. 3641, the "Free File Permanence Act of 2017," which would, true to its name, make the Free File program permanent by mandating that the Secretary of the Treasury "shall continue to operate the IRS Free File Program."[15] That key provision reappears in Section 1102 of H.R. 1957, the "Taxpayer First Act of 2019," which recently passed the U.S. House of Representatives.[16]

B. The Purpose of the Free File Program Is to Maximize Low-Income Taxpayer Access to Free Online Tax Services.

25. The Free File program is intended to implement the IRS's stated public policy of "extending the benefits of online federal tax preparation and electronic filing to economically disadvantaged and underserved populations at no cost to either the individual user or to the public treasury."[17] Article 2 of the MOU unambiguously states that Free File members "shall … [m]ake tax return preparation and filing easier and reduce the burden on individual taxpayers, *particularly the economically disadvantaged and underserved populations*," and shall also "[p]rovide greater service and *access to the [Free File] Services to taxpayers*."[18]

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[14] Intuit Inc., Annual Report (Form 10-K), at 13 (Aug. 31, 2018) (emphases added); Intuit Inc., Quarterly Report (Form 10-Q), at 42 (Feb. 22, 2019) (emphases added); *see also* Intuit Inc., Annual Report (Form 10-K), at 13 (Sept. 1, 2017).

[15] Free File Permanence Act of 2017, H.R. 3641, 115th Cong. § 3(a) (2017); *see* OpenSecrets.org, Center for Responsive Politics, "Intuit Inc. Profile for 2018 Election Cycle," https://www.opensecrets.org/orgs/summary.php?id=D000026667 (last accessed May 5, 2019); OpenSecrets.org, Center for Responsive Politics, "Clients lobbying on H.R.3641: Free File Permanence Act of 2017," https://www.opensecrets.org/lobby/billsum.php?id=hr3641-115 (last accessed May 5, 2019).

[16] Taxpayer First Act of 2019, H.R. 1957, 116th Cong. § 1102 (2019).

[17] Eighth MOU, art. 2; *see* Seventh MOU, art. 2.

[18] Eighth MOU, arts. 2.1, 2.3 (emphases added); Seventh MOU, arts. 2.1, 2.3 (emphases added).

26. This public policy of improving low-income taxpayer access to high-quality commercial products at no cost—and of protecting such vulnerable populations from being misled into unnecessarily paying for such services—is also reflected in several other provisions of the Seventh and Eighth MOUs, the Free File Agreement, and the IRS's responses to public comments published in the Federal Register.

27. First, the Free File Agreement provides that "[t]he Parties will coordinate with each other their respective marketing of these Free Services to provide uniformity and *maximize public awareness*."[19]

28. Second, in assuaging public concerns that the Free File program would not "sufficiently protect the interest of taxpayers, specifically low-income taxpayers," the IRS wrote in the Federal Register: "The Agreement … provides that taxpayers will not have to go through additional steps or barriers to access the Free Service, beyond those steps required or imposed to access the comparable paid service."[20] The IRS further wrote: "It is also expected that Free File Alliance products will be equivalent to those offered for sale on the commercial market and thus are expected to have all of the features and operability of those commercial products."[21]

29. Third, to further protect Free File-eligible taxpayers from being misled into paying for a product, the MOU imposes specific limitations on Free File Alliance members' sales activities. For example, the Eighth MOU explicitly prohibits "Other Sales and Selling Activity: No marketing, soliciting, sales or selling activity, or electronic links to such activity, are permitted in the Free File Program," except for state tax returns or where the user proves to be ineligible for the Free File product.[22]

30. The Eighth MOU similarly provides that "Members shall not include a 'value-added' button (i.e., an icon, link or any functionality that provides a taxpayer with access to a Member's commercial products or services) on the Member's Free File Landing Page."[23]

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[19] 2002 Free File Agreement, sec. VI.A (emphasis added).
[20] IRS' Intent to Enter Into an Agreement With Free File Alliance, LLC (i.e., Free File Alliance), 67 Fed. Reg. 67,247, 67,248 (Nov. 4, 2002).
[21] *Id.*
[22] Eighth MOU, art. 4.32.5; *see* Seventh MOU, art. 4.33.
[23] Eighth MOU, art. 4.32.6.

While the Seventh MOU did allow "value-added" buttons to be listed on the bottom of a Free File Landing Page, it also expressly provided that "[t]he Member shall have a prominent link permitting taxpayers on a Member's Paid Service Offering Page to easily and clearly return to the Member Free File Landing Page."[24]

31. Both the Seventh and Eighth MOUs also clearly state, "Members shall not post a billing screen requesting or collecting bank/financial information (e.g., debit/credit card information) from customers who qualify for a free return where no state tax return products have been purchased."[25]

32. Finally, the Eighth MOU sets forth specific rules to ensure that consumers who do not qualify for a particular member's Free File product (because, for example, the member imposes a lower income eligibility threshold, as Intuit does) are first redirected to other members' Free File products, for which they might be eligible, before being offered a member's paid products.[26]

II. Intuit's Business Acts and Practices

A. Intuit's Online TurboTax Products

33. As part of the IRS Free File program, Intuit offers a free online tax preparation and filing product called TurboTax "Freedom Edition." Anyone who (i) has an AGI of $34,000 or less, (ii) is eligible for the Earned Income Tax Credit, or (iii) is on active military duty and has an AGI of $66,000 or less, is eligible to use TurboTax "Freedom Edition."

34. TurboTax "Freedom Edition" is a robust software offering that enables users to complete and e-file their federal tax returns for free, no matter how complicated. In addition to the basic Form 1040, TurboTax "Freedom Edition" supports *125 additional federal tax forms*, including but not limited to Schedules 1 through 6, 1099-MISC, and 1040 Schedules A, B, C, D, E, EIC, F, H, and J.

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[24] Seventh MOU, art. 4.33.7.
[25] Eighth MOU, art. 4.19.4; Seventh MOU, art. 4.20.4.
[26] Eighth MOU, art. 4.19.2.

35. But TurboTax "Freedom Edition" is not the only free online tax product Intuit offers. Intuit also offers a *different* free online tax product that bears a similar name: TurboTax "Free Edition."

36. Notwithstanding the similarity of their names, TurboTax "Free Edition" is a very different product from TurboTax "Freedom Edition" and has nothing to do with the IRS Free File program. There are no income eligibility restrictions to use TurboTax "Free Edition," but the product itself is a very basic software offering that supports only the simplest of tax returns, i.e., "simple tax returns that can be filed on Form 1040 without any attached schedules."

37. The only taxpayers who can complete and file their returns using TurboTax "Free Edition" are those who have *only* the following situations: (i) have W-2 income; (ii) have limited interest and dividend income reported on a 1099-INT or 1099-DIV; (iii) claim the standard deduction; (iv) claim the Earned Income Tax Credit (EIC); and/or (v) claim child tax credits.

38. Any taxpayer who needs to file any additional forms or schedules as part of their tax return, such as itemized deductions (Schedule A), 1099-MISC income (Schedule C), or credits, deductions, and income reported on Schedules 1 through 6, cannot complete their return using TurboTax "Free Edition." This includes a large number of low-income taxpayers, including the growing number of persons working in the "gig economy" and classified (whether rightly or wrongly) by their employer as an "independent contractor" and paid with Form 1099-MISC. It also includes, for example, anyone paying off student loans or who has a health savings account.

39. If such taxpayers meet any one of the three income eligibility thresholds for TurboTax "Freedom Edition," however, they can successfully complete their tax return for free using TurboTax "Freedom Edition." Thus, a large number of taxpayers who are unable to complete their tax returns for free using TurboTax "Free Edition," due to its highly limited functionality, nonetheless *can* complete their tax returns for free using TurboTax "Freedom Edition," which supports virtually all federal tax forms.

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40. In addition to these two "free" online TurboTax products, Intuit also offers three paid TurboTax online products: "Deluxe," starting at $59.99 for federal returns (additional for state); "Premier," starting at $79.99; and "Self-Employed," starting at $119.99 (collectively, TurboTax "Paid Products"). Intuit also offers a variety of add-on products and services.

B. Intuit Deliberately Makes It Difficult for Consumers to Find TurboTax "Freedom Edition," Its Free File Product.

41. Although Intuit offers a Free File product, i.e., TurboTax "Freedom Edition," few consumers ever learn about it.

42. This is by design. TurboTax "Freedom Edition" is not conspicuously listed anywhere on TurboTax's main website, https://turbotax.intuit.com ("Main Website"), through which Intuit offers its four other TurboTax online products, and indeed cannot be accessed directly from the TurboTax Main Website, despite being a TurboTax online product.

43. Instead, Intuit only offers TurboTax "Freedom Edition" through an entirely separate and distinct website, https://turbotax.intuit.com/taxfreedom ("TurboTax Free File Website")—and Intuit makes it impossible to navigate directly to the TurboTax Free File Website from the TurboTax Main Website. Given that the top result for a Google search of the terms "turbotax" or "turbotax free" leads to the TurboTax Main Website, it is likely that most consumers never become aware of Intuit's Free File product at all.

44. Worse still, during the 2018 tax season (January through April 15, 2019), Intuit deliberately hid its TurboTax Free File Website from consumers by adding a line of code to the website that prevented it from appearing in any online search results. As of April 26, 2019, even a search for the terms "turbotax free file" and "turbotax freedom edition" did not yield search results containing the TurboTax Free File Website.

45. Intuit achieved this level of obscurity by adding the following instruction code on the TurboTax Free File Website: <meta name>="robots" content="noindex, nofollow">. A "robots meta tag" allows a website to control how Google and other search engines make content available to users through search results. A robots meta tag of "noindex" instructs search engines, "[d]o not show this page in search results and do not show a 'Cached' link in search results," while a robots meta tag of "nofollow" instructs, "[d]o not follow the links on

this page."[27] According to Google Support, "[i]f you wish to explicitly block a page from being indexed, you should … use the noindex robots meta tag," which effectively "guarantee[s] that a page will not appear in results."[28]

46. After the nonprofit investigative newsroom ProPublica exposed Intuit's deceptive practices in an article published April 26, 2019, Intuit changed the code on its TurboTax Free File Website so that it is no longer hidden from Google and other search engines.[29]

47. Upon information and belief, Intuit also took deliberate steps to steer consumers—including those specifically searching for the IRS Free File program—towards the TurboTax Main Website (with its inferior "Free Edition" and costly Paid Products), *not* the TurboTax Free File Website. Upon information and belief, Intuit advertised its Main Website by purchasing Google Search Ads (which display at the top of Google search results when triggered by the advertiser's pre-selected keywords), and chose keywords likely to be used by consumers specifically seeking IRS Free File options.[30]

48. For example, according to a report published April 22, 2019 by ProPublica, when journalists searched Google for "irs free file taxes," the top paid ad displayed above search results was for the TurboTax Main Website, advertising "TurboTax Free | Free IRS Fed Filing Online."[31]

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[27] Google Search, "Robots meta tag and X-Robots-Tag HTTP header specifications, https://developers.google.com/search/reference/robots_meta_tag (last accessed May 5, 2019).

[28] Google Search Console Help, "About robots.txt Robots FAQs," https://support.google.com/webmasters/answer/7424835?hl=en (last accessed May 5, 2019).

[29] Justin Elliott, *TurboTax Deliberately Hid Its Free File Page From Search Engines*, ProPublica (Apr. 26, 2019), *available at* https://www.propublica.org/article/turbotax-deliberately-hides-its-free-file-page-from-search-engines.

[30] Google Ads explains, "[k]eywords are phrases that you choose to determine when and where your ad can appear. They're matched to terms that people search for or web content that they view." Google, "Keywords," https://support.google.com/google-ads/topic/3119130?hl=en&ref_topic=3119122,3181080,3126923, (last accessed May 5, 2019). According to Google Ads, "[t]o get your ads to appear when people search for your product or service, the keywords you choose need to match the words or phrases that people search for. … When a customer searches for a term that matches your keyword, your ad can enter an auction to determine if it will show." Google, "About keywords," https://support.google.com/google-ads/answer/1704371?hl=en&ref_topic=3119131 (last accessed May 5, 2019).

[31] Justin Elliott and Lucas Waldron, *Here's How TurboTax Just Tricked You Into Paying to File Your Taxes*, ProPublica (Apr. 22, 2019), *available at* https://www.propublica.org/article/turbotax-just-tricked-you-into-paying-to-file-your-taxes.

C. Intuit Confuses Consumers by Aggressively Advertising "FREE" Tax Services and TurboTax "Free Edition," While Suppressing Access to Its Actual Free File Product, TurboTax "Freedom Edition."

49. While suppressing the accessibility of its Free File product and entirely omitting any mention of TurboTax "Freedom Edition" from its Main Website's list of product offerings, Intuit prominently and ubiquitously advertises "Free" tax services and TurboTax "Free Edition," thereby misleading reasonable consumers into believing TurboTax "Free Edition" is the *only* free online tax preparation product Intuit offers and/or believing TurboTax "Free Edition" *is* Intuit's Free File product. Intuit further misleads reasonable consumers into believing that if they are unable to complete their tax returns using TurboTax "Free Edition," due to its highly limited functionality, their only recourse is to upgrade to one of Intuit's Paid Products that supports the tax forms they need—even if they are eligible to file for free under the Free File program.

50. The TurboTax Main Website is the top search result for a Google search for "turbotax." The homepage of the TurboTax Main Website prominently advertises in large, bold font: "FREE Guaranteed. $0 Fed. $0 State. $0 To File."

51. At the top of the Main Website homepage is a link to "Products & Pricing." Hovering over that link elicits a drop-down menu, at the top of which is the subcategory "Online products."

52. Clicking on "Online products" takes the consumer to a new page, https://turbotax.intuit.com/personal-taxes/online/ ("Online Products Page"). The Online Products Page lists four TurboTax products: (1) "Free Edition" ($0 Fed. $0 State. $0 File.); (2) "Deluxe" ($59.99*); (3) "Premier" ($79.99*); and (4) "Self-Employed" ($119.99*).

53. The Online Products Page does not list or anywhere mention TurboTax "Freedom Edition" or the Free File program, even though TurboTax "Freedom Edition" is an online TurboTax product.

54. The Online Products Page states at the top: "Tell us about you – we'll recommend the right tax solution." Below that text are various circumstances that the consumer

can select, if applicable. Based on what circumstances the consumer selects, Intuit recommends one of the four listed TurboTax products.

55. For example, if the consumer selects "I want to maximize deductions and credits," "I own a home," "I donated to charity," or "I'm paying off student loans," Intuit recommends TurboTax "Deluxe," which costs $59.99 and up.

56. If the consumer selects "I sold stock or own rental property," Intuit recommends TurboTax "Premier," which costs $79.99 and up.

57. If the consumer selects "I'm self-employed/freelancer" or "I own a small business," Intuit recommends TurboTax "Self-employed," which costs $119.99 and up.

58. Intuit recommends these Paid Products to consumers regardless of whether they are eligible to file for free using TurboTax "Freedom Edition."

59. The Main TurboTax Website homepage also contains a link to a "Help" menu containing a link to "Frequently Asked Questions." The FAQ Page contains the question, "How do I know which product is right for me?" The answer reads, "We have a product for your unique tax situation. You can select the right product for you from our Products and Pricing page, or we'll help with a product recommendation. Plus, if you hit a point where another product might be better for you, we'll give you the opportunity to change. The information you've already entered will transfer automatically." The answer contains links to the Online Products Page described above, which, again, does not contain any mention of TurboTax "Freedom Edition" or the Free File program, even though TurboTax "Freedom Edition" is "the right product" for many consumers.

60. Furthermore, if consumers begin filling out their tax information in either "Free Edition" or one of the Paid Products, and then realize (somehow on their own) that TurboTax "Freedom Edition" is "better for [them]," it is not true that "[t]he information [they've] already entered will transfer automatically" to the "Freedom Edition" product. To the contrary, in order to switch from TurboTax "Free Edition" or one of the Paid Products accessed from the Main Website to TurboTax "Freedom Edition," consumers must *clear all information* they already entered, sign out of their account, go to the TurboTax Free File Website (which cannot be

directly navigated to from the Main Website), sign in to their account on that site, and then *re-enter* all their personal and tax information anew—yet another barrier Intuit erects to discourage reasonable consumers from using its Free File product. In fact, if consumers do *not* first clear all information entered on the Main Website under their account before logging back in via the TurboTax Free Filing Website, any previously incurred charges will still appear in their account.

D. Intuit Uses Further Deceptive Marketing and Design Tactics to Steer Free File-Eligible Consumers Into Unnecessarily Purchasing Paid Products.

61. While failing to clearly disclose the existence of TurboTax "Freedom Edition" anywhere on its Main Website and making it difficult for consumers to find it, Intuit employs additional deceptive marketing and design tactics that steer consumers—including those who are eligible to prepare and file their returns for free under the IRS's Free File program—into upgrading from TurboTax "Free Edition" to one of Intuit's Paid Products.

62. For example, the top result for a Google search for "turbotax free" is the webpage https://turbotax.intuit.com/personal-taxes/online/free-edition.jsp, advertising "100% Free Tax Filing, $0 Fed, $0 State | TurboTax Free – Intuit." Clicking on that link leads to a webpage again prominently advertising in large, bold font: "FREE guaranteed. $0 Fed. $0 State. $0 To File." The only free product advertised on that page is TurboTax "Free Edition," with a "File for $0" button. The page nowhere mentions TurboTax "Freedom Edition" or the Free File program.

63. If a Free File-eligible consumer clicks the "File for $0" button, she is prompted to create an account and then is asked a series of questions on successive webpages about her personal information and tax situation, including, for example, whether she paid student loan interest (reported on Form 1098-E, not supported by "Free Edition") or was self-employed (reported on Form 1099-MISC, not supported by "Free Edition"). Rather than immediately alerting the consumer that she cannot complete her tax returns using "Free Edition," the program continues to lead the consumer through the process of inputting personal information.

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64. The consumer is next prompted to input her income by income category. If a Free File-eligible consumer indicates that she needs to report income on a Form 1099-MISC (for example, because her employer classifies her as an independent contractor), the program falsely informs her, "[t]o accurately report this income, you'll need to upgrade," and then offers her the option of upgrading to TurboTax "Deluxe" for $59.99 or TurboTax "Self-Employed" for $119.99. At no point does the program inform the consumer that, rather than pay for an upgrade, she may still be able "[t]o accurately report this income" for free using TurboTax "Freedom Edition" if she meets one of the three income eligibility thresholds.

65. If the consumer upgrades to a Paid Product, she is then prompted to enter the income from her 1099-MISC. Even after the consumer enters an amount indicating that she is eligible to file for free using TurboTax "Freedom Edition" (e.g. $21,000), at no point does the program inform the consumer of this free TurboTax Free File product.

66. Meanwhile, after luring consumers—including Free File-eligible consumers—to begin filling out a return by clicking on a "File for $0" button, the TurboTax program makes multiple attempts throughout the process to upsell additional products or upgrades to the consumer. For example, at one point in the process, the program "recommend[s]" that the consumer upgrade to a service called "PLUS" for $19.99. At another point, the program prompts the consumer to upgrade to a "turbotaxlive" product offering live CPA assistance, such as "turbotaxlive Deluxe" for $119.99. Before finalizing the return, the program prompts the consumer to add "MAX" audit and identity theft coverage for $49.99.

67. A former Intuit marketing employee recalled a May 2017 meeting in which one employee suggested modifying the TurboTax software so that any customer who entered information indicating their eligibility for TurboTax Free File would be shown a pop-up window (similar to those currently used to upsell additional products and upgrades) directing them to TurboTax "Freedom Edition." According to the former employee, the suggestion was met with laughter and quickly dismissed.[32]

[32] Justin Elliot and Paul Kiel, *TurboTax and H&R Block Saw Free Tax Filing as a Threat – and Gutted It*, ProPublica (May 2, 2019), *available at* https://www.propublica.org/article/intuit-

68. Another former midlevel Intuit employee, as reported by ProPublica, confirmed that steering customers away from Intuit's Free File product is a "purposeful strategy."[33] For consumers finding TurboTax through a search engine or an online ad, "the landing page would direct you through a product flow that the company wanted to ensure would not make you aware of Free File."[34] According to the former employee, "[t]he entire strategy is to make sure people read the word 'free' and click our site and never use" TurboTax's Free File product.[35] The former employee further confirmed that Intuit's strategy is to lure customers in with their guarantee of a "free" filing, even though the "vast majority of people who click that will not pay $0."[36]

E. Intuit's Unfair and Fraudulent Business Acts and Practices Deceived Free File-Eligible Consumers Into Purchasing Intuit's Paid Products and Incurring Unnecessary Fees.

69. Upon information and belief, Intuit's unfair and fraudulent business acts and practices described above caused reasonable consumers eligible for a Free File product to unnecessarily purchase TurboTax Paid Products.

70. In response to reporting by ProPublica, at least 40 people reached out to the news organization claiming they sought out TurboTax's free option but ended up paying fees as a result of Intuit's business practices.[37] The stories published by ProPublica illustrate that Intuit's practices both in fact deceive consumers and detrimentally impact them:

a. A Los Angeles resident who works as a freelancer for $15 per hour and who has a substantial monthly rent payment was deceived by Intuit into paying $154 for a TurboTax Paid Product. He described Intuit's conduct as "the worst kind of injustice for someone in [his] position."[38]

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turbotax-h-r-block-gutted-free-tax-filing-internal-memo?utm_source=pardot&utm_medium=email&utm_campaign=dailynewsletter.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Ariana Tobin, Justin Elliott, and Meg Marco, *Here Are Your Stories of Being Tricked Into Paying by TurboTax. You Often Need the Money.*, ProPublica (Apr. 26, 2019), *available at* https://www.propublica.org/article/here-are-your-stories-of-being-tricked-into-paying-by-turbotax-you-often-need-the-money.

[38] *Id.*

b. Intuit deceived another California resident into unnecessarily spending $169—more than 1% of her $14,500 annual salary—on a TurboTax Paid Product.[39]

c. Intuit's victims include an unemployed woman recovering from chemotherapy and her husband who works part-time and suffers from Parkinson's disease, both of whom care for two disabled children and recently took out short-term loans to help pay their rent. Intuit's business practices caused the family, which earns $32,877 annually, to incur $200 in fees—money that could have gone toward rent or paying down their loans.[40]

d. Intuit similarly took advantage of a husband (on disability) and his wife who respectively earn $19,000 and $4,400 annually—deceiving them into paying $99.98 for a TurboTax Paid Product merely because the couple sold a piece of property the prior year (at a loss). That fee represented a full week's worth of groceries for the family.[41]

e. Intuit deceived another user who earned only $5,000 annually into paying $103.95—which constituted nearly his entire refund—for a TurboTax Paid Product because he worked as an independent contractor.[42]

f. One 72-year-old TurboTax user who makes $27,000 working part-time at a dermatologist's office was deceived into paying $20 for a TurboTax Paid Product. She stated, "I'm tightly budgeted. It's not a lot, but it's $20."[43]

g. An active service member was deceived by Intuit into paying $96 for a TurboTax Paid Product even though he was eligible for a Free File product.[44]

h. A graduate student who earned less than $10,000 in annual income spent $100 for a TurboTax Paid Product as a result of Intuit's unfair and fraudulent practices.[45]

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*

i. One TurboTax user helped prepare taxes for his 87-year-old sister, a retiree whose annual income totaled $11,009, and was deceived into paying $124.98 for a TurboTax Paid Product.[46]

j. Another TurboTax user similarly prepared taxes on behalf of his mother-in-law, who "made an adjusted gross income of around $18,000 from Social Security and a modest General Motors pension" and thus plainly qualified for a Free File product. But the user, who began preparing his mother-in-law's taxes using TurboTax "Free Edition," was misled into purchasing a TurboTax Paid Product costing $120, which constituted a substantial portion of the mother-in-law's refund. That cost was triggered by just ***$22*** of income for legal services associated with the mother-in-law's pension.[47]

k. A young reporter who was eligible for a Free File product was misled into paying $105 for a TurboTax Paid Product notwithstanding her purposeful efforts to find TurboTax's Free File product. She "kept trying to find [her] way back to the Free File page, but it seemed like [she] was locked in." TurboTax deceived the reporter into believing that she was required to purchase a TurboTax Paid Product because her taxes required a student loan interest form.[48]

71. ProPublica estimates that U.S. taxpayers eligible for a Free File product spend approximately ***$1 billion*** per year in unnecessary filing fees.[49] As the foregoing real-life experiences demonstrate, Intuit's unfair and fraudulent business practices, as described herein, have no doubt contributed substantially to these taxpayer losses.

72. Although Intuit has reportedly refunded some of the consumers eligible for Free File who unnecessarily purchased TurboTax Paid Products—namely, some of the consumers who complained as a result of recent news reports—Intuit has taken no steps toward making

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[46] *Id.*

[47] Justin Elliott, *If You Paid TurboTax but Make Under $34,000, You Could Get a Refund. Here's How.*, ProPublica (Apr. 23, 2019), *available at* https://www.propublica.org/article/how-to-get-turbotax-refund.

[48] *Id.*

[49] Tik Root, *Why Are Millions Paying Online Tax Preparation Fees When They Don't Need To?*, ProPublica (June 18, 2018), *available at* https://www.propublica.org/article/free-file-online-tax-preparation-fees-intuit-turbotax-h-r-block.

whole all of the thousands (if not millions) of consumers it has harmed over the years. In fact, ProPublica reports more recently that Intuit has evidently now "set up a special team" to handle calls from defrauded Free File-eligible consumers and is "no longer giving money back when people mention [ProPublica's] stories."[50] Intuit's actions and the resulting harm underscore the need for injunctive relief to ensure Intuit halts these unfair and deceptive business practices and does not return to those practices in the future, full restitution for all of Intuit's victims, and substantial civil penalties to punish Intuit and deter Intuit and others from engaging in such actions in the future.

FIRST CAUSE OF ACTION

VIOLATION OF UNFAIR COMPETITION LAW

(Bus. & Prof. Code §§ 17200 *et seq.*)

73. The People incorporate by reference the allegations in all preceding paragraphs as though fully set forth herein.

74. California's Unfair Competition Law, Bus. & Prof. Code §§ 17200-17210, prohibits any person from engaging in "any unlawful, unfair, or fraudulent business act or practice," or any "unfair, deceptive, untrue or misleading advertising," *id.* § 17200.

75. Intuit is a "person" subject to the UCL, pursuant to Business and Professions Code § 17201.

76. Through the actions alleged herein, Intuit has engaged, and continues to engage, in unfair and fraudulent business practices in violation of the UCL.

77. Specifically, Intuit has engaged in unfair business acts and practices by taking actions to reduce public awareness of and access to TurboTax "Freedom Edition" and the Free File program. Such actions violate the terms and spirit of the IRS Free File Agreement and MOU and undermine the public policy goals of the Free File program, to the detriment of low-income taxpayers, the intended third-party beneficiaries thereof. Intuit's unfair business acts and practices include but are not limited to:

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[50] Justin Elliott, *Updated: If You Paid TurboTax but Make Under $34,000, You Could Get a Refund. Here's How.*, ProPublica (update, May 2, 2019), *available at* https://www.propublica.org/article/how-to-get-turbotax-refund.

a. adding code to its TurboTax Free File Website that prevents it from appearing in online search results, rendering the site non-discoverable by consumers searching on Google or other search engines;

b. upon information and belief, associating its Google Search Ads for its Paid Products with keywords likely to be used by consumers searching for the IRS Free File program;

c. making it impossible to navigate directly from the TurboTax Main Website to the TurboTax Free File Website;

d. deliberately choosing not to inform TurboTax customers of Intuit's Free File product, TurboTax "Freedom Edition," even after they share information with Intuit indicating their eligibility for it; and

e. deterring consumers who have already begun using TurboTax "Free Edition" or one of the Paid Products from switching to Intuit's Free File product, even after realizing (somehow on their own) that they are eligible, by making the switching process unduly burdensome (i.e., requiring consumers to clear all tax information already entered and re-enter it anew on a different website), especially in comparison to the seamless process of upgrading to a Paid Product (in which Intuit transfers all tax information automatically).

78. Intuit has also engaged in unfair, fraudulent, and deceptive business acts and practices by making misrepresentations likely to deceive reasonable consumers. Such actions violate the terms and spirit of the IRS Free File Agreement and MOU and undermine the public policy goals of the Free File program, to the detriment of low-income taxpayers, the intended third-party beneficiaries thereof. Intuit's unfair, fraudulent, and deceptive business acts and practices include but are not limited to:

a. intentionally obscuring and failing to disclose the differences between TurboTax "Free Edition" and Intuit's Free File product, TurboTax

"Freedom Edition," knowing that reasonable consumers are likely to confuse these two products with nearly identical names;

b. misrepresenting to consumers that TurboTax "Free Edition," "Deluxe," "Premier," and "Self-Employed" are the only TurboTax online products, when in fact TurboTax "Freedom Edition" is a fifth product offering;

c. misrepresenting to Free File-eligible consumers that Intuit will "recommend the right tax solution" for them;

d. misrepresenting to Free File-eligible consumers that a particular Paid Product is the best product for them;

e. misrepresenting to Free File-eligible consumers that they "can select the right product for [them] on our Products and Pricing page";

f. misrepresenting to Free File-eligible consumers that if they begin entering their tax return information into a given TurboTax product but then realize TurboTax "Freedom Edition" is a better product for them, "[t]he information you've already entered will transfer automatically"; and

g. misrepresenting to Free File-eligible consumers who enter tax information unsupported by TurboTax "Free Edition" that they will "need to upgrade" to complete and file their return.

79. Additionally, Intuit has engaged in unfair, fraudulent, and deceptive business acts and practices by employing deceptive and manipulative marketing and product design schemes likely to deceive reasonable consumers. Such actions violate the terms and spirit of the IRS Free File Agreement and MOU and undermine the public policy goals of the Free File program, to the detriment of low-income taxpayers, the intended third-party beneficiaries thereof. Intuit's unfair, fraudulent, and deceptive business acts and practices include but are not limited to:

a. adding code to its TurboTax Free File Website that prevents it from appearing in online search results, rendering the site non-discoverable by consumers searching for it on Google or other search engines;

b. upon information and belief, associating its Google Search Ads for its Paid Products with keywords likely to be used by consumers searching for the IRS Free File program;

c. advertising "FREE Guaranteed" tax filing services when in fact only a small percentage of consumers are able to complete their tax returns for free on the TurboTax Main Website;

d. heavily marketing TurboTax "Free Edition," an inferior product with highly limited functionality, in a manner that makes it likely to be confused with TurboTax "Freedom Edition," a robust product that supports virtually all tax situations; and

e. requiring consumers to invest substantial time and effort inputting their tax return information through the TurboTax "Free Edition" software before alerting them that they cannot complete their returns using "Free Edition," and then manipulating them into paying for various product upgrades and upsells.

PRAYER FOR RELIEF

WHEREFORE, the People respectfully pray for judgment and relief as follows:

1. Preliminary and permanent injunctive relief enjoining Intuit, together with its successors and assigns and all persons acting in concert with them or on their behalf, from engaging in any of the unfair and fraudulent business acts and practices described herein, pursuant to Business and Professions Code § 17203;

2. Restitution of all moneys paid to Intuit for electronic tax preparation and filing services at any time during the period starting four years before the filing of this Complaint, up to and including the date of judgment in this action, by persons in the State of California who

were eligible at the time of payment to file for free under any IRS Free File program, pursuant to Business and Professions Code § 17203, including prejudgment interest;

3. Civil penalties of up to $2,500 assessed against Intuit for each violation of the UCL, according to proof, pursuant to Business and Professions Code § 17206(a);

4. Additional civil penalties of up to $2,500 assessed against Intuit for each violation of the UCL perpetrated against a senior citizen or disabled person, according to proof, pursuant to Business and Professions Code § 17206.1(a);

5. That the People recover the costs of this action; and

6. That the People be granted such other and further relief as the Court deems just and proper.

Dated: May 6, 2019

Respectfully submitted,

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By: _____
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Attorneys for Plaintiff,
THE PEOPLE OF THE STATE OF CALIFORNIA

Attachment B

Santa Clara County Complaint

FTC Docket No. 9408

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EXEMPT FROM FILING FEES PURSUANT TO GOV. CODE § 6103

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

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

Plaintiff,

v.

INTUIT INC., and DOES 1-50, inclusive

Defendants.

No. **19CV354178**

COMPLAINT FOR VIOLATIONS OF CALIFORNIA FALSE ADVERTISING LAW, SEEKING RESTITUTION, CIVIL PENALTIES, AND INJUNCTIVE RELIEF

TABLE OF CONTENTS

I. INTRODUCTION

1. For more than a decade, Intuit Inc., the owner and operator of the electronic tax preparation and filing service TurboTax, has engaged in unlawful, false, and misleading practices targeting low- and middle-income taxpayers to become the dominant player in the online tax preparation and filing market.

2. Since the early 2000s, the United States Internal Revenue Service ("IRS") and state tax authorities, including the California Franchise Tax Board ("FTB"), have instituted programs to allow low- and middle-income taxpayers to file their federal and state income tax returns for free. Under the IRS program, called "Free File," Intuit and other private electronic tax preparation and filing companies agreed to provide a free version of their tax filing products to the lowest-earning 70 percent of taxpayers in exchange for the IRS promising not to create its own competing tax preparation and filing software. Intuit refers to its Free File product as "TurboTax Free File" or the "TurboTax Freedom Edition."

3. Despite Intuit's agreement to create a Free File product, the governmental programs requiring free tax filing options threatened Intuit's massive TurboTax profits. Intuit earns billions of dollars in revenue by charging taxpayers to use TurboTax to file their taxes. For most TurboTax users, Intuit charges $100 or more. But because most taxpayers can file their taxes for free, few taxpayers—and particularly few lower-income taxpayers who can file for free through TurboTax Free File—will knowingly opt to pay the fees charged by Intuit for filing through the revenue-generating TurboTax products.

4. Intuit has dramatically expanded its paying userbase notwithstanding the availability of free filing options through false and deceptive advertising. To do so, Intuit has employed a sophisticated bait and switch scheme designed to lure taxpayers to use TurboTax through promises of free filing and then, once they spend hours preparing their taxes with TurboTax, telling them they actually need to pay in order to file their taxes.

5. To entice taxpayers to use TurboTax in lieu of other free or cheaper alternatives, Intuit created and maintains an online TurboTax product that appears both similar to the TurboTax Free File product and, *by its very title*, to be free—the "TurboTax Free Edition." However, despite

its confusingly similar title, Intuit designed the TurboTax Free Edition to be a wholly separate product from the TurboTax Freedom Edition.

6. Intuit then disseminated, and continues to disseminate, widespread advertising stating that if taxpayers use the TurboTax Free Edition they can file their taxes for free. Intuit's advertising includes multiple television commercials claiming over and over that taxpayers who use the TurboTax Free Edition can file their taxes for "free, free, free, free," online advertisements billing the TurboTax Free Edition as allowing users "100% Free Tax Filing, $0 Fed, $0 State," and Google advertising listing the TurboTax Free Edition as the top search result when taxpayers look for "free" tax filing options online. TurboTax's advertising of its "free" service directs taxpayers to access the TurboTax Free Edition at turbotax.intuit.com. There, Intuit offers additional representations confirming that taxpayers can indeed prepare and file their taxes for free, such as that it is "FREE guaranteed" and a button icon that taxpayers pressed to begin preparing their taxes that is entitled "File for $0":

7. But as Intuit knows and intends, most taxpayers who click "File for $0" and use the TurboTax Free Edition cannot in fact file for free using this product. Once taxpayers spend time and effort entering extensive information, Intuit executes the second part of the bait and switch scheme. Intuit suddenly informs the unsuspecting taxpayer that, due to the particulars of his or her tax situation he or she must upgrade to a paid version TurboTax to "accurately file." Intuit's statement is both contrary to Intuit's advertising and false on its own. Upgrading has nothing to do with "accurately filing"; taxpayers can accurately file the same tax return for free using other free alternatives—including forms directly available from the IRS—regardless of the particulars of their

tax situation. Instead, Intuit's advertising and design is simply meant to mislead taxpayers, who were looking for free tax filing options and were told they could file for free with TurboTax, into believing they now need to pay Intuit to file their taxes. And even at this stage, Intuit misleads user regarding the actual cost of the upgrade until users spend further hours completing their returns.

8. While Intuit's scheme has been and remains likely to deceive a broad swath of taxpayers, the deception is most egregious for the vulnerable low-income taxpayers who were *entitled* to file for free through Intuit's own TurboTax Free File product. Rather than "recommend[ing] the right tax solution" for taxpayers, as Intuit represented it would at turbotax.intuit.com, Intuit used deceptive advertising to steer qualified taxpayers away from free filing through TurboTax Free File to expensive TurboTax products. For instance, Intuit maintained TurboTax Free File at a separate URL from turbotax.intuit.com and, until investigative journalists recently uncovered and reported on this practice, placed tags in the code for the TurboTax Free File webpage that prevented it from appearing in Google search results. As a result, a low-income taxpayer who conducted an internet search for a service to help "file taxes for free" would see results for Intuit's revenue-producing TurboTax Free Edition, but not the truly free TurboTax Free File. And when many of those taxpayers then used the Free Edition and disclosed information that the software identified as giving rise to a minor deviation from the standard tax filing format, Intuit informed them they needed to pay to upgrade to accurately file even though *Intuit knew they qualified to accurately file for free through Intuit's other, truly free product*. As a result, these low-income taxpayers paid Intuit money they sorely needed for basic necessities such as food, rent, and medical care to file their taxes even though they should have been allowed to file for free through TurboTax, and after they were told repeatedly by Intuit filing their taxes would cost nothing.

9. Intuit has reaped enormous profits by deceiving taxpayers into paying for TurboTax products. It has attracted millions of additional paying TurboTax users while simultaneously and aggressively marginalizing free governmental filing options. In 2018, for example, although 70 percent of taxpayers were eligible to file for free under the Free File program, less than 3 percent did so. And numerous other taxpayers who did not qualify for free government programs but could have used cheaper commercial alternatives were misled into paying Intuit's high prices for TurboTax.

10. Intuit's massive scheme to deceive taxpayers violated and continues to violate the California False Advertising Law, Bus. & Prof. Code § 17500 *et seq*. The People of the State of California (the "People") seek injunctive relief directing Intuit to stop its unlawful promotion of its tax preparation services and to correct its misrepresentations. To redress the harm Intuit has caused taxpayers, the People seek restitution for those injured by Intuit's unlawful conduct. And to punish Intuit's previous and current violations of law, the People also seek a judgment requiring Intuit to pay civil penalties and any fees or costs permitted under law.

II. PARTIES

11. James R. Williams, County Counsel for the County of Santa Clara ("County Counsel"), is authorized to bring this action in the name of the People pursuant to Business and Professions Code section 17500 *et seq*.

12. Defendant Intuit Inc. is a Delaware corporation with its headquarters and principal place of business located in California at 2700 Coast Avenue, Mountain View, California 94043.

13. The true names and capacities, whether individual, corporate, or otherwise, of Defendants Does 1-50 are unknown to the People at this time, which therefore sues such Defendants by such fictitious names and will amend this Complaint to show their true names and capacities when ascertained. The People are informed, believe, and thereon allege that each of the Defendants designated herein as a Doe is also legally responsible in some manner for the events and happenings alleged in this Complaint.

III. JURISDICTION AND VENUE

14. This Court has jurisdiction over the subject matter in this Complaint pursuant to Article VI, Section 10 of the California Constitution, because no statute gives another trial court jurisdiction over it.

15. The amount in controversy exceeds the minimum for unlimited civil jurisdiction of this Court.

16. This Court has jurisdiction over Intuit because it is headquartered in this State and because the unlawful acts that are the subject of this Complaint were performed in this State.

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17. Venue properly lies in this County because Intuit is headquartered in this County, and because many of the unlawful acts that are the subject of this Complaint were performed in this County.

IV. FACTUAL ALLEGATIONS

A. Intuit's Business Model Relies on Charging Taxpayers to File Their Taxes

18. Taxpayers throughout California are responsible for preparing and filing their own personal income tax returns. Typically, this means that each taxpayer must prepare and file a federal income tax return with the IRS and a California state income tax return with the FTB. Taxpayers residing in California may also owe state income taxes to other states, and if so, must also prepare and file state income tax returns with those states' tax authorities.

19. Certain private companies benefit from this system by charging taxpayers for personal income tax preparation and filing services. Intuit is one such company. Intuit owns and operates TurboTax, a primarily online tax preparation service that taxpayers use to prepare and file their federal and state personal income tax returns.

20. Intuit profits from TurboTax by charging TurboTax users for accessing TurboTax's service to prepare and file their personal income taxes. Intuit's profits are therefore dependent on attracting increasing numbers of taxpayers to pay to use TurboTax and convincing each TurboTax user to pay more. Intuit acknowledges this fact, writing in its 2018 Form 10-K, for example, that its "future growth depends on [its] ability to attract new customers to the self-preparation tax category or to [its] new assisted offering, TurboTax Live, from tax stores and other tax preparers," and that its year-over-year growth in the last two fiscal years has been driven, in large part, by "higher average revenue per customer," and "a shift in mix to our higher end product offerings."

B. Most Taxpayers Qualify for Free Tax Filing through Government Programs

21. The single largest threat to the TurboTax business model is the implementation of a tax filing system that eliminates taxpayers' need to pay to use commercial software for personal income tax preparation and filing. In particular, the IRS and/or state governments could implement online tax-filing systems that would allow taxpayers to file their taxes for free and could pre-prepare returns for taxpayers (meaning taxpayers would not need to fill in any information) using

information already reported to the government. This type of free government tax return system is typically referred to as a "return-free filing system." More than 30 other countries, including Germany, Japan, Sweden, and the United Kingdom, employ a form of return-free tax filing system. Because taxpayers could file for free in a return-free or other government-operated filing system using pre-prepared returns, most taxpayers would likely no longer pay to use commercial tax preparation software such as TurboTax were such a program implemented.

22. Intuit is fully aware of this threat. For example, in its 2018 Form 10-K, Intuit noted that it "face[s] competitive challenges from government entities that offer publicly funded electronic tax preparation and filing services with no fees to individual taxpayers," and would be "harm[ed]" by "future administrative, regulatory, or legislative activity" that replaced the current tax preparation system with return preparation by government agencies. Similarly, in Intuit's Form 10-Q for the quarterly period ending April 30, 2019, Intuit explained that "government funded services that curtail or eliminate the role of taxpayers in preparing their own taxes could potentially have material and adverse revenue implications."

23. In large part due to Intuit's lobbying, the IRS and state tax authorities have not yet instituted a full return-free filing system. However, as described below, as part of its efforts to stave off a return-free filing system, Intuit has agreed to participate in government programs through which private companies such as Intuit must voluntarily provide low- and middle-income taxpayers with opportunities to file their taxes for free.

i. Most Taxpayers Are Able to Freely File Federal Taxes through IRS Free File

24. In the early 2000s, the IRS was considering instituting a return-free filing system for federal tax returns. To deter the IRS from doing so, Intuit and other private-sector tax software companies agreed to enter into a contractual agreement with the IRS to create the Free File program, under which the tax software companies must allow most taxpayers the ability to file their federal income tax returns through the companies' commercial tax preparation and filing software at no cost.

25. The participating private sector tax software companies are commonly referred to as "Free File Alliance Members." The terms of the agreement are set forth in the Free Online

Electronic Tax Filing Agreement and Amendments and the accompanying Memorandum of Understanding between the Free File Alliance Members and the IRS (collectively the "Free File Agreements").

26. Pursuant to the Free File Agreements, Intuit and the other Free File Alliance Members have agreed to "increase electronic filing of tax returns" and to "extend[] the benefits of online federal tax preparation and electronic filing to economically disadvantaged and underserved populations at no cost to either the individual user or to the public treasury." In exchange, the IRS has "pledged to not enter the tax preparation software and e-filing services marketplace."

27. Under the Free File Agreements as they have existed over the past decade, Intuit and the other Free File Alliance Members are obligated to jointly provide free federal tax services to the lowest 70 percent of the taxpayer population by adjusted gross income. Per the Free File Agreements, each Free File Alliance Member is committed to serve some but not all the qualified taxpayers through its own software. However, the Free File Alliance Members must together ensure that all 70 percent of qualified taxpayers are able to file for free through the Free File program.

28. In 2018, under the 70 percent threshold, the Free File Alliance Members had to allow taxpayers with an adjusted gross income of $66,000 or less the opportunity to file their taxes for free through at least one Free File Alliance Members' software, regardless of the complexity of the tax returns or any particulars of the taxpayers' financial status.

29. Intuit has agreed that its Free File product, TurboTax Free File, will serve the lowest-income and most vulnerable taxpayers in America. In 2018, for example, Intuit agreed that taxpayers with an adjusted gross income of $34,000 or less, taxpayers with an adjusted gross income of $66,000 or less who were active military members, and taxpayers eligible for the Earned Income Tax Credit, would be able to file for free using TurboTax Free File.

30. For those California taxpayers who use TurboTax Free File, filing a state tax return is free for everyone who qualifies for a free federal return.

ii. California Allows Free Filing of California State Tax Returns via CalFile

31. Like the IRS, the FTB has considered instituting return-free filing for California income tax returns. In 2005, the FTB initiated a pilot return-free tax return program called

"ReadyReturn." Under the pilot program, 50,000 California taxpayers received a tax return that had already been completed for them based on financial information reported to the FTB by employers and banks. The pilot group of taxpayers then had the option of filing this pre-completed tax return for free or discarding it and filing a conventional return.

32. The FTB has since incorporated elements of ReadyReturn into CalFile, the FTB's free electronic tax return filing program. Using CalFile, qualified California taxpayers can file their state taxes for free. If taxpayers obtain a free personal identification number ("PIN") they can pre-fill their return using the FTB's online system with data possessed by the State of California. In 2018 individual filers with income of up to $194,503 and joint filers with income of up to $389,013 qualified to use CalFile, subject to certain exceptions.

C. Intuit's Scheme to Maximize Its Profits by Misleading Taxpayers

33. To sustain and grow its revenue and profits, Intuit has sought to attract substantially more taxpayers to revenue-generating TurboTax products and to charge increasingly high prices for TurboTax. As a result, the revenue-generating TurboTax products are not only substantially more expensive than free filing options through the IRS Free File program of CalFile, they are also significantly more expensive than competing commercial products such as TaxSlayer or TaxAct. In 2018, for instance, TurboTax Deluxe, the most popular TurboTax product, cost a taxpayer a minimum of $105 to file the taxpayer's federal and California tax returns, and $45 more for each additional state in which the taxpayer needed to file. Other TurboTax products cost even more. On top of this base cost, Intuit encouraged taxpayers to pay for add-ons such as additional audit protection and live tax assistance, each of which added substantially to the overall costs that taxpayers paid. By contrast, in 2018 the classic version of TaxSlayer cost $49 and the basic plus version of TaxAct cost just $35 for filing a federal and California return.

34. The proliferation of free filing options under the IRS Free File program and CalFile and competing cheaper commercial options presented Intuit with a dilemma. How could Intuit convince taxpayers, most of whom can now file for free, and almost all of whom can file cheaper, to pay Intuit's high prices? Most taxpayers would not knowingly agree to pay Intuit's high prices if it was apparent they could instead use free or cheaper filing options. This is particularly true for low-

income families struggling to make ends meet in Santa Clara County and elsewhere in California.

35. Rather than reduce its prices or risk losing a significant portion of its customers, Intuit implemented a sophisticated marketing scheme that lured taxpayers to use TurboTax on the promise that they could do so for free, only to later tell them, after they spent hours entering information into TurboTax, that they would have to pay in order to complete the process of filing their returns. In doing so, Intuit falsely advertised TurboTax's cost and the availability of truly free alternatives in order to hoodwink taxpayers into paying for TurboTax. Intuit's marketing scheme, which is likely to deceive taxpayers and harmful to all who viewed Intuit's advertising, is particularly duplicitous for those taxpayers who qualified for Intuit's own TurboTax Free File product.

i. Intuit Draws Taxpayers to Turbo Tax with False Advertising About Its Cost

36. Intuit has engaged in a far-reaching advertising campaign to drive taxpayers to use TurboTax rather than free or cheaper alternatives through false and misleading advertisements representing that taxpayers who use the advertised version of TurboTax are "guaranteed" to be able to file their taxes for free.

37. To do so, Intuit created and maintains a seemingly free TurboTax product, the TurboTax Free Edition. Critically, the TurboTax Free Edition is an entirely separate product from the TurboTax Free File product, which is the product through which Intuit complies with its obligations under the IRS Free File program and allows truly free filing of federal and state tax returns for anyone who meets the income criteria. In fact, Intuit has used the TurboTax Free Edition to steer taxpayers away from the TurboTax Free File product. As described below, Intuit has extensively advertised the TurboTax Free Edition and its supposed free "guaranteed" filing while simultaneously minimizing taxpayers knowledge of or ability to find the TurboTax Free File product by, for example, providing it on a separate URL and then blocking that URL or descriptions of the TurboTax Free File product from appearing in internet search results.

38. Intuit next advertised and continues to advertise across a variety of media that if taxpayers use the TurboTax Free Edition they will be able to file their taxes for free.

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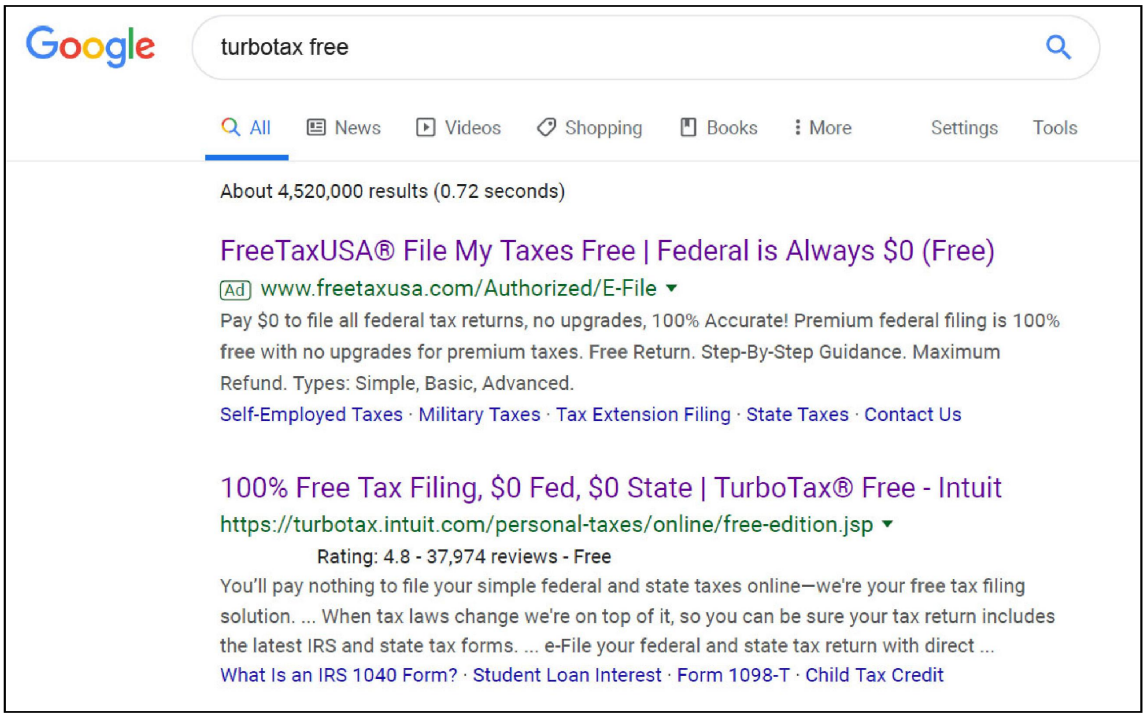
39. As part of this campaign, Intuit has created numerous television advertisements emphasizing repeatedly that taxpayers who want to file their taxes for free can do so through the TurboTax Free Edition. Examples of Intuit's TurboTax television advertisements can be viewed at <https://www.youtube.com/results?search_query=turbotax+free+commercials/>. The 30 and 60 second spots consist of actors repeating the word "free" for the entire commercial before a voiceover at the end confirms that TurboTax is "Free, free free free."

40. Intuit also paid, and upon information and belief continues to pay, Google and other search engines to prominently list and link to the TurboTax Free Edition when taxpayers search for free tax filing options and even for IRS Free File. For example, Intuit historically paid Google to list advertisements for the TurboTax Free Edition among the top search results when taxpayers searched for "IRS free file taxes." And in the advertisements that appeared in search results, Intuit described the TurboTax Free Edition in a variety of ways as free to file. For instance, Intuit described it as "Free Federal. Free State. Free to File" and costing "Absolutely nothing!"

41. Although Intuit has changed some of its advertising in the past few months following several news articles exposing its deceptive conduct, Intuit continues to list the TurboTax Free Edition as the first Intuit-sponsored result in a Google search for "TurboTax free." In the listing, Intuit describes the TurboTax Free Edition as "100% Free Tax Filing, $0 Fed $0 State" with the promise that TurboTax is "your free tax filing solution."

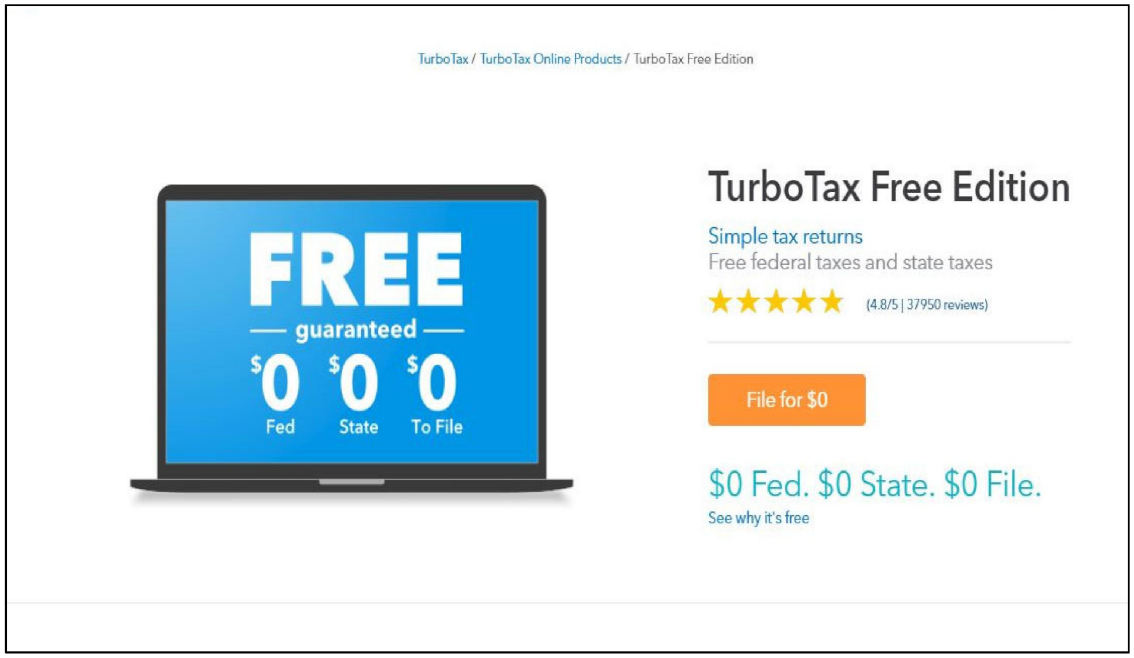


42. Intuit even created a fake crossword puzzle that it published on the New York Times website next to the real crossword puzzle entitled "Free" by "Free.F.Free" with prominent TurboTax branding. A copy of the crossword puzzle is incorporated by this reference and attached as Exhibit A. It contains 68 clues, such as "TurboTax Free is __" and "No charge." The answer to every clue is "free."

43. Intuit's advertisements direct taxpayers to the URL turbotax.intuit.com, the revenue-producing URL for the TurboTax Free Edition, and not to TurboTax Free File.

44. When taxpayers access this URL, Intuit again claims that they will be able to file for free through the TurboTax Free Edition. For example, as of September 5, 2019, Intuit continues to include the advertisement below, which contains a "FREE guarantee[]," a statement users could pay

"$0" for their federal and state taxes, for a total of $0, and a button icon to begin the filing process entitled "File for $0" with the hyperlinked message "See why it's free":



45. Intuit's advertisements were and are false and misleading. Contrary to its statements that taxpayers are guaranteed to be able to "File for $0" using the TurboTax Free Edition, Intuit deliberately designed that product to allow only a tiny percentage of taxpayers to file for free by building triggers into its software that requires taxpayers to pay to file their return if there is any deviation from the most standard tax filing. For example, Intuit charges taxpayers to file if they meet *any* of the following criteria: they are self-employed, do not have health insurance, have unemployment pay, have prize money, pay or receive alimony, have business income or losses, have capital gains or losses, have income from rental real estate, receive royalties, have farm income or losses, claim a student loan deduction, claim a health savings account contribution deduction, claim deductible educator expenses, claim education credits, claim retirement savings contribution credits, or claim credit for child and dependent care expenses. And even this list includes only *some* of the bases upon which the software will require a taxpayer to pay before filing. Taxpayers who cannot file for free include numerous taxpayers who have what any reasonable person would consider a simple tax return. Moreover, despite Intuit's advertising that taxpayers who use the TurboTax Free

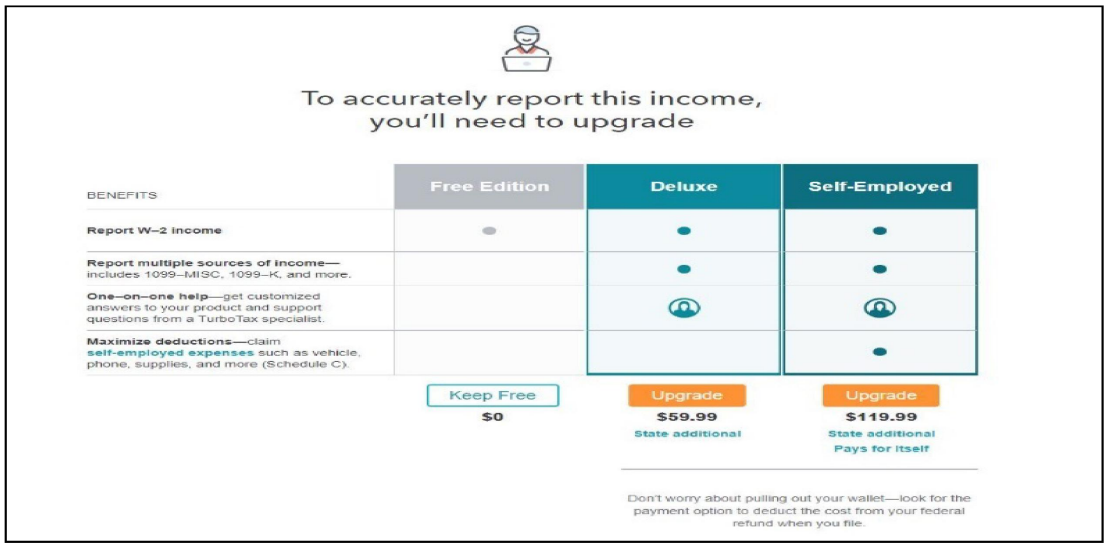
Edition can file for free, Intuit in fact designed the TurboTax Free Edition so that it *requires a massive number of low-income taxpayers who qualify to file their taxes for free*, including through IRS Free File and CalFile, to *pay to file*.

ii. Intuit Misleads Taxpayers into Paying Substantial Sums to File Via TurboTax

46. Intuit's false advertising that taxpayers who use the TurboTax Free Edition can file for free was and remains intentional and a key part of Intuit's bait and switch scheme to draw taxpayers away from truly free or cheap filing alternatives. Once taxpayers click the orange "File for $0" button and begin using the TurboTax Free Edition, Intuit provides further deceptive advertising designed to convince them to pay for expensive TurboTax products and other offerings.

47. After taxpayers access the TurboTax Free Edition, they are directed to a page that lists "TurboTax Free Edition" on the left-hand side and at the top of the browser window, confirming they are preparing their taxes through Intuit's "guaranteed" "free" tax filing program.

48. Intuit then prompts taxpayers to enter their personal and financial information. After they spend significant time entering their information, most eventually provide data that necessitates a basic change to the standard format tax return—for example, that they worked as an Uber driver or are paying off a student loan—which Intuit intentionally designed the Free Edition to exclude from the returns eligible for free filing. At this point, Intuit tells them that to "accurately report" their taxes, they need to pay to upgrade to another TurboTax program:



49. Intuit's statements are again knowingly false and misleading. As an initial matter, Intuit's decision to design the TurboTax Free Edition to require a taxpayer with no health insurance, for example, to pay to upgrade to an expensive TurboTax product has nothing to do with the "accuracy" of that taxpayer's return. To the contrary, as Intuit knows, many of these misinformed taxpayers qualify for free filing options through which they could accurately report their income, including the IRS Free File program and CalFile, rather than having to pay for an expensive upgrade. Intuit's deception of the taxpayers who qualify to use Intuit's own TurboTax Free File is especially appalling. Intuit knows that those taxpayers—the lowest-income taxpayers who can least afford to pay— can accurately file for free through *another TurboTax product offered by Intuit*, but nonetheless hides that option and misinforms them that they need to pay $105 or more to upgrade in order to "accurately" file.

50. Even if taxpayers click the "Keep Free" icon on the page shown in Paragraph 48, signaling that they are looking for any option that would allow free filing, Intuit simply repeats the same false representation that the taxpayer needs to upgrade to accurately report.

51. The misrepresentations do not end there. Intuit's strategy of initially informing taxpayers that they can file for free through TurboTax and then waiting to tell them they must pay to upgrade until after they have spent several hours entering information places the taxpayers in a lose-lose scenario. They must either waste the time they spent and leave TurboTax to go a truly free option or they must pay the price to upgrade. But because even taxpayers who learn the cost of upgrading at this point in the TurboTax process might still choose to leave TurboTax, Intuit employs additional deceptive advertising about TurboTax's cost.

52. For instance, in the example above, Intuit listed the price to upgrade to TurboTax Deluxe as $59.99. However, Intuit did not include the additional $44.99 it will charge for filing each necessary state tax return. Further, Intuit's encouragement to taxpayers to pay Intuit's fees with their refund, stating "Don't worry about pulling out your wallet—look for the payment option to deduct the cost from your federal refund when you file[,]" fails to disclose the $40 fee Intuit will charge for taking its payment out of a taxpayer's federal refund. All told, rather than the $59.99

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advertised by Intuit for the supposedly required "upgrade" to "Deluxe," a user who upgraded and opted to take the payment to Intuit out of a federal refund was charged at least $144.98.

53. Beginning in 2019, the news organization ProPublica published a series of articles publicly disclosing Intuit's false advertising for the first time. In the ProPublica articles, former Intuit employees admitted Intuit's intent to lure taxpayers to TurboTax by false advertisements of free filing and then to ultimately manipulate those individuals into paying to use TurboTax.

54. For example, a former midlevel Intuit employee told ProPublica journalists that Intuit's "entire strategy is [to] make sure people read the word 'free' and click our site and never use" a product that is actually free. The employee explained that Intuit designed its page to "direct you through a product flow that the company wanted to ensure would not make you aware of Free File." The "vast majority of people who click [the TurboTax Free Edition] will not pay $0."[1]

55. Another former TurboTax vice president wrote on LinkedIn that she had been "charged with addressing the threat posed by IRS free efile" and had "revamped TurboTax marketing strategy for low-end tax filers," driving a "100% increase in revenues."[2] In other words, Intuit tasked a TurboTax vice president with steering vulnerable low-end tax filers who qualified to file for free to expensive TurboTax products. She successfully created the marketing strategy that did so, and then boasted about it as a career accomplishment because it doubled Intuit's profits.

56. Similarly, former Intuit employees have admitted that Intuit considered and rejected ideas that would have rendered their advertising less misleading. A former Intuit marketing employee told ProPublica that a new employee proposed at a meeting with staff up to senior manager level that TurboTax users who provided information confirming their eligibility for IRS Free File be provided a clear recommendation they use that product. This new employee saw and attempted to correct Intuit's deceptive practice of informing users eligible for free filing that they

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[1] Elliot and Kiel, *TurboTax and H&R Block Saw Free Tax Filings as a Threat – and Gutted It* (May 2, 2019) ProPublica < https://www.propublica.org/article/intuit-turbotax-h-r-block-gutted-free-tax-filing-internal-memo> (as of Sep. 5 2019).

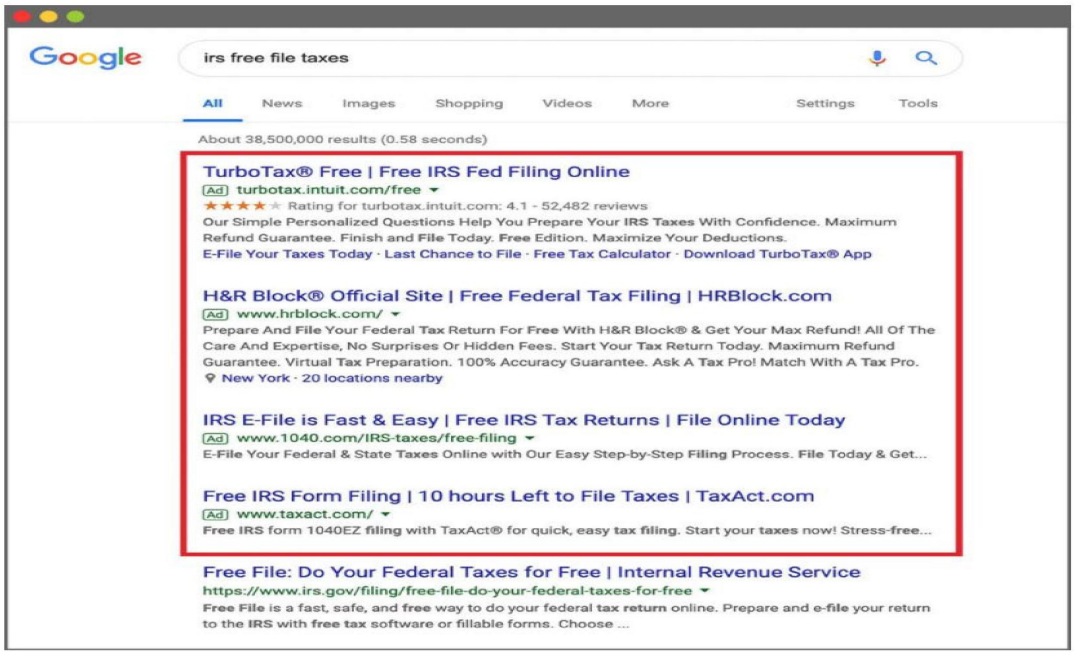
[2] *Ibid.*

needed to pay. According to the former marketing employee, when she proposed this idea, other employees at the meeting laughed and the meeting moved on.[3]

iii. Intuit Has Misled Taxpayers About the Availability of TurboTax Free File

57. To maximize its profits, Intuit not only wants to drive traffic to its paid TurboTax products but also to minimize the number of low-income taxpayers who learn about and use Intuit's actual free product, TurboTax Free File. Intuit thus has engaged in several deceptive tactics to mislead taxpayers about their ability to use that product to file for free.

58. When Intuit created TurboTax Free File, Intuit created a separate URL to host it: intuit.turbotax.com/taxfreedom. Intuit then hid that URL. Until its practice was recently exposed by ProPublica, Intuit actively manipulated the coding within the TurboTax Free File URL (intuit.turbotax.com/taxfreedom) to prevent Google's search engine from listing any links to that URL, including when taxpayers entered search terms such as TurboTax and Free File. At the same time, Intuit paid Google to list advertisements for its revenue-producing URL (turbotax.intuit.com) among the top search results when taxpayers searched for free tax services, even when using search terms as specific as "IRS free file taxes":



[3] *Ibid.*

59. Intuit also included descriptors in its online advertising, including the terms "TurboTax® Free" and "Free IRS Fed Filing Online" shown above, that created the impression that taxpayers would be directed to a website that allowed them to take advantage of their entitlement as low-income taxpayers to prepare and file their taxes for free. Again, the link sent taxpayers to Intuit's revenue-producing URL, turbotax.intuit.com, and not to the TurboTax Free File URL.

60. When taxpayers have accessed the revenue-producing TurboTax URL, Intuit included and continues to include misleading statements to convince them that no Free File product is available. For example, the revenue-producing TurboTax URL prominently contains a link entitled "Online Products." When taxpayers click that link, Intuit purports to list the available TurboTax products. However, while the list includes the TurboTax Free Edition and TurboTax products costing money such as TurboTax Deluxe, it omits any reference to TurboTax Free File. Lower on the revenue-producing TurboTax URL Intuit includes another link entitled "All online tax preparation software." At this link, Intuit again purports to list all of its online tax preparation software, and again includes the TurboTax Free Edition and TurboTax products costing money but omits TurboTax Free File. In fact, until recently, if a taxpayer searched turbotax.intuit.com after viewing TurboTax's advertising to find free tax filing options, he or she would find no reference to or ability to access TurboTax Free File and would be exclusively directed for supposedly free filing to the TurboTax Free Edition.

iv. Intuit Has Employed Deceptive Advertising on the TurboTax Free File Webpage

61. Despite Intuit's efforts to hide TurboTax Free File, some qualified taxpayers successfully access its URL. In yet another dimension of its scheme, Intuit engaged in further deception to attempt to direct those taxpayers back to turbotax.intuit.com and to ultimately pay to use TurboTax.

62. First, Intuit designed the TurboTax Free File Program URL to include misleading statements to taxpayers regarding their eligibility for the Free File program. For example, Intuit included prominent statements on the main page of the website creating the false impression that if taxpayers did not meet TurboTax's Free File product requirements, including the $34,000 cap on adjusted gross income, the taxpayers did not qualify for the Free File program and so should file

through TurboTax standard products by clicking an icon entitled "Start for Free." Intuit knew that taxpayers who earned between $34,000 and $66,000 qualified for the IRS Free File program and could file for free through other Free File Alliance Member products. But by misleading them about this fact and encouraging them to access the other TurboTax products "for free," Intuit redirected those taxpayers into TurboTax products that Intuit intended to sell to them using the same deceptive scheme discussed above. Intuit omitted any mention that these taxpayers qualified to file for free using another Free File Alliance Member products.

63. Second, Intuit rerouted a substantial portion of taxpayers who attempted to access TurboTax Free File back to revenue-generating TurboTax products without their knowledge. When first accessing TurboTax Free File, Intuit prompted taxpayers to provide their email, Intuit user ID, and password. If a taxpayer had a preexisting account with Intuit—for example, because that taxpayer began preparing a tax return using a different TurboTax product—the act of logging into TurboTax Free File with that preexisting account information caused that user to be automatically redirected to the TurboTax product that the taxpayer had previously accessed. Intuit provided no notice to these users that they were being forced away from TurboTax Free File and provided no means to these users to opt instead to use TurboTax Free File. At this point, the user, who qualified to file for free and had been told by Intuit that he or she was entering the TurboTax Free File system, instead was routed into a revenue-generating TurboTax product and likely paid to file.

D. Intuit Has Massively Profited by Harming Vulnerable Taxpayers

64. Intuit's deception has greatly profited Intuit while harming taxpayers throughout California and in Santa Clara County specifically.

65. Upon information and belief, millions of Californians and hundreds of thousands of Santa Clara County residents viewed Intuit's false and misleading advertising and then paid to use TurboTax to file their taxes.

66. Many of those taxpayers were looking for—and qualified for—actual free filing options but were misled by Intuit into paying money they could ill afford to spend for TurboTax products. In response to ProPublica's reporting, a substantial number of taxpayers have contacted ProPublica and alleged they sought out and qualified for free filing options but were misled by Intuit

into paying for TurboTax.[4] For example, an unemployed mother and part-time father raising two disabled sons who qualified for free filing were charged almost $200 by Intuit to use TurboTax.[5] A graduate student who earned less than $10,000 paid Intuit $100 for TurboTax.[6] And numerous military personnel who met free filing thresholds were misled by Intuit into using TurboTax.[7] These individuals were deceived into paying scarce resources to Intuit—a corporation that takes in billions in revenue every year—rather than using those resources for rent, groceries, and other basic living expenses.

67. In large part due to Intuit's pattern of deception, less than three percent of eligible Free File taxpayers did so nationwide. A similarly small percentage of eligible CalFile taxpayers use it to file their state tax returns for free.

68. Meanwhile, propelled by its deceptive marketing, Intuit's revenue and profits have increased by leaps and bounds. TurboTax is now the most used tax preparation software in the United States. In 2003, Intuit reported $422.9 million in revenue from TurboTax sales. By 2018, Intuit reported selling nearly 32 million units of TurboTax Online and earning nearly $3 billion in revenue from those sales. In fiscal year 2018 alone, Intuit's Consumer segment, which is "derived primarily from TurboTax Online tax return preparation software," increased by $316 million—a 14% increase from fiscal year 2017.

69. The People first learned of Intuit's false advertising and its deceptive conduct described above in April 2019 after ProPublica published the article "Here's How TurboTax Just Tricked You into Paying to File Your Taxes" on April 22, 2019.

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[4] Tobin, et al., *Here Are Your Stories of Being Tricked into Paying by TurboTax. You Often Need the Money* (Apr. 26, 2019) ProPublica <https://www.propublica.org/article/here-are-your-stories-of-being-tricked-into-paying-by-turbotax-you-often-need-the-money> (as of Sep. 5, 2019).

[5] *Ibid*.

[6] *Ibid*.

[7] Elliot and Tsutsumi, *TurboTax Uses a "Military Discount" to Truck Troops Into Paying to File Their Taxes* (May 23, 2019) ProPublica <https://www.propublica.org/article/turbotax-military-discount-trick-troops-paying-to-file-taxes> (as of Sep. 5, 2019).

70. After ProPublica published that article and subsequent stories thereafter, Intuit's response has been brazen indifference and further deception. After ProPublica's initial stories, multiple TurboTax users who qualified for IRS Free File but were misled into paying to use TurboTax reported to ProPublica that they had contacted Intuit to obtain a refund.[8] After a few initial refunds were granted, Intuit quickly settled on a different response. It denied the refunds and provided the callers with false information that Intuit was not responsible for the TurboTax Free File product and that ProPublica's stories about TurboTax were "fake news."[9]

V. CAUSES OF ACTION

FIRST CAUSE OF ACTION

FALSE ADVERTISING
(Violation of Business and Professions Code section 17500, *et seq.*)
(Against all Defendants)

71. The People allege and incorporate all the allegations set forth above in Paragraphs 1-70.

72. Business and Professions Code Section 17500 (the "FAL") makes it unlawful for a business, "with intent . . . to perform services… or induce the public to enter into any obligation" to make, disseminate, or cause to be made or disseminated to the public, including over the internet, "any statement, concerning . . . such services" or "concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof," which is *either* "untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading," *or* that serves "as part of a plan or scheme with the intent not to sell such … services . . . at the price stated therein, or as so advertised."

73. As alleged above, at all times relevant to this Complaint, Intuit violated the FAL by making false or misleading statements about TurboTax and taxpayers' ability to file their taxes for free, by causing such statements to be made and disseminated to the public, and by making

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[8] Elliot and Marco, *Listen to TurboTax Lie to Get Out of Refunding Overcharged Customers* (May 9, 2019) ProPublica < https://www.propublica.org/article/listen-to-turbotax-lie-to-get-out-of-refunding-overcharged-customers> (as of Sep. 5, 2019).

[9] *Ibid*.

statements that taxpayers could use TurboTax for free with the intent to charge most of those taxpayers to use TurboTax and/or to sell a different service than advertised.

74. Intuit deliberately implemented a scheme to draw taxpayers to TurboTax's revenue-producing URL with false representations that they could file their taxes for free using TurboTax and then to charge those taxpayers significant sums to file through additional false and misleading statements.

75. As part of this scheme, Intuit made and disseminated myriad statements that are likely to deceive members of the public on its website and in advertisements. Examples of Intuit's false or misleading statements include:

a. *Television and web advertisements and Google search results*:

- Falsely representing in numerous television advertisements that if taxpayers used the TurboTax Free Edition they would be able to file for free, including in an ad campaign using the tagline: "Free, free free free."
- Falsely representing in extensive online advertisements that if taxpayers used the TurboTax Free Edition they would be able to file for free.
- Falsely advertising the TurboTax Free Edition in online advertisements as "Guaranteed Free," and as "Free Federal," "Free State," and "Free File," requiring "absolutely nothing."
- Falsely advertising on Google with links entitled "TurboTax® Free" and "Free IRS Fed Filing Online" that in fact linked to the revenue-generating TurboTax URLs rather than TurboTax Free File.

b. *Statements on the revenue-producing TurboTax site*:

- Falsely describing the TurboTax Free Edition as the only free TurboTax product and omitting mention of the TurboTax Free File product.
- Falsely representing that if taxpayers use the TurboTax Free Edition they are charged "$0" for federal taxes, "$0" for state taxes, and "$0" for filing.
- Falsely representing that taxpayers who access the TurboTax Free Edition could file for "FREE guarantee[d]."
- Falsely representing that taxpayers could "File for $0" if they clicked on the TurboTax Free Edition icon.

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- Falsely stating to taxpayers that they had to pay hundreds of dollars to upgrade to a different product in order to "accurately report" their income after taxpayers had invested substantial time inserting their personal and financial information.

- Encouraging taxpayers to use their federal refund to pay for upgrades while failing to disclose that taxpayers would be charged substantial additional money to do so.

c. *Statements on the TurboTax Free File site*:

- Falsely informing taxpayers with over $34,000 in adjusted gross income that they did not meet the qualifications for Free File.

- Falsely informing taxpayers that they had accessed the TurboTax Free File product when they were in fact using a different TurboTax product that would cost money to use.

76. At the time Intuit made the statements alleged above or caused them to be disseminated it knew and should have known the statements were false and misleading and likely to deceive the public. Intuit knew and intended that its false and misleading advertising created a false impression that taxpayers could file for free through the standard TurboTax products.

77. Intuit's scheme has been wildly profitable. Intuit has not merely been able to preserve its corporate profits, initially threatened by free filing options, but has experienced dramatic year on year increases in revenue and income. Intuit profits have come at the expense of the low- and middle-income taxpayers who qualified to file for free and have been deceived into paying their sorely needed resources to a multi-billion-dollar corporation.

78. Pursuant to Business and Professions Code Section 17535, the People request an order enjoining Defendants from any further violations of Section 17500, *et seq*.

79. Pursuant to Business and Professions Code Section 17535, the People request restitution of any money acquired by virtue of Defendants' violations of Section 17500, *et seq*.

80. Pursuant to Business and Professions Code Section 17536, the People request an order assessing a civil penalty of $2,500 against Defendants for each violation of Section 17500, *et seq*.

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VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the People, pray that the Court:

1. Declare that Defendants have made, disseminated as part of a plan or scheme, or aided and abetted the dissemination of false and misleading statements in violation of the False Advertising Law;

2. Enjoin Defendants from performing or proposing to perform and further false or misleading statements in violation of the False Advertising Law.

3. Order Defendants to pay restitution of any money acquired by means of Defendants' false and misleading advertising, pursuant to Business and Professions Code sections 17500 and 17535.

4. Order Defendants to pay $2,500 civil penalties for each act of false and misleading advertising pursuant to Business and Professions Code sections 17500 and 17536.

5. For pre- and post-judgment interest;

6. For attorneys' fees and costs; and

7. For such other and further relief as the Court deems proper.

Dated: September 6, 2019

Respectfully submitted,

OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
JAMES R. WILLIAMS, County Counsel
GRETA S. HANSEN, Chief Assistant County Counsel
KAVITA NARAYAN, Lead Deputy County Counsel
AARON BLOOM, Deputy County Counsel
TONY LOPRESTI, Deputy County Counsel

By: _____
AARON H. BLOOM
Attorneys for Plaintiff,
PEOPLE OF THE STATE OF CALIFORNIA

2077217

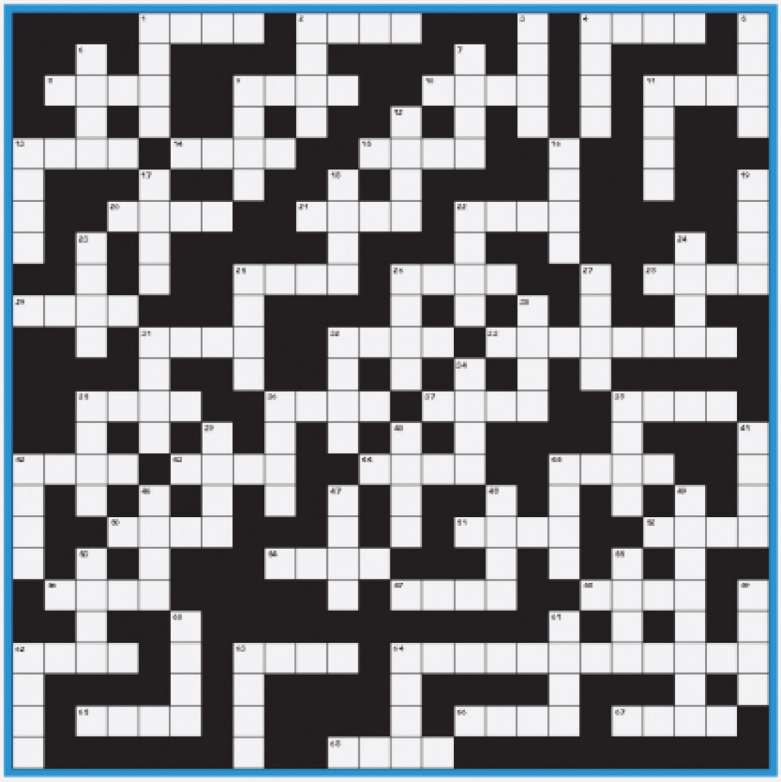
Exhibit A

FREE

By Free F. Free

DOWN:

1 TurboTax Free is ____
2 EERF backward
3 Rhymes with tree
4 Opposite of not-free
5 ____ refills
6 With TurboTax, simple returns are ____
7 To set loose
9 Buy one, get one ____
11 $0.00
12 No charge
13 Off the hook
16 Samples at the grocery store
17 Four letters
18 Same as 19-Down
19 Same as 20-Across
22 Rhymes with tree
23 The truth will set you ____
24 Phonetics: Fuh-Ree
25 Sterile or germ-____
26 You know the answer
27 The answer is FREE
30 [Insert clue here]
31 A four-letter word that means basically the exact same thing as "Free" and, in fact, is free
32 Uncaged
34 Unleashed
35 ____-range chicken
36 It's so cold I'm ____zing
38 Chargeless
39 Complimentary
40 First Amendment, shortened: ____ speech
41 If you pay nothing for something, then it's ____
42 Seriously, you can't get this wrong
45 If it's TurboTax Free, it's ____
46 FREE
47 ____ in-flight Wi-Fi
48 free
49 Two F's, two R's, four E's
53 Combine 45-Across and 4-Down, then just pick one
55 F___
59 _R_ _
60 _ _E_
61 ___E
62 Freebie—it's free
63 $$$
64 Sugar-____



ACROSS:

1 At no cost
2 Gluten-____
4 REFE unscrambled
8 Gratis
9 TurboTax ____ is free
10 Put this in your car when it gets cold: Anti____ze
11 F to the REE
13 Free
14 Not a highway but a ____way
15 Exact same word as free
20 FREE
21 FREE
22 FREE
25 FREE
26 FREE
28 Duty-____ store
29 Just write "free"
31 Same answer as everything else
32 "Phree," spelled correctly
33 It's "Free," twice
35 ($10 x 2) - $20 = ____
36 Did we mention TurboTax Free is ____?
37 No dollars and zero cents
38 ____ throws, worth one point each
42 "Kostenlos" in Germany
43 "Libre" in France
44 Opposite of confined
45 Sugar-____ gum
50 Spoiler alert: It's free
51 Open
52 Four-letter word for free
54 Contract position: ____lancer
56 Freeeeeeeeeeee (minus 11 E's)
57 ꟻꟻꟻ (use mirror)
58 Land of the ____
62 "Please enjoy a ____ sample"
63 Also rhymes with Brie
64 TurboTax tagline: "Free, ____ ____ ____"
65 TLDR: Free
66 The word FREE
67 Literally, just the word FREE
68 Writing all of these clues was way harder than it seems—oh, and the answer is FREE

Attachment C

Consolidated Class Action Complaint

FTC Docket No. 9408

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE INTUIT FREE FILE LITIGATION This Document Relates to: All Actions	Case No. 3:19-cv-02546-CRB **CONSOLIDATED CLASS ACTION COMPLAINT** **DEMAND FOR JURY TRIAL**

NATURE OF THE ACTION

1. Plaintiffs are United States taxpayers who paid Intuit Inc. for online tax services that Intuit agreed to provide for free. Intuit offers online tax preparation software under the TurboTax tradename. Pursuant to an agreement with the Internal Revenue Service (IRS), Intuit and 11 other tax preparation providers are required to provide free online tax return preparation and filing services to a substantial majority of U.S. tax filers, including lower income Americans and active duty military servicemembers (the "Free File Program"). In exchange for Intuit's participation, the IRS agreed not to build and publish its own online, free e-filing system—a service that would have competed directly with Intuit. The agreed goal of the Program is for 70% of U.S. taxpayers to e-file their taxes for free. But as a result of Intuit's nationwide scheme to divert eligible filers to its paid products, less than 3% of eligible taxpayers filed for free under the Free File Program in the 2018 tax year.

2. Intuit uses a variety of means to steer taxpayers away from its free e-filing offering under the Program. Intuit named the filing software it provides under the Free File Program "TurboTax **Freedom** Edition" while simultaneously promoting a competing product that it named "TurboTax **Free** Edition." The criteria to file for free using Intuit's Free Edition are not the same as the criteria to file for free using Freedom Edition, however. Free Edition is only free for the simplest returns. Most taxpayers who seek to file for free using Free Edition must pay tax preparation charges starting at $59.99 or more to complete their returns.

3. If a taxpayer begins the tax filing process using TurboTax's Free Edition, Intuit does not inform the taxpayer that they must pay a fee to file until after the taxpayer has devoted considerable time to inputting information into the Free Edition software. In other words, Intuit implements a "free-to-fee" scheme to bait customers with the offer of free tax filing services but then charge them a fee to complete their return and file. Even if the taxpayer is eligible to file for free under the Free File Program, Intuit does not inform the taxpayer of the free file option or provide a path to Freedom Edition from Free Edition. Furthermore, Intuit's website, where it advertises Free Edition, contains no link to Freedom Edition.

4. Intuit uses pervasive nationwide advertising and email campaigns and sophisticated search technology to suppress free filing by directing taxpayers, including those eligible to participate in the Free File Program, to its paid products. For example, Intuit made the Freedom Edition (i.e., its truly free software) virtually invisible to eligible filers under the Free File Program by removing any links to the Freedom Edition from its primary website and even altering the Freedom Edition's website source code to prevent it from appearing in search engines like Google. By contrast, Intuit uses different source code to ensure that its paid products, including Free Edition, appear in response to Google search requests. Intuit also pays Google through Google's advertising platform to ensure that Intuit's paid products appear at the top of internet search results. Thus, taxpayers who search for terms like "TurboTax Free" or "turbo tax free file" or "irs free file taxes" are steered to Intuit's commercial products including Free Edition without being given an option to use the Freedom Edition.

5. Intuit's practices victimize low-income American taxpayers and military servicepeople who are eligible to file their tax returns at no cost under the Free File Program. Intuit exploits its superior knowledge of tax laws and regulations, superior access to capital and technology, and the confusion, anxiety and frustration associated with payment of income taxes to generate billions in revenue from low-income taxpayers—often students, elderly people on fixed incomes, and public assistance recipients—and service members who qualify to electronically file their tax returns at no charge. Intuit's conduct in devising and implementing a common plan or scheme to divert eligible online filers to its paid products, while actively working to conceal the availability of its free filing product, has allowed Intuit to extract, through the use of deceptive, unlawful and unfair acts, practices and conduct, funds which should rightfully have been retained by eligible taxpayers.

6. Through this action, Plaintiffs seek equitable relief in the form of an order enjoining Intuit from engaging in the practices challenged herein and requiring restitution of all funds improperly obtained by Intuit from the taxpayers who make up the proposed class.

PARTIES

7. Plaintiff Andrew Dohrmann is a resident and citizen of California.

8. Plaintiff Laura Nichols is a resident and citizen of Nebraska.

9. Plaintiff Brianna Sinohui is a resident and citizen of California.

10. Plaintiff Joseph Brougher is a resident and citizen of Pennsylvania.

11. Plaintiff Monica Chandler is a citizen and resident of Florida.

12. Defendant Intuit Inc. is a Delaware corporation with its principal place of business in Mountain View, California.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this lawsuit under the Class Action Fairness Act, 28 U.S.C. § 1332, because this is a proposed class action in which: (1) there are at least 100 class members; (2) the combined claims of class members exceed $5,000,000, exclusive of interest, attorneys' fees, and costs; and (3) Intuit and class members are domiciled in different states.

14. The Court has personal jurisdiction over Intuit because its principal place of business is within this District and it has sufficient minimum contacts in California to render the exercise of jurisdiction by this Court proper and necessary.

15. Venue is proper in this District under 28 U.S.C. § 1391(b) because a substantial part of the conduct at issue in this case occurred in this District.

THE CLASS REPRESENTATIVES

Andrew Dohrmann

16. Plaintiff Andrew Dohrmann is a student and carpenter residing in Moraga, California. His adjusted gross income in 2018 was under $20,000. In April 2019, he used TurboTax to prepare and file his tax returns for the 2018 tax year.

17. Mr. Dohrmann searched the internet for free e-filing options and found TurboTax's Free Edition. He began the tax-preparation process on Free Edition believing, as its name indicated, that Free Edition was free.

18. After submitting his personal information required to file his taxes—including information sufficient to confirm to Intuit that Mr. Dohrmann qualified for the Free File

Program—Mr. Dohrmann received a notification from Intuit stating that he would need to pay a fee to complete and file his tax return.

19. Intuit did not notify Mr. Dohrmann that its service was not free until the very end of the tax-filing process, after he had entered a significant amount of personal information. Mr. Dohrmann paid the fee to complete his filing, to avoid losing the value of the time he had spent inputting his information.

20. Mr. Dohrmann qualified to file his taxes for free using TurboTax Freedom Edition and the Free File Program. Had Intuit made its free tax-filing service accessible to him, Mr. Dohrmann would have used it, rather than the paid version. But for Intuit's concealment of Freedom Edition, Mr. Dohrmann would not have paid Intuit to file his taxes.

21. Intuit's conduct, as further described in this complaint, caused Mr. Dohrmann to pay approximately $105 to Intuit on April 14, 2019 to file his 2018 federal and state tax returns.

Laura Nichols

22. Plaintiff Laura Nichols is a current member of the Marine Corps Reserve residing in Nebraska. Her adjusted gross income in 2018 was under $30,000. In April 2019, she used TurboTax to prepare and file her taxes for the 2018 tax year.

23. When Ms. Nichols filed her 2018 taxes, she was working for the military full time and living on a military base. She searched the internet for free e-filing options and found TurboTax's Free Edition. She began the tax-preparation process on Free Edition believing, as its name indicated, that Free Edition was free.

24. Ms. Nichols spent several hours using TurboTax to prepare her tax returns. As part of that process, she provided TurboTax with significant amounts of personal information, including information sufficient to notify Intuit that Ms. Nichols qualified for the Free File Program. After submitting her personal information, Intuit informed Ms. Nichols that she would have to pay a fee to complete and file her tax return through TurboTax.

25. Intuit did not notify Ms. Nichols that its service was not free until the very end of the tax filing process, after she had entered a significant amount of personal information. Ms.

Nichols paid the fee to complete her filing, to avoid losing the value of the time she had spent inputting her information.

26. Ms. Nichols qualified to file her taxes for free using TurboTax Freedom Edition and the Free File Program. Had Intuit made its free tax-filing service accessible to her, Ms. Nichols would have used it rather than the paid version. But for Intuit's concealment of Freedom Edition, Ms. Nichols would not have paid Intuit to file her taxes.

27. Intuit's conduct, as further described in this complaint, caused Ms. Nichols to pay approximately $30 to Intuit in April 2019 to file her 2018 federal and state tax returns.

Brianna Sinohui

28. Plaintiff Brianna Sinohui is a resident of Redlands, California. Her adjusted gross income in 2018 was under $10,000. In 2019, she used TurboTax to prepare and file her tax returns for the 2018 tax year.

29. Ms. Sinohui navigated to Intuit's TurboTax Free Edition website and began the tax-preparation process, believing that Free Edition was, as its name indicated, free.

30. After submitting her personal information—including information sufficient to confirm to Intuit that Ms. Sinohui qualified for the Free File Program—Ms. Sinohui received a notification from Intuit stating that she would need to pay a fee to complete and file her tax return.

31. Intuit did not notify Ms. Sinohui that its service was not free until the very end of the tax-filing process, after she had entered a significant amount of personal information. Ms. Sinohui paid the fee to complete her filing, to avoid losing the value of the time she had spent inputting her information.

32. Ms. Sinohui qualified to file her taxes for free using TurboTax Freedom Edition. Had Intuit made its free tax filing service accessible to her, Ms. Sinohui would have used it, rather than the paid version. But for Intuit's concealment of Freedom Edition, Ms. Sinohui would not have paid Intuit to file her taxes.

33. Intuit's conduct, as further described in this complaint, caused Ms. Sinohui pay approximately $179 to Intuit to file her 2018 federal and state tax returns.

Joseph Brougher

34. Plaintiff Joseph Brougher is a student with a part-time job who resides in West Mifflin, Pennsylvania. His adjusted gross income in 2018 was under $10,000. In January 2019, he used TurboTax to prepare and file his tax returns for the 2018 tax year.

35. Mr. Brougher navigated to the TurboTax's Free Edition and began the tax-preparation process based on the understanding that Free Edition was, as its name indicated, free.

36. After submitting his personal information—including information sufficient to confirm to Intuit that Mr. Brougher qualified for the Free File Program—Mr. Brougher received a notification from Intuit stating that he would need to pay a fee to complete and file his tax return.

37. Intuit did not notify Mr. Brougher that is service was not free until the very end of the tax-filing process, after he had entered a significant amount of personal information. Mr. Brougher paid the fee to complete his filing, to avoid losing the value of the time he had spent inputting his information.

38. Mr. Brougher qualified to file his taxes for free using TurboTax Freedom Edition. Had Intuit made its free tax filing service accessible to him, Mr. Brougher would have used it, rather than the paid version. But for Intuit's concealment of Freedom Edition, Mr. Brougher would not have paid Intuit to file his taxes.

39. Intuit's conduct, as further described in this complaint, caused Mr. Brougher to pay approximately $85.58 to Intuit to file his 2018 federal and state tax returns.

Monica Chandler

40. Plaintiff Monica Chandler works in public services and resides in Lakeland, Florida. Her adjusted gross income in 2018 was under $25,000. In March 2019, she used TurboTax to prepare and file her tax returns for the 2018 tax year.

41. Ms. Chandler used an accounting service to complete her taxes the previous year, but decided to use the TurboTax Free Edition for the 2019 tax season so that she could file her

tax returns for free. She navigated to the Free Edition and began the tax-preparation process believing that Free Edition was, as its name indicated, free.

42. After submitting her personal information—including information sufficient to confirm to Intuit that Ms. Chandler qualified for the Free File Program—Ms. Chandler received a notification from Intuit stating that she would need to pay a fee to complete and file her tax return.

43. Intuit did not notify Ms. Chandler that its service was not free until the very end of the tax filing process, after she had entered a significant amount of personal information. Ms. Chandler paid the fee to finish her filing, to avoid losing the value of the time she had spent inputting her information.

44. Ms. Chandler qualified to file her taxes for free using TurboTax Freedom Edition. Had Intuit made its free tax filing service accessible to her, Ms. Chandler would have used it, rather than the paid version. But for Intuit's concealment of Freedom Edition, Ms. Chandler would not have paid Intuit to file her taxes.

45. Intuit's conduct, as further described in this complaint, caused Ms. Chandler to pay approximately $64.98 to Intuit to file her 2018 federal and state tax returns.

COMMON FACTUAL ALLEGATIONS

A. The Free File Program

46. Congress passed the Internal Revenue Service Restructuring and Reform Act of 1998 (the "Act") to restructure, modernize, and improve taxpayer protections and rights. A central feature of the Act was its command to modernize computer systems and business processes to offer expanded electronic tax filing. The Act set a goal of 80 percent of all tax returns being filed electronically by 2007.

47. In November 2001, the Office of Management and Budget's Quicksilver Task Force established the EZ Tax Filing Initiative, which directed the IRS to "create a single point of access to free on-line preparation and electronic tax filing services provided by Industry Partners to reduce burden and costs to taxpayers." *See* Presential Initiatives: *IRS Free File*, https://georgewbush-whitehouse.archives.gov/omb/egov/c-1-3-IRS.html. Initially, the

administration proposed that the IRS develop its own digital filing form, which would be accessible through the whitehouse.gov website. Ultimately, however, the IRS entered into an agreement with a consortium of private tax preparation companies, originally known as the Free File Alliance, LLC and now called Free File, Inc. (the "Alliance"), to facilitate the expansion of free electronic tax filing.

48. In 2002, the IRS entered into an agreement with the Alliance called the Free File Agreement (the "Agreement"). Under the Agreement, members of the Alliance committed to provide free tax preparation and electronic filing services to at least 60% of United States taxpayers.

49. Intuit—developer of the TurboTax tax preparation and filing software—is the market leader in consumer tax software and has largest market share of any member of the Alliance. The other current members of the Alliance are H&R Block, 1040NOW Corp., Drake Enterprises, ezTaxReturn.com, FileYourTaxes, Free Tax Returns, Liberty Tax, OnLine Taxes, TaxACT, TaxHawk, and TaxSlayer.

50. The IRS and the Alliance extended the Agreement in 2005 and expanded the Program to include "taxpayers with an AGI equal to or less than 70% of all US taxpayers or below for the prior year, including those least able to afford efiling tax returns, based upon verifiable characteristics in their tax return[.]" The criteria for eligibility for free tax preparation and filing services have remained substantially the same since 2005. The Agreement has been renewed several times and has been amended through a series of memoranda of understanding ("MOUs"). On October 31, 2018, the IRS and Alliance entered into an Eighth MOU renewing the Free File Program through October 31, 2021.

51. Pursuant to the Agreement, each Alliance member serves a share of eligible taxpayers based on specific objective criteria, so that all qualifying taxpayers have access to at least one online platform that will allow them to file their returns at no cost. Intuit is responsible for providing free e-filing to some of the lowest-earning, and most vulnerable, taxpayers: those who have AGI of $34,000 or less, are eligible for the Earned Income Tax Credit, or are active military members with AGI of $66,000 or less. Under the Agreement,

these are the only requirements taxpayers must meet to file for free through TurboTax under the Free File Program.

52. The Agreement's stated purpose is to "extend[] the benefits of online federal tax preparation and electronic filing to economically disadvantaged and underserved populations at no cost to either the individual user or to the public treasury." The Agreement states that "to serve the greater good . . . the scope of this program is focused on covering the taxpayers least able to afford e-filing their returns on their own."

B. Intuit Entered Into the Free File Agreement to Avert the Competitive Threat Posed by the Federal Government

53. According to the Treasury Inspector General for Tax Administration, the Alliance's "primary goal is to keep the Federal Government from entering the tax preparation business." *See Written Statement of Treasury Inspector General for Tax Administration J. Russell George Before the U.S. House of Representatives Committee on Ways and Means* (Apr. 6, 2006) (available at https://www.treasury.gov/tigta/congress/congress_04062006.htm) (last visited Sept. 13, 2019).

54. The Agreement includes a noncompete provision that prohibits the IRS from creating its own free e-filing system. In contrast, many countries offer their citizens the option to file free online tax returns directly with the government.

55. Intuit and other Alliance members have spent millions lobbying to make the Free File Program permanent in order to preserve the benefits of this noncompete provision.

56. In its SEC filings, Intuit has acknowledged the competitive threat of a government-run free e-filing system: "We also face potential competitive challenges from publicly funded government entities that offer electronic tax preparation and filing services at no cost to individual taxpayers." Intuit's participation in the Alliance "has kept the federal government from being a direct competitor to Intuit's tax offerings."

57. In its 2004 Annual Report, Intuit acknowledged: "were the federal government to terminate the Free File Alliance and elect to provide its own software and electronic filing services available to taxpayers at no charge it would negatively impact our revenue and

profits."

58. Thus, by entering into the Agreement with the IRS, Intuit avoided competition from government-provided free tax programs. As a result, Intuit ensured that millions of taxpayers would visit its websites in search of e-filing options, nearly all of which are fee-based. As of 2017, Intuit had a 65% market share in the do-it-yourself tax software category.

C. Intuit Steers Taxpayers Away from Free File to Its Commercial Sites

59. Although the stated purpose of the Agreement is to allow free tax filing for those taxpayers who are least able to afford e-filing, Intuit devised a scheme to steer customers away from participation in the Free File Program and drive revenue from Free File eligible taxpayers to Intuit's fee-based software products. For example, Intuit offers two similarly-named products that perform the same core functions: (1) a free tax preparation software product it named "TurboTax Freedom Edition"—which enables eligible users to complete and e-file their tax returns for free pursuant to the Free File Program; and (2) a separate commercial tax preparation software product it named "TurboTax Free Edition"—which is heavily marketed and promoted as free, but actually charges customers to file all but the most basic of tax returns including returns that are eligible for free filing under the Free File Program.

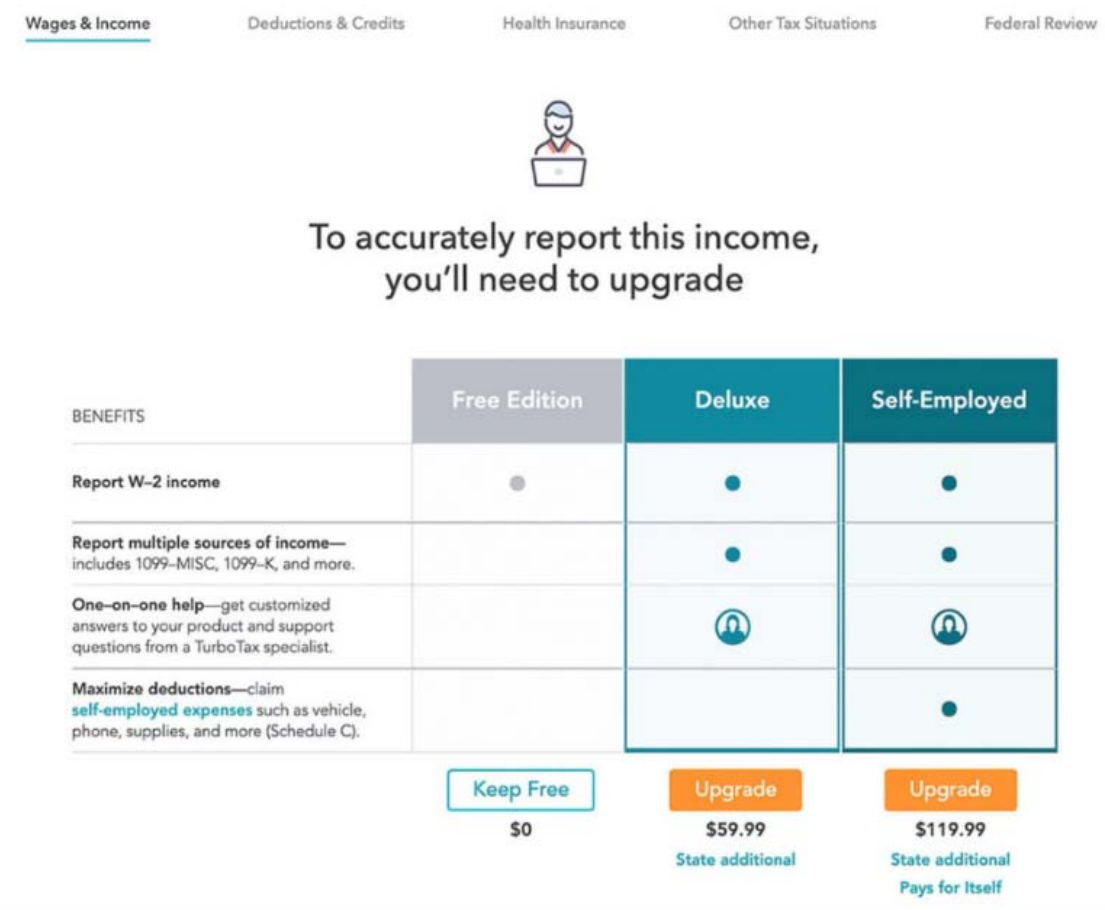
60. Thus, while the trade names given by Intuit to its Free File and paid software products are almost identical, the products are distinct in material, unfair and misleading ways. Freedom Edition, the actually free software product Intuit offers pursuant to the Free File Program, is intended for taxpayers with an adjusted gross income of $34,000 or less, those who are eligible for the Earned Income Tax Credit, as well as those on active military duty with an adjusted gross income of $66,000 or less. These taxpayers are eligible under the Free File Program to prepare and file a return for free using TurboTax Freedom Edition, a full-featured tax filing software system that allows a taxpayer to prepare and file a federal tax return for free. In addition to the Form 1040, Freedom Edition provides free access to over 100 other tax forms as required under the Free File Program, including Schedules 1 through 6, 1099-MISC, and 1040 Schedules A-E, EIC, F, H, and J. This means that, as required under the Free File

Program, even taxpayers with complex returns can use Freedom Edition to e-file for free if they are able to access it and meet the basic eligibility requirements described above.

61. The Free Edition, by contrast, is only free for "simple tax returns that can be filed on Form 1040 without any attached schedules." The addition of any forms, including in returns requiring itemized deductions, credits, or incomes reportable on Schedules 1 to 6, cannot be prepared for free using TurboTax Free Edition. Consequently, taxpayers who meet any of the following criteria, among others, will be charged when using the Free Edition: they are self-employed, do not have health insurance, receive unemployment pay, live in one state but work in another, pay or receive alimony, have business income, expenses, or losses, have capital gains or losses, have income from rental real estate, receive royalties, have farm income or losses, claim a student loan deduction, claim a health savings account contribution deduction, claim deductible educator expenses, claim education credits, claim retirement savings contribution credits, or claim credit for child and dependent care expenses. None of these criteria impact a taxpayer's eligibility to file for free under the Free File Program.

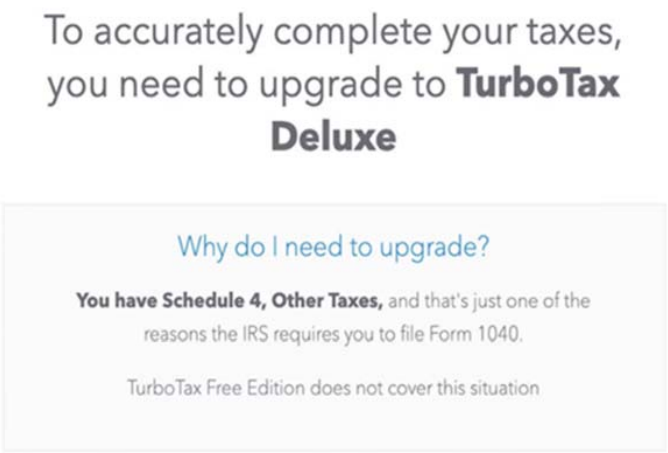
62. Even where a taxpayer using the Free Edition has provided sufficient information to allow Intuit to determine that the taxpayer qualifies for free filing under the Free File Program, Intuit does not notify the taxpayer of their eligibility under the Program or direct the taxpayer to the Freedom Edition website where the filing would actually be free. Thus, even though a taxpayer is eligible to file for free under the Free File Program and has been directed by Intuit to a purportedly "Free Edition" of its product, Intuit nonetheless charges that taxpayer a fee to complete the e-filing of his or her return.

63. Instead of offering an eligible taxpayer the option to file for free under the Free File Program, when such a taxpayer seeks to file for free using the "Free Edition" but triggers one of the conditions set by Intuit precluding them from doing so, Intuit claims there is a need to "upgrade" to one of TurboTax's paid products (1) "Deluxe" ($59.99 and up); (2) "Premier" ($79.99 and up); or (3) "Self-Employed" ($119.99 and up). Taxpayers typically spend considerable time inputting their personal and wage information using the Free Edition before Intuit informs them that an "upgrade" is necessary to file their returns.



64. Thus, the Free Edition requires users to "upgrade" (i.e., pay a fee) even when they otherwise qualify under the Free File Program and could submit the exact same forms using the Freedom Edition at no cost. For example, the above graphic lists 1099 tax forms as requiring an upgrade to a paid product, even where the IRS website lists these *same forms* as qualifying for free filing under the Free File Program and they could be filed for free through Intuit's Freedom Edition website by taxpayers able to access it.

65. Intuit further represents to taxpayers using the Free Edition that an upgrade is required to "accurately" file their tax return:



66. Intuit's statement in this regard is both contrary to Intuit's advertising and literally false. "[U]pgrading" has nothing to do with "accurately" filing—taxpayers can accurately file the same tax return for free using other free alternatives—including using the Freedom Edition created for the Free File Program.

67. While duping taxpayers into paying for filings Intuit knew could be filed for free, Intuit went to great lengths to conceal the existence of the Freedom Edition and direct taxpayers towards its Free Edition. As reported by ProPublica, a former Intuit employee recalled a May 2017 marketing team meeting at Intuit's Headquarters at which a new employee proposed that customers who go through TurboTax's filing process and input information demonstrating their eligibility for free filing receive a "hard recommendation" and be routed to the truly free product. This suggestion was reportedly met with laughter, and then other meeting attendees quickly changed the subject. The same former employee explained that Intuit has "ways of detecting if you're paying too much, but they just don't do it."

68. In earnings calls, Intuit openly boasted of the success of its "free-to-fee" or "free-to-pay" business model in steering customers to pay for e-filing unnecessarily. For example:

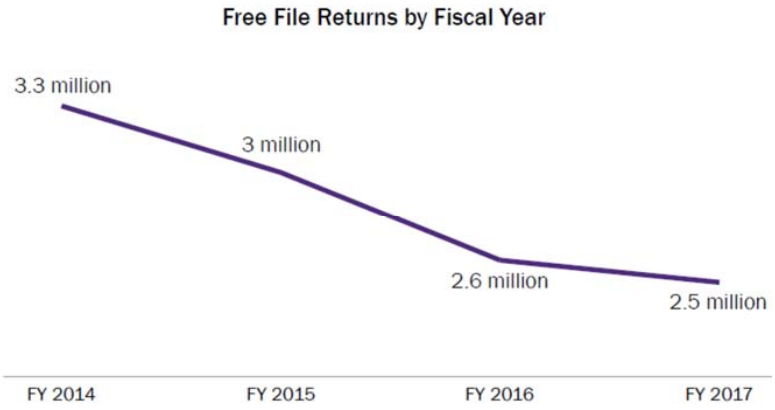
a. In a 2008 earnings call, then-CEO Brad Smith explained that Intuit has "2.5 years of experience of learning what free is about and how best to monetize free." He added, "We feel good with the model. We have a pretty good handle for how to get customers who use free to come into the franchise and actually buy additional products and services . . . ."

b. In a 2015 earnings call, Brad Smith further explained, "I think our track record is we can bring people in on free. We can monetize many of them in the same season. But we also tend to monetize more of them the following season and that just continues to be a formula that pays off."

69. Intuit's strategy to suppress free filing has been wildly successful. In 2018, more than 100 million taxpayers were eligible to file for free under the Free File Program, but only about 2.5 million did so—far short of the Free File Program's intended goal of making free e-filing available to at least 70% of filers. Moreover, while one might reasonably expect the number of e-filers using websites to increase in light of the significant increase in the number of filers, the growth of the internet and, more recently, changes to the tax code, the number has steadily declined from its peak in 2005, when over 5 million taxpayers filed through the Free File Program.

70. In November 2018, the IRS Advisory Council wrote that one explanation for the decline in participation involve "[Alliance] members directly marketing their non-Free File products to taxpayers who used their Free File product in prior years." *See* Internal Revenue Service Advisory Council, *Public Report*, Publication 5316, November 2018, Catalog Number 17824A, *available at* https://www.irs.gov/pub/irs-pdf/p5316.pdf (last visited Sept. 13, 2019).

71. The participation rate in the Free File Program continues to decline steadily:

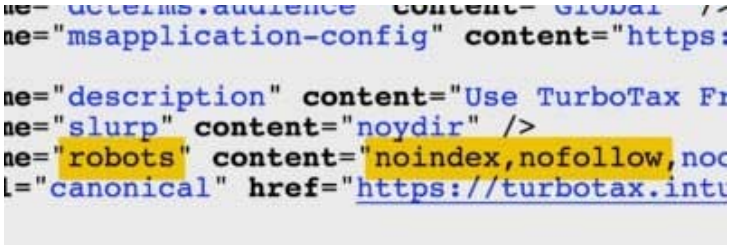


72. Intuit's efforts to maximize revenue from low-income taxpayers have been successful: In 2018, Intuit earned $2.5 billion in revenue derived from its TurboTax segment, a

$300 million increase from 2017 and a $500 million increase from 2016. Representative examples of Intuit's acts, practices and conduct directed at suppressing participation in the Free File Program in favor of Intuit's paid products for the 2019 tax season are described below. On information and belief, Plaintiffs allege that Intuit has engaged in a similar course of conduct in the 2018, 2017 and 2016 tax seasons, and while the specific actions taken may have differed, the object and effect of such actions was to suppress and deter taxpayer participation in the Free File Program in favor of Intuit's paid tax preparation products.

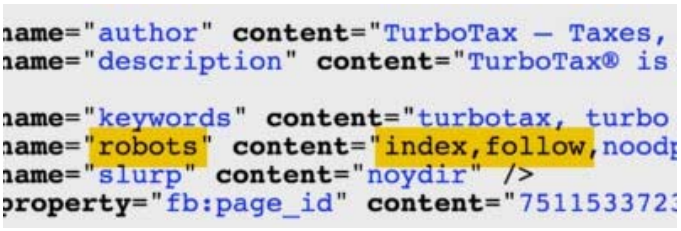
Internet Search Manipulation

73. In furtherance of its common plan or scheme to conceal the ability of taxpayers to file for free through the Free File Program, for the 2018 tax season Intuit instituted a plan to prevent taxpayers from locating the free version of its Free File Program software—TurboTax Freedom Edition—by adding code on its website directing Google and other search engines not to list that free product in online search results. The code Intuit added can be found in a file called robots.txt or in an HTML tag, both of which only appear in a website's underlying code if they have been affirmatively added:



74. This code is typically used on web pages that designers do not want to make accessible to the public, like sites for internal use only; the code directs Google's search algorithms to exclude the specified pages in search returns. In 2018 and the first few months of 2019, Intuit used code to direct traffic away from the online portal to the no-cost TurboTax Freedom Edition. As a result, eligible taxpayers searching for "turbo tax free file" or "irs free file taxes" (or any other combination of search terms that a taxpayer might use to find a free e-filing service they were eligible to use) were unable to locate TurboTax Freedom Edition through web searches.

75. By contrast, Intuit went to great lengths to ensure that its primary, commercial website, TurboTax.com, was at or near the top of relevant search engine results. For example, Intuit did not include similar code concealing its primary website from search engines. As a result, taxpayers searching the internet for "free" tax preparation services were directed to Intuit's revenue-producing URL:



76. Furthermore, for the 2018 tax year, Intuit purchased Google "AdWords"—advertisements that appear at the top of Google search results—to direct taxpayers to its commercial tax-filing options instead of its Freedom Edition website.

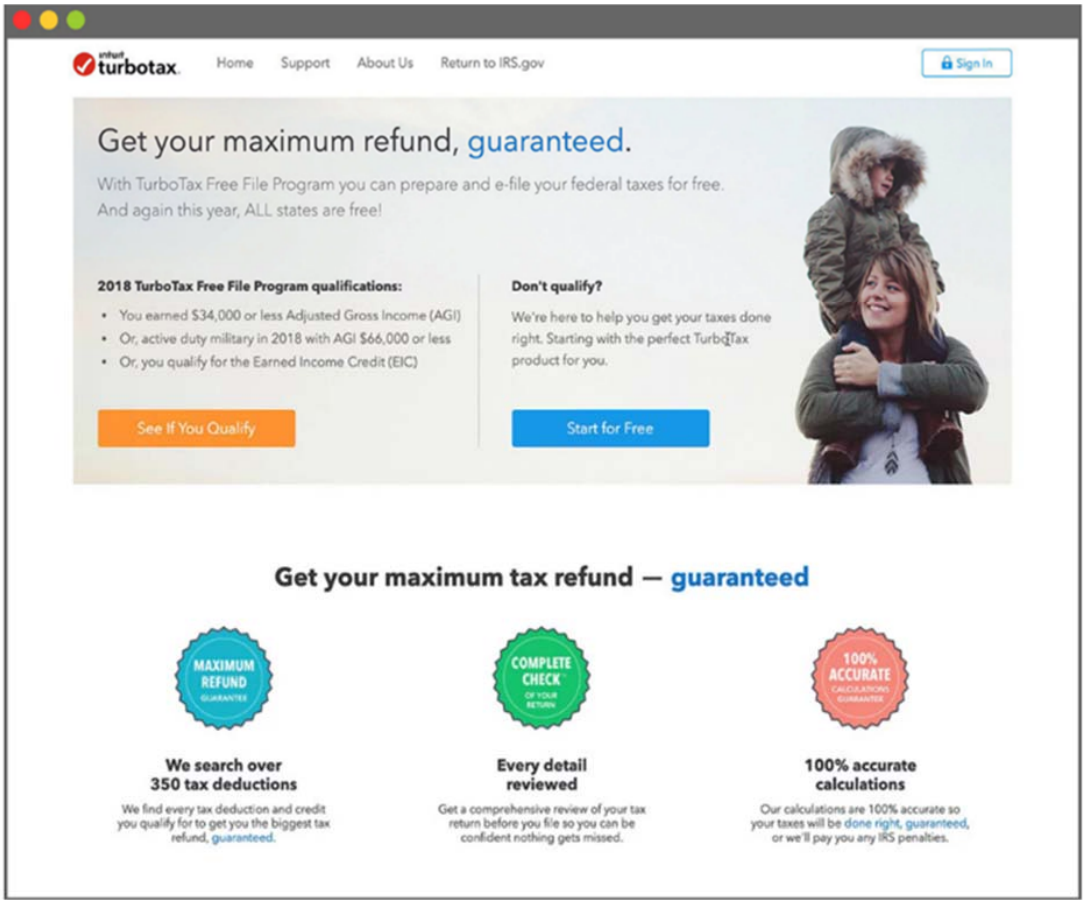
77. Google allows advertisers to specify various search phrases that will trigger display of the advertisements paid content. Intuit invested in Google AdWords to ensure that taxpayers searching terms like "turbo tax free" would see advertisements for Intuit's revenue-producing URL at the top of Google's search results. Intuit consulted with marketing firms to choose the optimal terms and invested heavily in Google AdWords during tax filing season.

78. During the 2018 tax season, a search for "TurboTax Free" in Google yielded as the top search result a link to TurboTax's "Free Edition." "Freedom Edition" does not appear on the search result list. A search for "irs free file taxes" displayed Intuit's commercial filing options as the top search results.

79. Once a taxpayer reaches TurboTax's primary website, the Freedom Edition is not listed as a product offering or even accessible via link from TurboTax's primary website.

80. Further, even if taxpayers knew to type "TurboTax Freedom" in a Google search to locate the free filing product, the first link still would not provide access to the Freedom Edition website. Instead, during the 2019 filing season, it directed consumers to a landing page that required users to click on the orange "See If You Qualify" link in order to access the

Freedom Edition website. The landing page is designed so that users who do not read the smaller print will click the blue link that says "Start for Free," which directs the user to TurboTax's *paid* offerings. This is known as a "dark pattern"—a user-interface design intended to coerce users into making decisions promoted by the website operator.



81. Intuit's Freedom Edition website also contains dark patterns to surreptitiously steer taxpayers away from the Freedom Edition to one of Intuit's paid products. For example, Intuit requires users to log into an "Intuit Account" on its website before beginning a tax return using either Freedom Edition or a commercial version. Anyone who has used a TurboTax product in the past already will have an Intuit ID. But a user who enters her preexisting Intuit ID into the Freedom Edition website is redirected back to the TurboTax "Free" (commercial) website. To actually use Freedom Edition, a user must (1) sign out of their existing TurboTax

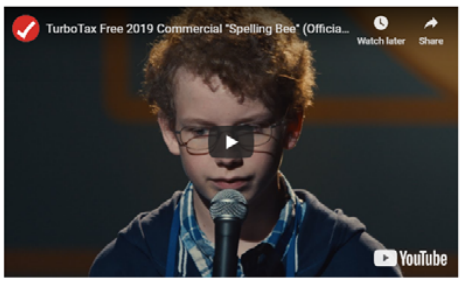
account; (2) go to the IRS Free File Program; (3) create a new account or sign back into their existing account; and (4) confirm the switch to TurboTax Free File Program when prompted.

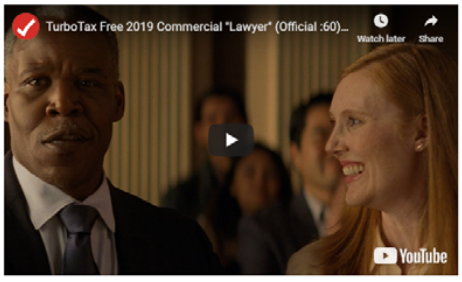
82. As a result of Intuit's actions, millions of taxpayers eligible under the Free File Program to file for free through the Freedom Edition were instead diverted to Intuit's Free Edition and paid to file their taxes.

Deceptive Marketing

83. In furtherance of its common plan or scheme, Intuit implemented a pervasive, nationwide marketing and advertising campaign during the 2018 tax filing season promoting its offering of "free" tax filing services, even though the vast majority of users would actually be charged to file their returns.

84. Intuit purchased online and televised advertising, promoting the slogan "Turbotax Free is free. Free, free free free[,]" to direct taxpayers to Intuit's commercial products, rather than Freedom Edition. A one-minute advertisement, screenshots from which are displayed below, presents a dramatic courtroom scene in which the various lawyers, judge and jury say only the word "free" 85 times in a row. The advertisement ends with a voiceover stating, "That's right, TurboTax Free is free. Free, free, free, free."[1]

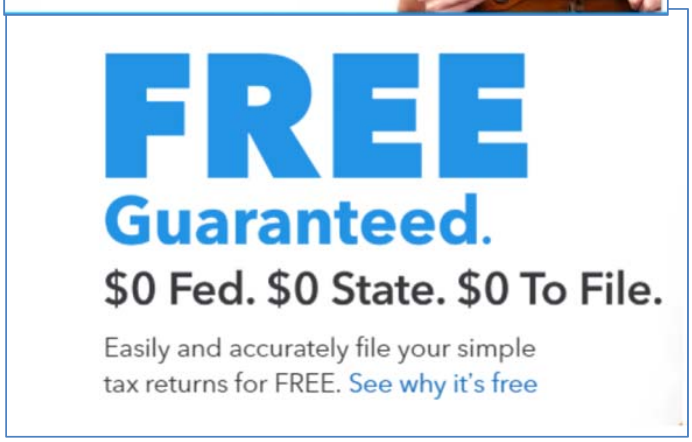




[1] https://www.youtube.com/watch?v=5VV80ozpuMw (last visited Sept. 13, 2019).

85. A former Intuit employee reported that "[t]he entire strategy is make sure people read the word 'free' and click our site and never use" an actually free product. He added that the "vast majority of people who click" on the Free Edition "will not pay $0."

86. Intuit's advertising used the term "FREE guaranteed" and "$0 Fed $0 State and $0 To File" in the following manner:



87. As part of its marketing campaign, Intuit even created a crossword puzzle with 68 clues to which every answer was "free." Intuit entitled the crossword "FREE by Free F. Free" and published it on *The New York Times* website and in *The New York Times Magazine*.

FREE

By Free F. Free

intuit turbotaxfree
Free, free free free.

DOWN:

1 TurboTax Free ___ is
2 EERF backward
3 Rhymes with tree
4 Opposite of not-free
5 ___ refills
6 With TurboTax, simple returns are ___
7 To set loose
9 Buy one, get one ___
11 $0.00
12 No charge
13 Off the hook
16 Samples at the grocery store
17 Four letters
18 Same as 19-Down
19 Same as 20-Across
22 Rhymes with tree
23 The truth will set you
24 Phonetics: Fuh-Ree
25 Sterile or germ-___
26 You know the answer
27 The answer is FREE
30 [Insert clue here]
31 A four-letter word that means basically the exact same thing as "Free" and, in fact, is free
32 Uncaged
34 Unleashed
35 ___-range chicken
36 It's so cold I'm ___zing
38 Chargeless
39 Complimentary
40 First Amendment, shortened: ___ speech
41 If you pay nothing for something, then it's ___
42 Seriously, you can't get this wrong
45 If it's TurboTax Free, it's ___
46 FREE
47 ___-in-flight Wi-Fi
48 free
49 Two F's, two R's, four E's
53 Combine 45-Across and 4-Down, then just pick one
55 F_ _ _
59 _R_ _
60 _ _E_
61 E
62 Freebie—it's free
63 $$$-
64 Sugar-___

ACROSS:

1 At no cost
2 Gluten-___
4 REFE unscrambled
8 Gratis
9 TurboTax ___ is free
10 Put this in your car when it gets cold: Anti___ze
11 F to the REE
13 Free
14 Not a highway but a ___ way
15 Exact same word as free
20 FREE
21 FREE
22 FREE
25 FREE
26 FREE
28 Duty-___ store
29 Just write "free"
31 Same answer as everything else
32 "Phree," spelled correctly
33 It's "Free," twice
35 ($10 x 2) - $20 = ___
36 Did we mention TurboTax Free is ___?
37 No dollars and zero cents
38 ___ throws, worth one point each
42 "Kostenlos" in Germany
43 "Libre" in France
44 Opposite of confined
45 Sugar-___ gum
50 Spoiler alert: It's free
51 Open
52 Four-letter word for free
54 Contract position: ___ lancer
56 Freeeeeeeeeeee (minus 11 E's)
57 ɘɘɿƎ (use mirror)
58 Land of the ___
62 "Please enjoy a ___ sample"
63 Also rhymes with Brie
64 TurboTax tagline: "Free. ___"
65 TLDR: Free
66 The word FREE
67 Literally, just the word FREE
68 Writing all of these clues was way harder than it seems—oh, and the answer is FREE

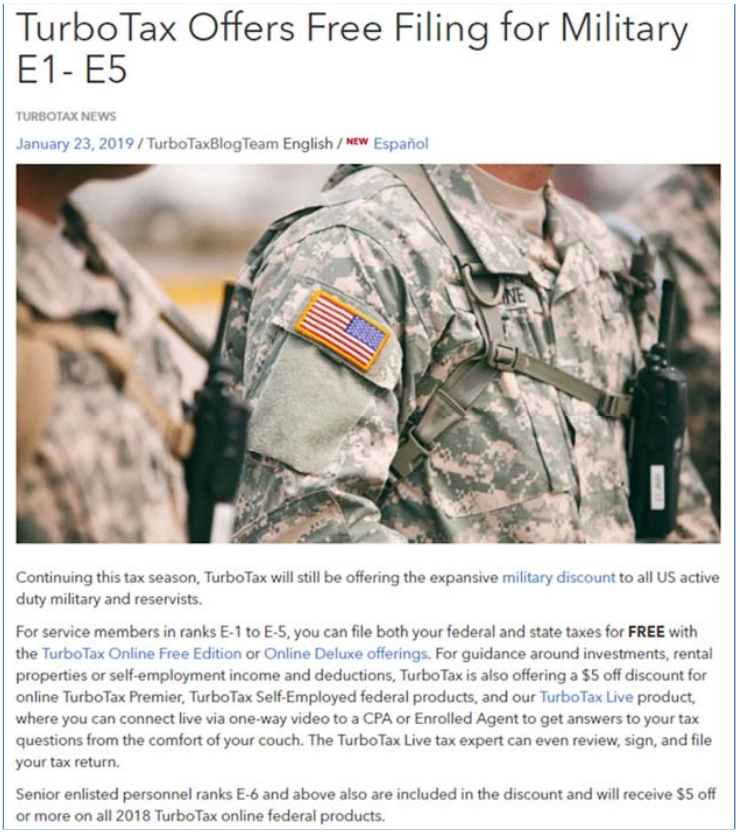
Further images of this crossword puzzle are available at: http://s3.amazonaws.com/abn-prod/wp-content/uploads/sites/7/2019/01/NYT_Magazine_Free_Crossword.png.

Military Marketing

88. Other ads disseminated in connection with the same 2018 promotional campaign were directed at active military servicemembers. For example, the below advertisement states, "If you're a service member in ranks E-1 to E-5 you can file both your federal and state taxes for FREE with the TurboTax Online Free Edition":

89. Intuit also uses patriotic imagery to attract servicemembers to file taxes using its commercial products and maintains a dedicated webpage for servicemembers, which only references TurboTax's commercial filing options alongside purportedly "free" offerings:


TurboTax / TurboTax Online Products / TurboTax Military
TurboTax military discount
Enjoy TurboTax for free or at a reduced rate.
E1 – E5
• Free federal and state filing with Free Edition or Deluxe
• $5 off discount or more for Premier, Self-Employed, and TurboTax Live federal products
E6 and above
• $5 off discount or more on all TurboTax federal products
Simply use your military W-2 to verify rank and your discount will be applied when you file.
Valid for TurboTax Online only. Special discount offers may not be valid for mobile in-app purchases. Discounts are not reflected in price below.


TurboTax Offers Free Filing for Military E1- E5
TURBOTAX NEWS
January 23, 2019 / TurboTaxBlogTeam English / NEW Español
Continuing this tax season, TurboTax will still be offering the expansive military discount to all US active duty military and reservists.
For service members in ranks E-1 to E-5, you can file both your federal and state taxes for FREE with the TurboTax Online Free Edition or Online Deluxe offerings. For guidance around investments, rental properties or self-employment income and deductions, TurboTax is also offering a $5 off discount for online TurboTax Premier, TurboTax Self-Employed federal products, and our TurboTax Live product, where you can connect live via one-way video to a CPA or Enrolled Agent to get answers to your tax questions from the comfort of your couch. The TurboTax Live tax expert can even review, sign, and file your tax return.
Senior enlisted personnel ranks E-6 and above also are included in the discount and will receive $5 off or more on all 2018 TurboTax online federal products.

90. Despite the fact that servicemembers ranking E-1 to E-5 typically make less than $39,000 a year from their military service—and are therefore eligible for free filing under the Free File Program (which permits free filing for servicemembers with AGI up to $66,000)—Intuit's military-centric advertisements direct taxpayers to TurboTax's paid offerings rather than its Freedom Edition website.

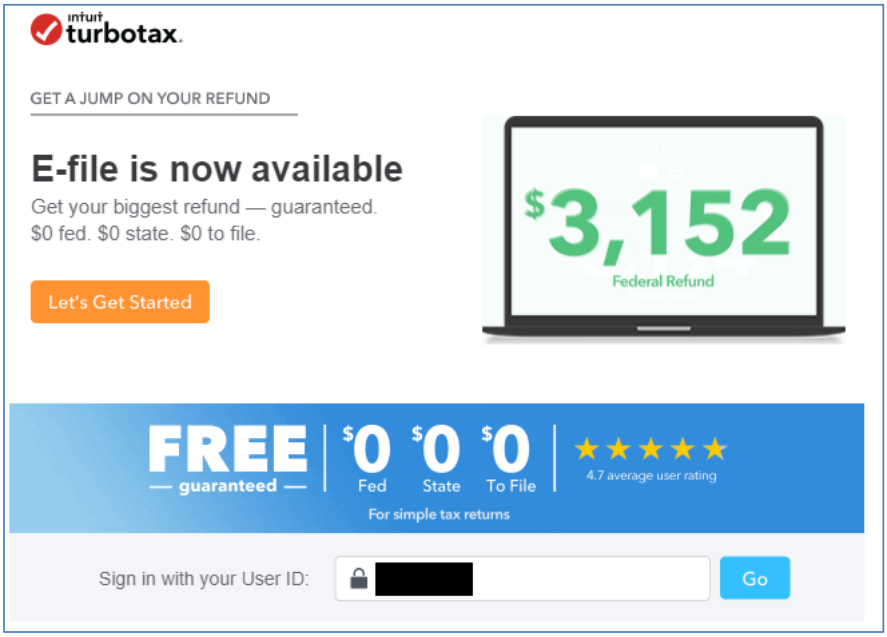
E-Mail Marketing

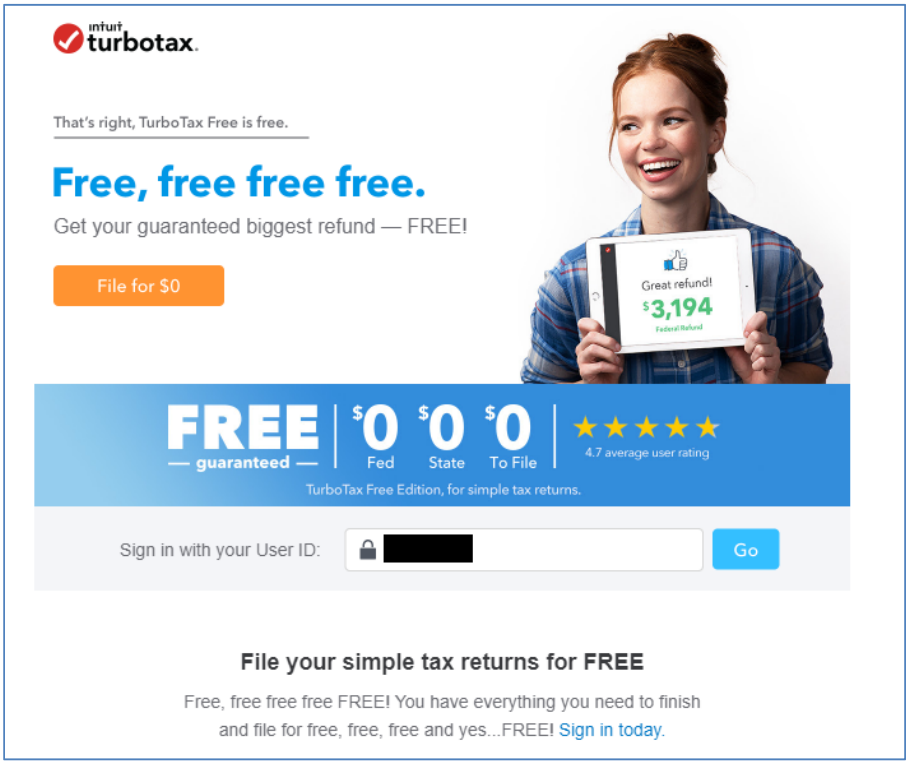
91. Through 2018, Intuit also targeted taxpayers through direct email campaigns. As each tax season approaches, taxpayers who have previously used TurboTax to file their returns receive emails reminding them of upcoming filing deadlines. These emails direct taxpayers to Intuit's commercial products, not the Freedom Edition, *even for taxpayers who used Freedom Edition to file in previous tax years*. Many users also reported that when they entered their preexisting email, user ID, and password on the Freedom Edition website, they were automatically routed to the commercial version.

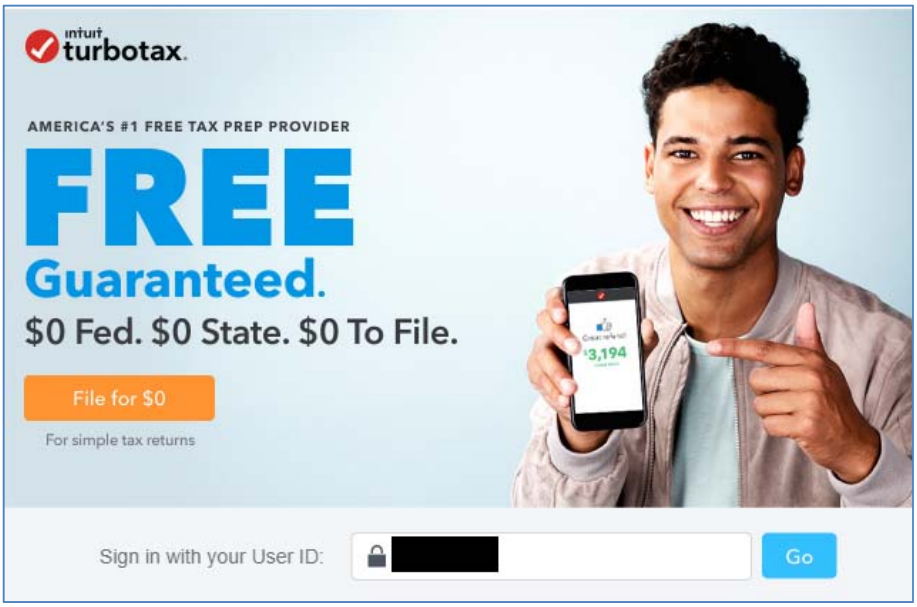
92. Individuals who previously used a TurboTax product receive on average 20 or more emails from TurboTax@e.turbotax.intuit.com leading up to the April filing deadline, including emails exhorting them to sign in to receive "max refund" that is "FREE guaranteed." Examples appear below:

TurboTax Inbox 2018 Tax Reminder: User ID and Easy Refund Inside - 100% free and your max refund guaranteed.
TurboTax Inbox (2018 Tax Reminder) Your Biggest Refund Is Waiting - Get your max refund FREE - guaranteed.
TurboTax Inbox (Please Sign in With Your User ID) Refunds Are Being Processed Now - Get your max refund FREE - guaranteed.
TurboTax Inbox Your Refund and User ID Are Waiting – Get Started Here - Do your taxes for FREE. Get started today.
TurboTax Inbox Please Sign in to Your Account: Your Refund and User ID Are Waiting - Do your taxes for FREE. Get started today.
TurboTax Inbox Open for Details – Your 2018 Refund Is Waiting. - Don't delay: get your biggest refund sooner.
TurboTax Inbox (New Message) You Deserve Your Biggest Refund. User ID Inside. - Don't delay your refund. Sign in and file for $0.

93. Once the individual clicks on the e-mail, they see visual images claiming that their tax filings will be "FREE guaranteed" and inviting them to click on the blue button labeled "Go" next to their pre-populated user ID. A sampling of these email advertisements is provided below:


intuit turbotax
GET A JUMP ON YOUR REFUND
E-file is now available
Get your biggest refund — guaranteed.
$0 fed. $0 state. $0 to file.
Let's Get Started
$3,152
Federal Refund
FREE — guaranteed —
$0 Fed
$0 State
$0 To File
4.7 average user rating
For simple tax returns
Sign in with your User ID:
Go


intuit turbotax
That's right, TurboTax Free is free.
Free, free free free.
Get your guaranteed biggest refund — FREE!
File for $0
Great refund!
$3,194
FREE — guaranteed —
$0 Fed
$0 State
$0 To File
4.7 average user rating
TurboTax Free Edition, for simple tax returns.
Sign in with your User ID:
Go
File your simple tax returns for FREE
Free, free free free FREE! You have everything you need to finish
and file for free, free, free and yes...FREE! Sign in today.


intuit turbotax.
AMERICA'S #1 FREE TAX PREP PROVIDER
FREE
Guaranteed.
$0 Fed. $0 State. $0 To File.
File for $0
For simple tax returns
Sign in with your User ID:
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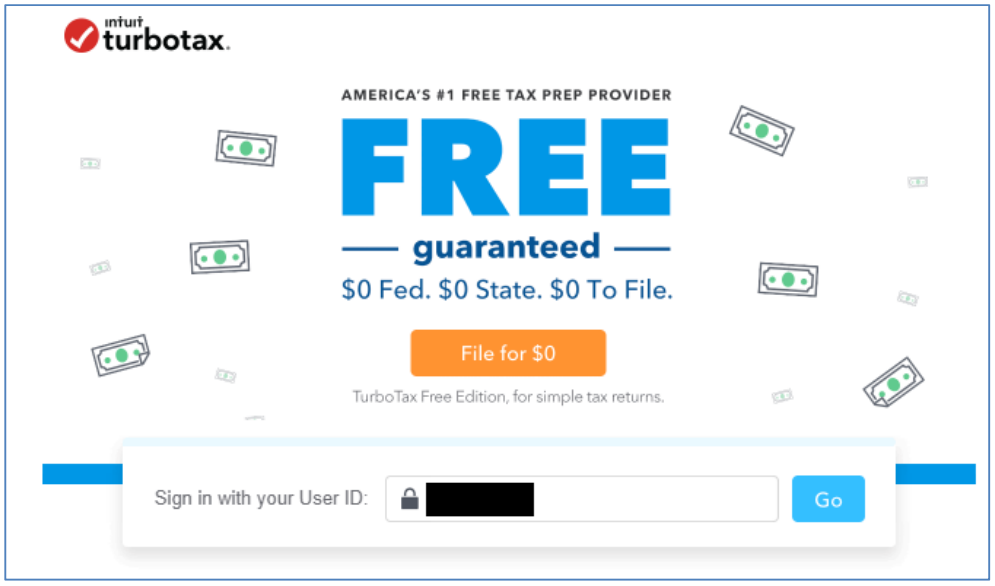
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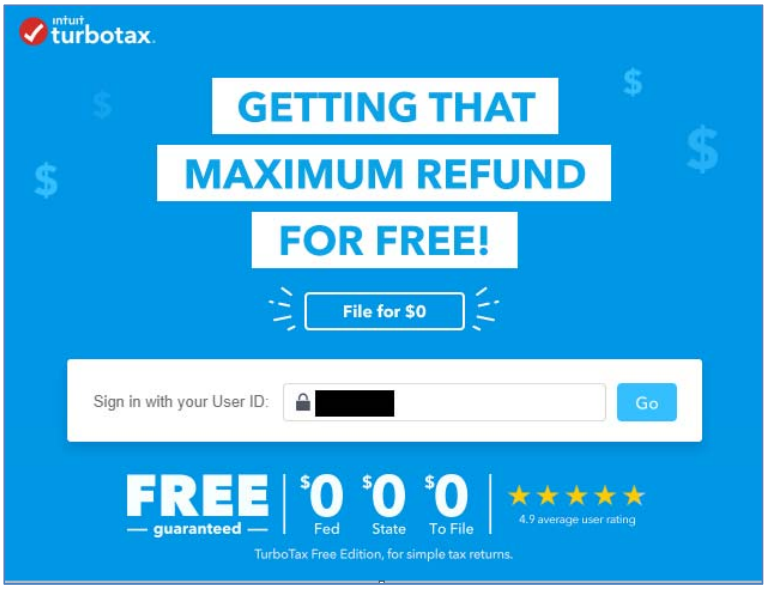

94. Intuit's advertisements and solicitations draw taxpayers into Intuit's paid products with no "off-ramp" to the Freedom Edition website. Intuit's common plan or scheme is designed to prompt taxpayers to input their data into its commercial software, believing they are eligible for free services, and alert them to the filing fees they will be charged only after they have invested significant time inputting their sensitive personal and wage information. As former CEO Brad Smith explained at a Morgan Stanley Technology presentation, "it's actually the best customer acquisition strategy we've had. What ends up being the opportunity is getting you to come in and start filling out your tax return electronically."

D. <u>The Fallout From Pro Publica's Reporting</u>

95. Since publication of the ProPublica articles, taxpayers who sought but were unable to obtain free tax preparation and filing services have reported their experiences to ProPublica. Their stories show the impact of Intuit's practices on the lower income taxpayers targeted by the Free File Program:

- An 87-year-old on social security with an adjusted gross income of $11,000 had to pay $124.98 to file taxes.

- An unemployed woman recovering from chemotherapy with two disabled sons whose household earned approximately $30,000 was charged $200. The woman said, "Those $200 would have helped pay for rent."
- A freelancer earning $15 an hour was charged $154, and said, "To suddenly be saddled with [a] $154 fee for a service I will only use one day out of the year, when I file, is the worst kind of injustice for someone in my position."
- A man earning $5,000 a year paid $103.95 to file.
- A contractor earning $14,500 a year was charged $169 to file taxes. The contractor said, "That was a whole 1% of my total income . . . . How are they allowed to lie like this?"

96. The stories shared by military servicemembers who paid for "free" TurboTax software are similar:

- A mother of three married to a Navy officer Googled "tax preparation military free." She clicked the top result—a link to a TurboTax site promising "free military taxes"—and landed on a site emblazoned with miniature American flags. Even though her family's household income was under the $66,000 threshold to file at no cost under the Free File Program, Intuit charged her $60 to file her family's tax return.
- A hospital corpsman in the Navy who made less than $66,000 paid $95 to file his 2018 tax return.

97. Many taxpayers have contacted Intuit to demand a refund after learning that they paid for a TurboTax commercial product even though they qualified to file for free under the Free File Program. In response, Intuit created a special team to handle inquiries from taxpayers who were eligible for the Free File Program. The team has repeatedly denied refund requests. *See* Justin Elliot and Paul Kiel, *The TurboTax Trap: TurboTax and H&R Block Saw Free Tax Filing as a Threat—and Gutted it*, ProPublica (May 2, 2019) (available at https://www.propublica.org/article/intuit-turbotax-h-r-block-gutted-free-tax-filing-internal-memo) (last visited Sept. 13, 2019).

98. Intuit's team has also disseminated inaccurate information about the Free File Program to consumers calling and seeking refunds. For example, when one low-income tax filer asked why there are no links to the actual free file software on the TurboTax website, an Intuit agent responded that "it is an IRS product" and "the IRS is the one managing it." Intuit agents have also told low-income tax filers that Intuit's free service is owned by the IRS and that Free File is a "government product that is simply branded as TurboTax." *See* Justin Elliot and Meg Marco, *Listen to TurboTax Lie to Get Out of Refunding Overcharged Customers*, ProPublica (May 9, 2019) (available at https://www.propublica.org/article/listen-to-turbotax-lie-to-get-out-of-refunding-overcharged-customers) (last visited Sept. 13, 2019).

CLASS ACTION ALLEGATIONS

99. Class Definition: Plaintiffs bring this class action on behalf of themselves and other similarly situated individuals. Pursuant to Federal Rules of Civil Procedure 23(b)(2) and (b)(3) Plaintiffs seek certification of a class (the "Class") initially defined as:

> All United States citizens and residents who during the applicable limitations period were eligible to file a federal tax return pursuant to the IRS Free File Program on Intuit's TurboTax Freedom Edition website but paid a fee to TurboTax to file such return.

100. Excluded from the Class is Intuit's officers, directors, affiliates, legal representatives, employees, successors, subsidiaries, and assigns. Also excluded from the Class is any judge, justice or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

101. Numerosity: The Class is so numerous that individual joinder of all members is impracticable.

102. Common Questions of Law and Fact Predominate: There are many questions of law and fact common to Plaintiffs and Class members, and those questions substantially predominate over any questions that may affect individual Class members. Common questions of law and fact include:

a. Whether Intuit's conduct constituted unfair business acts and practices under California's Unfair Competition Law;

b. Whether Intuit's conduct was unlawful under California's Unfair Competition Law;

c. Whether Intuit's conduct was fraudulent under California's Unfair Competition Law;

d. Whether Intuit's advertising was unfair, deceptive, and misleading in violation of California's Unfair Competition Law;

e. Whether Intuit was unjustly enriched; and

f. Whether Plaintiffs and members of the class are entitled to equitable relief, including injunctive relief and restitution.

103. All members of the Class are ascertainable by reference to objective criteria. Intuit has access to addresses and other contact information for Class members which can be used for notice purposes.

104. Typicality: Plaintiffs' claims are typical of the claims of the Class. Plaintiffs and all Class members were subjected to Intuit's common course of conduct and were similarly affected by its actions.

105. Adequacy of Representation: Plaintiffs are adequate class representatives because their interests do not conflict with the interests of the Class members whom they seek to represent. Plaintiffs have retained counsel with substantial experience in prosecuting complex and class action litigation. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of class members and have the financial resources to do so. The Class members' interests will be fairly and adequately protected by Plaintiffs and their counsel.

106. Superiority of Class Action: Plaintiffs and Class members suffered, and will continue to suffer, harm as a result of Intuit's conduct. A class action is superior to other available methods for the fair and efficient adjudication of the present controversy. Individual joinder of all Class members is impractical. Even if individual Class members had the resources to pursue individual litigation, it would be unduly burdensome to the judicial system. Individual litigation also would magnify the delay and expense to all parties of resolving the

controversies engendered by Intuit's common course of conduct. A class action allows a single court to provide the benefits of unitary adjudication, judicial economy, and the fair and equitable handling of the claims of all Class members in a single forum. The conduct of this action as a class action will conserve the resources of the parties and of the judicial system and will protect the rights of the Class.

107. Injunctive Relief: Intuit has acted and refused to act on grounds generally applicable to the Class, making injunctive relief warranted with respect to the Class as a whole.

INTUIT'S TERMS OF ADHESION

108. Intuit drafted the Terms of Service and/or Terms of Use (collectively, "Terms") and presented those terms to all Plaintiffs. The Terms are a form contract. They are not negotiable, and they were not negotiated by the Plaintiffs. The Terms are a contract of adhesion by Intuit that Plaintiffs were required to accept to use the services.

109. The Terms contain an arbitration provision that provides: "DISPUTES. ANY DISPUTE OR CLAIM RELATING IN ANY WAY TO THE SERVICES OR THIS AGREEMENT WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act governs the interpretation and enforcement of this provision; the arbitrator shall apply California law to all other matters. Notwithstanding anything to the contrary, *any party to the arbitration may at any time seek injunctions or other forms of equitable relief from any court of competent jurisdiction*." (emphasis added). As alleged herein, this action seeks only injunctive and equitable relief and is not subject to arbitration under the foregoing provision.

110. The Terms were drafted exclusively by Intuit, including the arbitration clause and the exception to that clause providing that the Plaintiffs may seek equitable remedies in a court of law.

111. Intuit, on information and belief, retained sophisticated lawyers with experience drafting arbitration agreements to draft and review the Terms. In contrast, Plaintiffs are

ordinary consumers who were not represented by counsel in regard to entering into a relationship with Intuit.

112. The Plaintiffs are not commercial entities but ordinary consumers who were induced to engage Intuit for ordinary consumer services. They are not sophisticated in legal matters or commercial dealings.

CHOICE-OF-LAW ALLEGATIONS

113. California law applies to the claims of all Class members under either a contractual choice-of-law or governmental interest analysis.

114. The Terms state that "California state law governs this Agreement without regard to its conflicts of law provisions."

115. Further, the State of California has sufficient contacts to Intuit's relevant conduct for California law to be uniformly applied to the claims of the Class. Application of California law to all relevant Class member transactions comports with the Due Process Clause given the significant aggregation of contacts between Intuit's conduct and California.

116. Intuit is headquartered and does substantial business in California.

117. A significant percentage of the Class members are located in, and Intuit aimed a significant portion of its unlawful conduct at, California.

118. The conduct that forms the basis for each Class member's claims against Intuit emanated from its headquarters in Mountain View, California. Intuit devised and executed its wrongful conduct and marketing scheme, wrote the software code at issue, received customer complaints, planned its communications with Class members, and set its policies and practices at its Mountain View headquarters.

119. California has a greater interest than any other state in applying its law to the claims at issue in this case. California has a very strong interest in preventing its resident corporations from engaging in unfair and deceptive conduct and in ensuring that harm inflicted on resident consumers is redressed. California's interest in preventing unlawful corporate behavior occurring in California substantially outweighs any interest of any other state in denying recovery to its residents injured by an out-of-state defendant or in applying its laws to

conduct occurring outside its borders. If other states' laws were applied to Class members' claims, California's interest in deterring resident corporations from committing unfair and deceptive practices would be impaired.

COUNT I
California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*
Unfair Business Acts and Practices
(*On Behalf of Plaintiffs and the Class*)

120. Plaintiffs incorporate the foregoing paragraphs as if set forth fully herein.

121. Plaintiffs bring this cause of action on behalf of themselves, the members of the Class and the general public.

122. Intuit is a "person" as defined by Cal. Bus. & Prof. Code § 17201.

123. Intuit has violated and continues to violate Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL"), which prohibits unfair business practices.

124. Intuit engaged in oppressive, unscrupulous, and substantially injurious conduct. Plaintiffs and Class members are low-income individuals and active-military members who were entitled to file their taxes for free but instead, by consequence of Intuit's pervasive unfair conduct, spent money to file their taxes. They could not have reasonably avoided this injury. Nor is Intuit's relevant conduct outweighed by any countervailing benefits to consumers or to competition.

125. Intuit's unfair business acts and practices include, without limitation:

a. Devising a common plan, scheme and course of conduct designed to steer low-income Americans and active-duty military service personnel who were eligible for free tax filing into paying for Intuit's TurboTax product.

b. Implementing software code that was designed to, and did, conceal or impede Class members' access to Intuit's actual free product, TurboTax Freedom Edition.

c. Steering Class members to its commercial TurboTax website by paying for Google AdWords associating that site with keywords likely to be used by consumers searching for Intuit's free tax-filing options, with the result that Class members clicked on links advertising and sending them to Intuit's commercial site.

d. Deliberately failing to notify taxpayers of the availability of TurboTax Freedom Edition even after Intuit received information indicating the taxpayers were eligible to file for free under the Free File Program.

e. Causing confusion by naming the TurboTax commercial website "TurboTax Free Edition" and including a link to that website on the "TurboTax Freedom Edition" website.

f. Preventing Class members from navigating directly via hyperlink from the TurboTax commercial website to the TurboTax Freedom Edition website.

g. Requiring Class members to spend time and effort inputting tax-return information on the TurboTax Free Edition commercial site before informing them at the end of the process that paying a fee would be necessary to file their returns, even when the taxpayer was eligible to file for free with Intuit under the Free File Program.

h. Representing to Class members, after they spent time and effort inputting tax-return information on the TurboTax commercial site, that they needed to pay for upgrades to "accurately" file their return when, in fact, they could and should have been directed to file for free on the Freedom Edition site, which Intuit did not offer as an "upgrade" option.

126. As a direct and proximate result of Intuit's unfair business practices, Plaintiffs and Class members suffered injury in fact and lost money or property, including the amounts they paid to Intuit or that were deducted from their tax refunds as part of the online filing process.

127. Intuit continues to engage in the unfair conduct set forth above. This conduct is thus likely to recur in the absence of a court order.

128. Accordingly, pursuant to Cal. Bus. & Prof. Code § 17203, which permits the Court to make such orders or judgments as may be necessary to prevent the use of any practice which constitutes unfair competition, or as may be necessary to restore money that may have been acquired by means of such unfair competition, Plaintiffs seek the following relief on behalf of themselves and the class: (i) a judicial finding that Intuit's conduct as described herein violates the UCL; (ii) an injunction prohibiting Intuit from engaging in unfair and

deceptive practices to promote its commercial online tax preparation software website while actively concealing the Free File Program, whether by using confusing tradenames such as Free Edition and Freedom Edition, misleading "free to fee" conversion practices, implementing software code or paid advertisements to divert taxpayers eligible to file for free to paid product offerings, or other unfair acts, practices or conduct; and (iii) an order or judgment requiring Intuit to restore all money it acquired from the Class by means of its unlawful conduct.

COUNT II
California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*
Fraudulent Business Acts and Practices and Deceptive Advertising
(*On Behalf of Plaintiffs and the Class*)

129. Plaintiffs incorporate the foregoing paragraphs as if set forth fully herein.

130. Plaintiffs bring this cause of action on behalf of themselves, the members of the Class and the general public.

131. Intuit is a "person" as defined by Cal. Bus. & Prof. Code § 17201.

132. Intuit violated Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL") by engaging in fraudulent business acts and practices and unfair, deceptive, and misleading advertising.

133. Intuit's deceptive advertising and fraudulent conduct was likely to, and did, deceive Plaintiffs and Class members acting reasonably under the circumstances.

134. Intuit's deceptive advertising and fraudulent conduct included affirmative misrepresentations, active concealment of material facts, and partial representations paired with suppression of material facts. Intuit's conduct violative of the fraudulent prong includes at least the following acts and omissions:

a. In a pervasive nationwide advertising campaign, Intuit falsely advertised its TurboTax commercial website as being free, causing confusion and deceiving Class members, eligible for free tax filing, into paying Intuit for tax-filing services.

b. As part of the same campaign, Intuit marketed its tax-filing services as being "FREE Guaranteed" when, far from honoring any such guarantee, Intuit charged a fee to most consumers who attempted to file their taxes on its TurboTax commercial website while

also concealing and diverting consumers from its "Freedom Edition" site, on which Class members could have filed for free.

c. Intuit obscured and failed to disclose the material differences between its commercial TurboTax "Free Edition" site and its actual free-filing site, "Freedom Edition," knowing that consumers would confuse the two similarly named products and pay Intuit for tax-filing services that it could and should have provided for free.

d. Intuit heavily marketed TurboTax "Free Edition" in a manner that made it highly likely to be confused by consumers with TurboTax's "Freedom Edition," including by launching an extensive advertising campaign for "Free Edition" and sending consumers repeated emails marketing "Free Edition" while failing to mention or distinguish it from "Freedom Edition."

e. Intuit inserted code within its Freedom Edition website that prevented that site from appearing in online search results, rendering the site undiscoverable by Class members searching for free tax-filing options on Google or other search engines.

f. Intuit did not inform Class members, whom it knew were eligible for free filing, that they would need to pay to file their returns until shortly before filing—after they had spent time and effort inputting their personal and financial information on the TurboTax commercial site.

g. Intuit misrepresented to Class members, who were eligible for free filing, that a particular paid product of Intuit was the best product for them.

h. Intuit misrepresented to consumers that the only TurboTax online products were TurboTax "Free Edition," "Deluxe," "Premiere," and "Self-Employed" when, in fact, "Freedom Edition" (i.e., the truly free product) constituted a fifth TurboTax product.

135. Further, in relation to active military personnel, Intuit engaged in additional unfair, deceptive, and misleading advertising and fraudulent business acts and practices. Those acts and practices include maintaining a dedicated webpage for service members that only references TurboTax's commercial filing options.

136. As a direct and proximate result of Intuit's deceptive acts, practices, and advertising, Plaintiffs and Class members suffered injury in fact and lost money or property, including the amounts they paid to Intuit or that were deducted from their tax refunds as part of the online filing process.

137. Before purchasing TurboTax e-filing services, each Plaintiff saw representations by Intuit that its tax preparation services were "free." The representations did not distinguish between Intuit's Freedom Edition, which is actually free, and its Free Edition, which is free in only limited circumstances and intended by Intuit to generate revenue. Plaintiffs were exposed to these representations via television commercials, online product descriptions, internet and print advertisements, and/or emails from Intuit. Had Intuit accurately described the nature of its Free Edition tax-filing product and made clear its intent to assess a fee, no Plaintiff would have used TurboTax's commercial website. Instead, each would have filed a tax return through a different means.

138. Given its relative ease of use, Plaintiffs would like to continue self-filing their tax returns using the TurboTax platform. But because of Intuit's conduct, Plaintiffs cannot be assured that Intuit's representations about the cost of its tax-preparation and filing services are accurate. As a result, although each Plaintiff would like to use the TurboTax platform for future tax filing, none of them will do so unless Intuit takes sufficient steps to ensure the accuracy of its representations about the cost of its services.

139. Accordingly, pursuant to Cal. Bus. & Prof. Code § 17203, which permits the Court to make such orders or judgments as may be necessary to prevent the use of any practice which constitutes unfair competition, or as may be necessary to restore money that may have been acquired by means of such unfair competition, Plaintiffs seek the following relief on behalf of themselves and the class: (i) a judicial finding that Intuit's conduct as described herein violates the UCL; (ii) an injunction prohibiting Intuit from engaging in unfair and deceptive practices to promote its commercial online tax preparation software website while actively concealing the Free File Program, whether by using confusing tradenames such as Free Edition and Freedom Edition, misleading "free to fee" conversion practices, implementing

software code or paid advertisements to divert taxpayers eligible to file for free to paid product offerings, or other unfair acts, practices or conduct; and (iii) an order or judgment requiring Intuit to restore all money it acquired from the Class by means of its unlawful conduct.

COUNT III
California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*
Unlawful Business Acts and Practices
(*On Behalf of Plaintiffs and the Class*)

140. Plaintiffs incorporate the foregoing paragraphs as if set forth fully herein.

141. Plaintiffs bring this cause of action on behalf of themselves, the members of the Class and the general public.

142. Intuit violated Cal. Bus. & Prof. Code § 17200, et seq. ("UCL") by engaging in unlawful business acts and practices.

143. Intuit's business practices in question are unlawful and in violation of the UCL, because they violate California's Consumers Legal Remedies Act, Cal. Civ. Code § 1780 *et seq.* ("CLRA").

a. Intuit is a "person" as defined by Civil Code §§ 1761(c) and 1770, and provided "services" as defined by Civil Code §§ 1761(b) and 1770.

b. Plaintiffs and class members are "consumers," as defined by Civil Code §§ 1761(d) and 1770, and engaged in a "transaction," as defined by Civil Code §§ 1761(e) and 1770.

c. Intuit's acts and practices, as described herein, were intended to and did result in the sale of products and services to Plaintiffs and Class members in violation of the CLRA. Intuit violated Civil Code § 1770(a)(5) by representing that goods or services had characteristics that they did not have. Intuit also violated Civil Code § 1770(a)(7) by representing that goods or services were of a particular standard, quality, or grade when they were not. And Intuit violated Civil Code § 1770(a)(9) by advertising goods or services with intent not to sell them as advertised.

d. A reasonable consumer would attach importance to Intuit's misrepresentations and omissions alleged herein and would be induced to act on the

information in making purchase decisions. Intuit's misrepresentations and omissions were likely to and did deceive reasonable consumers who were eligible for Free File into using and paying for Intuit's paid products.

e. As a direct and proximate result of Intuit's CLRA violations, Plaintiffs and Class members have suffered injury and ascertainable losses of money or property through payment for Intuit's products and services that it could and should have provided for free.

144. Intuit's business practices in question are also unlawful, in violation of the UCL, because they violate the Federal Trade Commission Act, 15 U.S.C. § 45, which prohibits "unfair or deceptive acts or practices in or affecting commerce." As described above, Intuit engaged in unfair and deceptive acts and practices affecting commerce that caused substantial injury to consumers.

145. As a direct and proximate result of Intuit's unlawful acts and practices, Plaintiffs and Class members suffered injury in fact and lost money or property, including the amounts they paid to Intuit or that were deducted from their tax refunds as part of the online filing process.

146. Accordingly, pursuant to Cal. Bus. & Prof. Code § 17203, which permits the Court to make such orders or judgments as may be necessary to prevent the use of any practice which constitutes unfair competition, or as may be necessary to restore money that may have been acquired by means of such unfair competition, Plaintiffs seek the following relief on behalf of themselves and the class: (i) a judicial finding that Intuit's conduct as described herein violates the UCL; (ii) an injunction prohibiting Intuit from engaging in unfair and deceptive practices to promote its commercial online tax preparation software website while actively concealing the Free File Program, whether by using confusing tradenames such as Free Edition and Freedom Edition, misleading "free to fee" conversion practices, implementing software code or paid advertisements to divert taxpayers eligible to file for free to paid product offerings, or other unfair acts, practices or conduct; and (iii) an order or judgment requiring Intuit to restore all money it acquired from the Class by means of its unlawful conduct.

COUNT IV
Unjust Enrichment
(*On Behalf of Plaintiffs and the Class*)

147. Plaintiffs incorporate the foregoing paragraphs as if set forth fully herein.

148. Plaintiffs bring this cause of action on behalf of themselves and members of the Class.

149. Plaintiffs and Class members conferred a benefit on Intuit by paying Intuit for online tax-preparation and filing services.

150. Intuit acted wrongfully by (a) acting in a coordinated manner to suppress free filing; (b) actively concealing its free online tax-preparation and filing services from the people for whom those services were intended; and (c) marketing its services in a deceptive and misleading manner. Among other deception and wrongdoing, Intuit manipulated internet search results to steer Plaintiffs and Class members to its paid website, blocked their ability to navigate to Intuit's actual free-filing site once they clicked on Intuit's paid website, falsely marketed its paid services as being free, and purposely did not inform low-income individuals and active military personnel of their eligibility to file their tax returns at no cost.

151. Intuit's scheme to divert free-file eligible consumers and active military personnel to its paid website, and to induce their payments for services that Intuit could and should have provided at no cost, has caused Intuit to profit.

152. Based on the foregoing, retention by Intuit of its ill-gotten gain is unjust and inequitable.

153. Plaintiffs, on behalf of themselves and the Class, seek restitution, restitutionary disgorgement, and all other appropriate relief permitted by the law of unjust enrichment, including reasonable attorneys' fees and costs of suit.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the proposed Class, respectfully pray for judgment as follows:

A. For an order certifying this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and (b)(3);

B. For an order appointing Plaintiffs as Class Representatives and Interim Class Cousel as Class Counsel pursuant to Federal Rule of Civil Procedure 23(g);

C. For an order declaring that Intuit's conduct as alleged herein constitutes unfair competition;

D. For an order declaring that Intuit has unlawfully profited from its unjust and inequitable conduct as alleged herein;

E. For an order enjoining Intuit from engaging in all manner of unfair, unlawful, deceptive, misleading or otherwise wrongful acts, omissions or practices, in connection with its participation in the Free File Program, that threaten future injury to the Class and/or the general public, including, without limitation, promoting its commercial tax preparation website to taxpayers eligible to file for free while concealing its actual free file website and the Free File Program, whether by implementing software code or advertising to divert such taxpayers to its paid offerings, using confusing tradenames such as Free Edition and Freedom Edition, or engaging in any other unlawful "free to fee" conversion practices, or through engaging in any other wrongful acts, omissions or practices.

F. For an order requiring restitution of all monies paid to Intuit by any person who qualified for free tax-return filings pursuant to the Free File Program and who paid money to Intuit to file a return, regardless of which TurboTax program or software the person used in filing;

G. For an order awarding Plaintiffs and Class members pre-judgment and post-judgment interest;

H. For an order awarding Plaintiffs and Class members reasonable attorneys' fees, costs, and expenses; and

I. For such other relief as the Court may deem just and proper, including any order or judgment as may be necessary to prevent the use of any practice alleged herein found to consittute ufnair competition or unjust or inequitable conduct, or as may be necessary to resotre money that may have been acquired by means of unfair compeition or unjust and inequitable conduct.

DEMAND FOR JURY TRIAL

Plaintiffs assert only claims for equitable and injunctive relief at this time. Plaintiffs respectfully demand a trial by jury only as to any claim deemed so triable by the Court for any reason.

Dated: September 13, 2019

Respectfully submitted,

/s/ *Daniel C. Girard*

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Co-Lead Interim Counsel

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all registered users.

/s/ Daniel C. Girard

Daniel C. Girard

Attachment D

Postman Declaration

FTC Docket No. 9408

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Attorneys for Intervenors

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE INTUIT FREE FILE LITIGATION

This Document Relates to: All Actions

Case Nos.: 3:19-cv-02546-CRB

DECLARATION OF WARREN POSTMANT IN SUPPORT OF MOTION TO INTERVENE AND IN OPPOSITION TO PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Judge: Hon. Charles R. Breyer
Date: December 17, 2020
Time: 10:00 a.m.
Courtroom: 6 – 17th Floor

I, Warren Postman, declare based on personal knowledge as follows:

1. I am a Partner at Keller Lenkner LLC, counsel for Intervenors in this matter.

2. I have personal knowledge of the facts stated herein, and if called upon as a witness, I could and would testify competently thereto.

3. This declaration is submitted in support of the Motion to Intervene and in Opposition to Preliminary Approval of Class Action Settlement.

A. Over 100,000 Intuit Customers, Including Intervenors, Have Sought Individual Arbitration Against Intuit.

4. Based on Intuit's representations to this Court, before an Intuit customer uses TurboTax's online tax filing services, she must click a button stating that she agrees to the TurboTax Terms of Service. Those Terms include an arbitration agreement. A true and correct copy of the arbitration agreement included in Intuit's Terms of Service for TurboTax Online Tax Preparation Services – Tax Year 2018 is attached as Exhibit A. That agreement is materially similar to the agreements for each of the tax years covered by the proposed settlement agreement.

5. On October 1, 2019, and January 28, 2020, approximately 9,000 current and former Intuit customers, including Intervenors, filed demands for individual arbitration against Intuit with the American Arbitration Association ("AAA"), the organization Intuit's Terms of Service states must administer arbitration. On March 11, 2020, approximately 31,000 current and former Intuit customers filed demands for individual arbitration against Intuit with the AAA. On October 9, 2020, approximately 17,000 Intuit customers filed demands for individual arbitration against Intuit with the AAA. On October 23, 2020, approximately 70,000 Intuit customers filed demands for individual arbitration against Intuit with the AAA.

6. Each of the above claimants (the "Arbitration Claimants") has individually retained Keller Lenkner to bring claims against Intuit and has executed an individual engagement agreement with the firm.

7. Each Arbitration Claimant's arbitration demand was submitted on the AAA's official demand form, contains the Arbitration Claimant's individual contact information, describes the Arbitration Claimant's individual consumer-fraud and federal antitrust claims, and requests

individual relief. Arbitration Claimants also seek public injunctive relief, which Intuit has represented to this Court may be pursued in arbitration. See Intuit's Mot. to Compel Arbitration at 17, Dkt. 97. A true and correct copy of one Intervenor's arbitration demand is attached as Exhibit B.[1]

8. Each Arbitration Claimant is pursuing consumer-fraud claims against Intuit under the consumer fraud laws of the Claimant's home state and/or the consumer-fraud laws of California, depending on which law is most favorable to the Claimant.

9. The average amount in controversy pursued by the Arbitration Claimants—reflecting the statutory penalties, statutory damages multiple, punitive damages, and/or attorneys' fees authorized by the Sherman Act and the consumer fraud statute applicable to each Claimant's claims—is approximately $2,700.

10. The AAA assigns an individual arbitration a case number only after both sides have paid their initial filing fees. The AAA has not yet issued a case number for the vast majority of Arbitration Claimants.

11. A true and correct copy of the AAA Consumer Arbitration Fee Schedule currently in effect is attached as Exhibit C. The current fee schedule took effect on November 1, 2020. The fee schedule in place before that date is attached as Exhibit D. Under the former fee schedule, a consumer claimant was required to submit a $200 initial filing fee (or a hardship-based fee waiver request), and the respondent was required to pay a $300 initial filing fee. Under the new fee schedule, the initial filing fee is reduced incrementally if a large number of similar arbitrations are filed against the same defendant. Accordingly, for Arbitration Claimants' arbitrations, the claimant will owe an initial filing fee of $50 and Intuit will owe an initial filing free of $75.

12. Approximately 37,000 Arbitration Claimants who filed demands in October 2019, January 2020, and March 2020 have satisfied their AAA filing-fee obligations by submitting their filing fee or a hardship-based fee waiver. Keller Lenkner has advanced filing fees to the AAA on

[1] This sample demand has been redacted to keep personal identifying information, including the Claimant's home address, email address, and phone number confidential.

behalf of its clients totaling over $8 million. Upon implementing its new fee schedule, AAA applied it retroactively to some claims, resulting in a refund of about half of those fees.

13. Intuit has paid its share of those Arbitration Claimants' filing fees "under protest."

14. Under the AAA's Consumer Arbitration Fee Schedule and pursuant to the AAA's administrative determinations, Intuit must pay approximately $11 million in case management fees ($1,400 per Claimant) in December 2020, for approximately 7,800 Arbitration Claimants' arbitrations to proceed.

15. Intuit must pay approximately $12 million in arbitrator compensation fees ($1,500 per Claimant) for those same arbitrations in January and February 2021.

16. After tens of thousands of Arbitration Claimants filed their individual demands for arbitration, Intuit and Keller Lenkner scheduled a mediation for July 30, 2020, to discuss resolving Arbitration Claimants' claims.

17. Intuit and Keller Lenkner agreed that before the mediation, Arbitration Claimants would present to Intuit an initial settlement demand.

18. After receiving the initial settlement demand, Intuit withdrew from the mediation because it believed the parties were "too far apart to have any meaningful discussion." A true and correct copy of the email from Intuit's counsel withdrawing Intuit from the mediation is attached as Exhibit E.

19. After Intuit withdrew from the mediation, it made individual settlement offers to 101 Arbitration Claimants. Twenty-three Arbitration Claimants accepted their offers. Each Claimant's offer reflected Intuit's calculation of the Claimant's full out-of-pocket damages for each year that Claimant had a claim against Intuit. *See* Declaration of Stephen M. Bundy, ¶ 3.f, attached as Exhibit F. Many Arbitration Claimants are seeking damages for at least three years of violations. Thus, the settlement offers for those Claimants ranged in amount from approximately six to 15 times the amount of money Intuit and interim class counsel have calculated each class member is likely to receive in the proposed settlement.

B. Arbitration Claimants Have Strong Claims on the Merits.

20. Arbitration Claimants' claims are based on deceptive conduct by Intuit that has been

widely documented. The May 2, 2019, ProPublica article that first triggered widespread scrutiny of Intuit's conduct, *TurboTax And H&R Block Saw Free Tax Filing As A Threat – And Gutted It*, is available at http://zpr.io/H3sAj.

21. According to Intuit's press releases, TurboTax, Intuit's online tax preparation and filing product, generated more than $2.2 billion in revenue in fiscal year 2019. TurboTax reportedly occupies as much as two-thirds of the U.S. online tax filing market. *See* Paul Kiel and Justin Elliott, *TurboTax's Bid to Buy Free Tax Prep Competitor Might Violate Antitrust Law, Experts Say*, ProPublica (Feb. 28, 2020), available at https://www.propublica.org/article/turbotax-bid-to-buy-free-tax-prep-competitor-might-violate-antitrust-law-experts-say.

22. Intuit is a member of the Free File Alliance (now called Free File, Inc.), a consortium of private tax preparation and filing companies. *See* Free File homepage, available at https://freefilealliance.org/. In 2002, the Alliance promised to provide free online tax filing to low-income taxpayers—at least 60% of the population—in exchange for the IRS agreeing not to provide competing online filing services (the "Agreement"). *See* 2002 Free On-Line Electronic Filing Agreement. Under this Agreement, Intuit created free tax filing software that would allow eligible consumers to file complex federal and state returns electronically for no charge. True and correct copies of the Agreements and Memoranda of Understanding between the Free File Alliance and the IRS are available at https://www.irs.gov/e-file-providers/about-the-free-file-alliance.

23. Each Arbitration Claimant alleges that while Intuit created a free tax filing service for low- and middle-income taxpayers, it also steered these consumers away from the free option and toward its paid products. It did this primarily by introducing a "free" product called the "Free Edition" (the product it created with the Alliance is called the "Freedom Edition"). While the "Freedom Edition" was truly free for eligible filers, Intuit's "Free Edition" was free only for truly simple tax returns. For example, consumers could not use Intuit's Free Edition if they were self-employed or received unemployment, lacked health insurance, claimed a student loan deduction, had business income and expenses, had capital gains or losses, and so on. These consumers, including Intervenors, were lured to Intuit's website with promises of its Free Edition, only to learn later that they were ineligible for that free product and would have to pay to use TurboTax. But in

fact, those consumers could still have used TurboTax's Freedom Edition as long as they met the basic eligibility requirements. Intuit took steps to mask from consumers the fact that they could have filed for free using TurboTax's Freedom Edition. This deception was carefully designed and fully intentional. A true and correct copy of one Intervenor's arbitration demand, which describes Arbitration Claimants' allegations in greater detail, is attached as Exhibit B.

24. At least eight class-action lawsuits have been filed against Intuit, alleging substantially similar consumer fraud claims to those claims Plaintiffs seek to arbitrate against Intuit. The class actions were consolidated before this Court.

25. Intuit successfully compelled those class actions to individual arbitration. In moving to compel arbitration, Intuit asserted that "the Terms clearly and unmistakable required each Plaintiff to resolve any dispute they have with Intuit through individual arbitration." Intuit's Mot. to Compel Arbitration at 2, ECF 97. The Ninth Circuit's decision holding that the class actions must be compelled to arbitration can be found at *Dohrman v. Intuit Inc.*, 823 F. App'x 482, 483–85 (9th Cir. 2020).

26. Several state and local governments and agencies are reportedly investigating Intuit's deceptive conduct alleged in Defendants' arbitration demands. *See* Justin Elliott, *TurboTax Tricked Customers Into Paying to File Taxes. Now Several States Are Investigating It.*, ProPublica (Dec. 19, 2019), available at http://zpr.io/H3YNh. The City of Los Angeles and Santa Clara County attorneys have sued Intuit for that conduct, on behalf of California residents. *See generally TurboTax Free File Cases*, No. JCCP5067 (Cal. Super Ct. Nov. 25, 2019). At least one state—New York—has already determined that TurboTax used "unfair and abusive practices" to channel consumers eligible for free tax filing to its paid products. *See* N.Y. Dep't Fin. Servs., *Report on Investigation of Free Tax Preparation and Filing Servs.* at 17 (July 2020). A true and correct copy of that agency's report is available at http://zpr.io/H3YNA.

27. The Federal Trade Commission is reportedly investigating "whether Intuit has engaged in deceptive or unfair acts or practices with respect to the marketing or advertising of online tax preparation products"—the very conduct alleged in the Arbitration Claimants' arbitration demands. The Commission recently rejected Intuit's petition to narrow the scope of its

investigation. A true and correct copy of the Commission's order is available at http://zpr.io/H3Y5T.

C. Keller Lenkner is Equipped to Pursue Individual Arbitration for Each Client.

28. Keller Lenkner is committed to, and capable of, litigating Arbitration Claimants' claims to a successful conclusion. Keller Lenkner has invested millions of dollars in the client management systems, document review and management systems, personnel, and other infrastructure necessary to litigate a large number of claims simultaneously. The firm also regularly hires attorneys on a contract basis from staffing agencies that are capable of providing hundreds of attorneys and paralegals if necessary. And Keller Lenkner regularly enters into co-counsel relationships with other law firms; the firm currently has co-counsel relationships in active matters with dozens of law firms. The firm has devoted its resources to representing Arbitration Claimants—and will continue to do so—because it believes in the merits of their claims.

29. Over the last two years, Keller Lenkner has secured more than $190 million in recoveries for more than 100,000 individual clients. In many of those cases, class-action attorneys brought claims similar to those of Keller Lenkner's clients, and those cases resulted in class settlements. The amounts Keller Lenkner's clients received, after pursuing their individual claims, were often 10 to 20 times higher than the amounts paid to participating class members without individual representation.

30. Keller Lenkner regularly communicates with each client to provide updates on his or her case. If this Court grants preliminary approval of a class settlement that includes Arbitration Claimants, Keller Lenkner will send every client the Court-approved settlement notice. Keller Lenkner will also update each client individually about the status of his or her individual arbitration. And Keller Lenkner will individually advise each client on how to proceed with the class settlement and ask the client to decide whether or not to opt out of the settlement.

31. If a settlement is granted preliminary approval and a Keller Lenkner client decides to participate in the class settlement, Keller Lenkner will assist that client in submitting a claim form to the settlement administrator. Keller Lenkner will also waive any right to collect attorneys' fees from that client.

32. If a Keller Lenkner client decides to opt out of the class settlement and instead pursue individual arbitration, Keller Lenkner would, if allowed, communicate that client's individual opt-out request to the Court or the settlement administrator.

33. On November 6, 2020, Intuit and interim class counsel filed a joint case management statement in this action, announcing that they had scheduled a mediation for November 11, 2020, to discuss resolving class members' claims. *See* ECF 157.

34. Based on that statement, Keller Lenkner understood that the mediation would involve the potential resolution of Arbitration Claimants' claims.

35. On November 8, 2020, I emailed counsel for Intuit and interim class counsel to request that Keller Lenkner be allowed to participate in the November 11 mediation "so that the KL arbitration clients will have their distinct interests protected by their counsel of choice."

36. On November 9, 2020, Intuit's counsel responded to my email and refused to allow Keller Lenkner to participate in the November 11 mediation, stating that "Judge Breyer appointed Interim Class Counsel to represent the interests of the putative class and to negotiate on their behalf. Our mediation on Wednesday is with the lawyers the court appointed for that purpose." Intuit's counsel also requested that I offer dates and times "to schedule a call so we can explore whether it would be productive to resume [mediation] discussions." After I provided my availability, Intuit's counsel never responded.

37. True and correct copies of emails between me, Intuit's counsel, and interim class counsel regarding the November 11 mediation are attached as Exhibit G.

38. When interim class counsel filed the motion for preliminary settlement approval, Keller Lenkner learned that interim class counsel and Intuit had entered into a confidential side agreement under which Intuit has a right to terminate the settlement if a certain number of class members opt out.

39. On November 19, 2020, my colleague emailed interim class counsel and counsel for Intuit, copying me, to request that Keller Lenkner be allowed to review the confidential agreement so that we could "better understand the arrangement [interim class counsel and Intuit] negotiated for our clients." My colleague offered to sign a protective order to maintain the agreement's

confidentiality.

40. On November 20, 2020, interim class counsel responded to my colleague's email and refused to send Keller Lenkner the side agreement.

41. True and correct copies of emails between my colleague, Intuit's counsel, and interim class counsel regarding the side agreement are attached as Exhibit H.

D. Intuit Has Resisted Arbitration and Ignored AAA's Determinations.

42. Both before and after Intuit paid its share of Arbitration Claimants' filing fees, Intuit sought to delay Arbitration Claimants' arbitrations and convince the AAA to decline to administer those arbitrations.

43. In a series of letters to AAA, Intuit objected to:

- The method by which Arbitration Claimants filed their demands and the form of those demands. *See* Intuit's letters of Feb. 10; Mar. 13; Mar. 31.
- The merits of Arbitration Claimants' claims. *See* Intuit's letters of Feb. 10; Mar. 13; May 12.
- The amount of fees Intuit must pay to proceed with Arbitration Claimants' arbitrations, as required by Intuit's arbitration agreement and the AAA rules the agreement incorporates. *See* Intuit's letters of Feb. 10; Feb. 18; Mar. 13; May 12.
- The AAA's ability to administer Arbitration Claimants' arbitrations. *See* Intuit's letters of Feb. 10; May 12.
- The AAA's neutrality. *See* Intuit's letters of Feb. 18; Mar. 13; Apr. 20; Apr. 29; May 12; June 10.

44. Intuit also claimed that its Terms of Service and the AAA's rules granted it the right to elect to face Arbitration Claimants' claims in small-claims court, rather than in arbitration. *See* Intuit's letters of Feb. 10; Feb. 18; Mar. 13; Mar. 31; Apr. 20; May 12; July 31.

45. The AAA reviewed the parties' disputes and determined five separate times—on March 6, 2020, April 9, 2020, April 24, 2020, May 27, 2020, and August 14, 2020—that Intuit's arguments raise questions of arbitrability that must be decided by individual arbitrators, in

accordance with Intuit's Terms of Service and the AAA rules that the Terms incorporate. The AAA therefore proceeded with the administration of Arbitration Claimants' arbitrations, so that it could appoint an arbitrator to each Claimant's case.

46. Intuit also requested that the AAA submit the parties' small-claims court dispute to the AAA's Administrative Review Counsel ("ARC"). *See* Intuit's letter of Mar. 13.

47. The AAA declined to submit the parties' small-claims court dispute to the ARC because the ARC only reviews "certain administrative decisions arising in the AAA's large, complex domestic caseload,"[2] and the AAA determined that each Claimant's individual arbitration is not large or complex. *See* AAA's letters of Apr. 9; Apr. 24.

48. Arbitration Claimants declined to submit the parties' small-claims court dispute to a single arbitrator, because a single arbitrator's decision governing all Arbitration Claimants' claims would violate the arbitration agreement's prohibition of representative actions. *See* Terms § 14.

49. True and correct copies of relevant correspondence between the parties and the AAA's administrative determinations between February 10, 2020, and August 14, 2020, are attached as Exhibit I.

50. After the AAA repeatedly rejected Intuit's attempts to stop Arbitration Claimants' arbitrations, Intuit sued several thousand Arbitration Claimants in California Superior Court. In that action Intuit sought (i) a declaration that Intuit may unilaterally elect to force Arbitration Claimants' claims out of arbitration and into small claims court, (ii) an order enjoining Arbitration Claimants' arbitrations, (iii) a declaration that Arbitration Claimants seek "de facto" class or representative arbitration barred by Intuit's Terms of Service, and (iv) a declaration that California Senate Bill 707, which imposes sanctions on a "drafting party" that fails to pay the fees necessary to proceed under a consumer arbitration agreement, is preempted by the Federal Arbitration Act. *See* Am. Compl., *Intuit Inc. v. 9,933 Individuals*, No. 20STCV22761 (L.A. Super. Ct. Oct. 23,

[2] *See* ARC Review Standards, a*vailable at* https://kl.link/37LerR7; *see also* ARC Overview and Guidelines, available at https://kl.link/2YkSfde.

2020).

51. On September 2, 2020, Intuit sought a preliminary injunction from the Superior Court staying Arbitration Claimants' arbitrations. *See* Mot. for Stay of Arbitration, *9,933 Individuals* (Sept. 2, 2020).

52. On October 8, 2020, the Superior Court denied Intuit's motion and held that Arbitration Claimants' arbitrations must proceed in accordance with the AAA's rules and Intuit's Terms of Service. A true and correct copy of the Court's decision is attached as Exhibit J.

53. On October 26, 2020, Intuit appealed the Superior Court's denial of its motion for a preliminary injunction, to the California Court of Appeal, Second Appellate District.

54. On October 27, 2020, Intuit filed a petition for a writ of supersedeas from the California Court of Appeal. Intuit's petition seeks an order staying Arbitration Claimants' arbitrations pending resolution of Intuit's appeal or, in the alternative, an order enjoining enforcement of California Senate Bill 707 against Intuit. *See* Petition for Writ of Supersedeas, *Intuit Inc. v. 9,933 Individuals*, No. B308417 (Cal. App. 2d. Oct. 27, 2020). As of the filing of this declaration, Intuit's petition is pending before the Court of Appeal.

55. In October 2020, Keller Lenkner learned that Intuit was negotiating a class-action settlement that would attempt to resolve Arbitration Claimants' claims in court without their affirmative consent, without the participation of their chosen counsel, and in violation of Intuit's Terms of Service.

56. On October 28, 2020, Keller Lenkner filed a motion for a preliminary injunction in the Superior Court on behalf of Arbitration Claimants, seeking an order enjoining Intuit from entering into a class-action settlement that includes Keller Lenkner clients who are currently engaged in arbitration against Intuit and that burdens their right to opt out of the settlement. The motion was scheduled for a hearing on November 20, 2020. *See generally* Mot. Prelim. Inj., *9,933 Individuals* (Oct. 28, 2020); Intuit's Opp'n, *9,933 Individuals* (Nov. 6, 2020). A true and correct copy of the Declaration of Stephen M. Bundy in support of Intuit's opposition to Arbitration Claimants' motion for a preliminary injunction is attached as Exhibit F.

57. After Arbitration Claimants filed their motion for a preliminary injunction, but

before the Superior Court ruled on the motion, Intuit signed the proposed settlement agreement and interim class counsel filed their motion for preliminary settlement approval before this Court.

58. In Arbitration Claimants' reply brief in support of their motion for a preliminary injunction, they sought a declaration of their rights, under Intuit's Terms of Service, to avoid having their claims resolved in court. *See* Reply Supp. Prelim. Inj., *9,933 Individuals* (Nov. 13, 2020).

59. On November 20, 2020, the Superior Court denied Arbitration Claimants' motion, stating that Intuit's signing of the proposed settlement agreement "mooted out [Arbitration Claimants'] original request." The court also stated that it:

> [C]annot and will not interfere with Judge Breyer's work on this class action.· I can't tell him who can be part and who cannot be part.· I can't tell him what counsel has to be contacted.· And I can't tell him, you know, whether someone can opt-out.· I'm sure he knows that.· You know, the class action is in very capable hands.· And it doesn't need my interference and I'm not about to interfere.

60. A true and correct copy of the transcript of the November 20, 2020 Superior Court hearing is attached as Exhibit K.

61. As of the filing of this declaration, the Superior Court had not issued a written decision.

62. When an individual files his or her taxes online using TurboTax, TurboTax invites that individual to submit an electronic signature to authenticate his or her tax filing. *See* TurboTax, *E-file: Income Tax Return Electronic Filing*, available at https://turbotax.intuit.com/tax-tips/e-file/e-file-income-tax-return-electronic-filing/L9DnoQ39y (last visited Nov. 29, 2020).

63. Attached as Exhibit L is a true and correct copy of the November 26, 2019, San Francisco Superior Court order denying preliminary approval of a class-action settlement in *Rimler v. Postmates, Inc.*, No. CGC-18-567868.

64. Attached as Exhibit M is a true and correct copy of the April 24, 2020, San Francisco Superior Court tentative ruling denying preliminary approval of a class-action settlement in *Marciano v. DoorDash Inc.*, No. CGC-18-567869.

65. Attached is Exhibit N is a true and correct copy of the transcript of this Court's

November 13, 2020, case management conference.

I affirm that the foregoing is true under penalty of perjury under the laws of the United States and the State of California.

Signed on November 30, 2020 in Arlington, Virginia.

/s/Warren Postman
Warren Postman

Exhibit A

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INTUIT TERMS OF SER ICE FOR TURBOTAX ONLINE TAX PREPARATION SER ICES - T AX YEAR 2018

Thank you for selecting the Services of" ed by Intuit Consumer Gr"up Inc. and/or its subsidiaries and affiliates (r" d to as "Intuit", "we", "our", or "us"). R" view" these T"ms of Service ("Agr" ment") thor" oughly. This Agr"ment is a legal agr" ment between you and Intuit. By clicking "I Agr", " indicating acceptance" lectr"onically, or by, installing, accessing or using the Services, you agr" to this Agr" ment. If you do not agr" to this Agr" ment, then you may not use the" Services."

Section A

L TERMS

1. A MENT

This Agr"ment describes the terms governing your use of the Intuit online services pr" ovided to you on this website, including Content (defined below), updates" and new r"le"ases (collectively, the "Services"). This Agr"ment includes by r" nce:"

- Intuit's P"ivacy Statement. Click here. (https://security.intuit.com/index.php/privacy)"
- Additional terms and conditions, which may include those fr"m third parties."
- Any terms pr"vided separately to you for the Services, including pr"duct or pr"gram terms, ordering, activation, payment terms, etc."

2. YOUR RIGHTS TO USE THE SERVICES

2.1 The Services ar" pr"otected by copyright, trade secr"t, and other intellectual pr"operty laws. You ar" only gr"anted the right to use the Services and only for the" purposes described by Intuit." Intuit reserves all other rights in the Services. Until termination of this Agr"ment and as long as you meet any applicable payment obligations and comply with this Agr"ment, Intuit gr" ants to you a personal, limited, nonexclusive, nontransferable right and license to use the Services."

2.2 You agr" not to use, nor permit any thir" d party to use, the Services in a manner that violates any applicable law, regulation or this Agreement. You agr" you" will not:"

- P"ovide access to or give any part of the Services to any third party."
- R"pr"oduce, modify, copy, sell, trade, lease, r"nt or r" ll the Services."
- Decompile, disassemble, or r"verse engineer the Services."
- Make the Services available on any file-sharing or application hosting service."

3."PAYMENT. For Services of" ed on a payment or subscription basis, the following terms apply, unless Intuit or its third party affiliate notifies you otherwise in" writing. This Agr"ment also incorpor" ates by r" nce and includes pr"ogram ordering and payment terms pr"vided to you on the website for the Services:"

1. "Payments will be billed to you in U.S. dollars, and your account will be debited when you subscribe and pr"vide your payment information, unless stated" otherwise in the pr"gram ordering or payment terms on the website for the Services."
2. You must pay with one of the following:"
    1. A valid cr"dit car"d acceptable to Intuit;"
    2. A valid debit card acceptable to Intuit;"
    3. Sufficient funds in a checking or savings account to cover an electronic debit of the payment due; " or"
    4. By another payment option Intuit pr"vides to you in writing."
3. If your payment and r"gistr"ation information is not accurate, curr"nt, and complete and you do not notify us pr"omptly when such information changes, we" may suspend or terminate your account and r" any use of the Services."
4. If you do not notify us of updates to your payment method (e.g., cr"dit car"d expiration date), to avoid interruption of the Services, we may participate in" pr"grams supported by your card provider (e.g., updater services, r"curring billing pr"ograms, etc.) to try to update your payment information, and you" authorize us to continue billing your account with the updated information that we obtain."
5. Intuit will automatically renew your monthly, quarterly, or annual Services at the then-curr"nt r"ates, unless the Services subscription is cancelled or terminated" nder this Agr" ment."
6. Additional cancellation or r"newal terms may be pr"ovided to you on the website for the Services."

4.yUSE WITH YyUR MOBILE DEVICE

Use of these Services may be available through a compatible mobile device, Internet access and may require software.yYyou agree that you are solely responsibley for these requirements, including any applicable changes, updates and fees (including message and data rates) as well as the terms of your agreement with youry mobile device and telecommunications provider.y

INTUIT MAKES NO WARRANTIES OR REPRESENTATyIONS OF ANY KIND, EXPRESS, SyAyUTy OR IMPLIED AS Ty:

1. TyHE AVAILABILITyOF TELECyOMMUNICAyJON SERyVICES FROM YyUR PROyVIDER AND ACCESS TyTHE SERyVICESyAyANY TIME OR FROM ANY LyOCAyJON;y
2. ANY LyOSS, DAMAGE OR SECURITyINTRUSION OF THE TELECyOMMUNICAyJON SERyVICES; ANDy
3. ANY DISCLySURE OF INFORMAy ION Ty THIRD P ARyTIES OR FAILURE TyO TRANSMIT ANY DAyA, CyOMMUNICAyJONS OR SETTINGS CyNNECy ED WITHy E SERy VICES.

5.y UR PERSONAL INFORMAy ION. Yyou can view Intuit's Privacy Statement provided with the Services and on the website for the Services. Yyou agree to they applicable Intuit Privacy Statement and any changes published by Intuit.y ou agree that Intuit may use and maintain your data according to the Intuit Privacy Statement, as part of the Services.yThyis means that Intuit may use your data to improve the Services or to design promotions andyto develop new products ory services. Intuit is a global company and may access or store personal information in multiple countries, including countries outside of your own country to they extent permitted by applicable law.y

6. CyNTENT AND USE OF THE SERyVICESy

6.1 Ryesponsibility for Content and Use of the Services.y

a. Content includes any data, information, materials, text, graphics, images, music, software, audio, video, works of authorship of any kind, that are uploaded,y transmitted, posted, generated, stored or otherwise made available through the Services ("Content"), which will include without limitation any Content that accounty holders (including you) provide through your use of the Services.yBy making your Content available through your use of the Services, you grant Intuit a worldwide, royalty-free, non-exclusive license to host and use your Content. Archive your Content frequently. Yyou are responsible for any lost or unrecoverable Content. Yyouy must provide all required and appropriate warnings, information and disclosures. Intuit is not responsible for any of your Content that you submit through they Services.y

b. Yyou agree not to use, nor permit any third party to use, the Services to upload, post, distribute, link to, publish, reproduce, engage in, promote or transmit any ofy the following:y

1. Illegal, fraudulent, defamatory, obscene, pornographic, profane, threatening, abusive, hateful, harassing, offensive, inappropriate or objectionableyinformation or communications of any kind, including without limitation conduct that is excessively violent, incites or threatens violence, encouragesy "flaming" others or criminal or civil liability under any local, state, federal or foreign law;y
2. Content that would impersonate someone else or falsely represent your identity or qualifications, or that may constitute a breach of any individual's privacy;yis illegally unfair or deceptive, or creates a safety or health risk to an individual or the public;y
3. Except as permitted by Intuit in writing, investment opportunities, solicitations, chain letters, pyramid schemes, other unsolicited commercial communicationyor spamming or flooding;y
4. Virus, Tyrojan horse, worm or other disruptive or harmful software or data; andy
5. Any Content that you do not own or have the right to use without permission from the intellectual property rights owners thereof.y
6. y 2. y estricted Use of the Services.y

1. you shall not, and shall not permit any users of the Services or any other party to, engage in, solicit, or promote any activity that is objectionable or may beyillegal, violates the rights of others, is likely to cause notoriety, harm or damage to the reputation of Intuit or could subject Intuit to liability to third parties,yincluding: (i) unauthorized access, monitoring, interference with, or use of the Services or third party accounts, data, computers, systems or networks; (ii)yinterference with others' use of the Services or any system or network, including mail bombing, broadcast or denial of service attacks; (iii) unauthorizedy collection or use of personal or confidential information, including phishing, pharming, spidering, and harvesting; (iv) viewing or other use of any Contenty that, in Intuit's opinion, is prohibited under this Agreement; (v)yany other activity that places Intuit in the position of fostering, or having potential or actual liability for, illegal activity in any jurisdiction; or (vi) attempting to probe, scan, penetrate or test the vulnerability of an Intuit system or network or to breachy Intuit's security or authentication measures, whether by passive or intrusive techniques.yIntuit reserves the right to not authorize and may terminate your use of the Services based on reasonable suspicion of your activities, business, products or services that are objectionable or promote, support or engage in any of the restricted uses described above.y

6.3 Community forums. Thye Services may include a community forum or other social features to exchange Content and information with other users of the Servicesy and the public. Intuit does not support and is not responsible for the Content in these community forums.yPlease use respect when you interact with other users. Do not reveal information that you do not want to make public. Users may post hypertext links to content of third parties for which Intuit is not responsible.y

6.4 Intuit may freely use feedback you provide. Yyou agree that Intuit may use your feedback, suggestions, or ideas in any way, including in future modifications ofy the Services, other products or services, advertising or marketing materials. Yyou grant Intuit a perpetual, worldwide, fully transferable, sublicensable, non-y revocable, fully paid-up, royalty free license to use the feedback you provide to Intuit in any way.y

6.5 Intuit may monitor Content. Intuit may, but has no obligation to, monitor access to or use of the Services or Content or to review or edit any Content for they purpose of operating the Services, to ensure compliance with this Agreement, and to comply with applicable law or other legal requirements. We may disclose any information necessary to satisfy our legal obligations, protect Intuit or its customers, or operate the Services properly. Intuit, in its sole discretion, may refuse to post,y remove, or refuse to remove, or disable any Content, in whole or in part, that is alleged to be, or that we consider to be unacceptable, undesirable, inappropriate,y or in violation of this Agreement.y

7. ADDITIONAL TERMSy

7.1 Intuit does not give prfessional advice. Unless specifically included with the Services, Intuit is not in the business of prviding legal, financial, accounting, tax,m healh carm,rmal estate or other prfessional services or advice. Cnsult the services of a competent prfessional when you need this type of assistance.m

7.2 Wmay tell you about other Intuit Services. Yrou may be offermother services, prm ucts, or prm tions by Intuit ("Intuit Services"). Additional terms andm conditions and fees may apply. With some Intuit Services you may upload or enter data frmyour account(s) such as names, addrm and phone numbers, purchases, etc., to the Internet.mYou grant Intuit permission to use information about your business and exprience to help us to prvide the Intuit Servicesm (including other prducts and services you might be interm ted in), to develop new prm ucts and services, and to enhance the Services.m

7.3 Communications. Intuit may be rquirred by law to send you com unications about the Services or thirdhparty prducts. Ymu agrree that Intuit may send thesem com unications to you via email or by posting them on our websitesm

7.4 Yrou will manage your passwordls and accept updates. Yrou armrmponsible for securmly managing your passwrm(s) for the Services and to contact Intuit if youm become awareof any unauthorized access to your account. The Services may periodically be updated with tools, utilities, imprvements, thirrd party applications, orm general updates to imprve the Services. Ymu agrm to rreceive these updates.m

8. DISCLAIMER OF WARRANTIESm

8.1 YOUR USE OF THE SERVICES, SOFTWARE, AND CONTENT IS ENTIRELY AT YOUR OWN RISK. EXCEPT AS DESCRIBED IN THIS AGREEMENT, THE SERVICESm ARE PROVIDED "AS IS." TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, INTUIT, ITS AFFILIATES, AND ITS AND THEIR THIRD PARTY PROVIDERS,m LICENSORS, DISTRIBUTORS OR SUPPLIERS (COLLECTIVELY, "SUPPLIERS") DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTYm THAT THE SERVICES ARE FIT FOR A PARTICULAR PURPOSE, TITLE, MERCHANTABILITY, DATA LOSS, NON-INTERFERENCE WITH OR NON-INFRINGEMENT OFm ANY INTELLECTUAL PROPERTY RIGHTS, OR THE ACCURACY, RELIABILITY, QUALITY OF CONTENT IN OR LINKED TO THE SERVICES. INTUIT AND ITS AFFILIATESm AND SUPPLIERS DO NOT WARRANT THAT THE SERVICES ARE SECURE, FREE FROM BUGS, VIRUSES, INTERRUPTION, ERRORS, THEFT OR DESTRUCTION. IF THEm EXCLUSIONS FOR IMPLIED WARRANTIES DO NOT APPLY TO YOU, ANY IMPLIED WARRANTIES ARE LIMITED TO 60 DAYS FROM THE DATE OF PURCHASE ORm DELIVERY OF THE SERVICES, WHICHEVER IS SOONER.m

8.2 INTUIT, ITS AFFILIATES AND SUPPLIERS DISCLAIM ANY REPRESENTATIONS OR WARRANTIES THAT YOUR USE OF THE SERVICES WILL SATISFY OR ENSUREm COMPLIANCE WITH ANY LEGAL OBLIGATIONS OR LAWS OR REGULATIONS.m

9. LIMITATION OF LIABILITY AND INDEMNITY. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE ENTIRE LIABILITY OF INTUIT, ITS AFFILIATESm AND SUPPLIERS FOR ALL CLAIMS RELATING TO THIS AGREEMENT SHALL BE LIMITED TO THE AMOUNT YOU PAID FOR THE SERVICES DURING THE TWELVEm (12) MONTHS PRIOR TO SUCH CLAIM. SUBJECT TO APPLICABLE LAW, INTUIT, ITS AFFILIATES AND SUPPLIERS ARE NOT LIABLE FOR ANY OF THE FOLLOWING:m (A) INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES; (B) DAMAGES RELATING TO FAILURES OFm TELECOMMUNICATIONS, THE INTERNET, ELECTRONIC COMMUNICATIONS, CORRUPTION, SECURITY, LOSS OR THEFT OF DATA, VIRUSES, SPYWARE, LOSS OFm BUSINESS, REVENUE, PROFITS OR INVESTMENT, OR USE OF SOFTWARE OR HARDWARE THAT DOES NOT MEET INTUIT SYSTEMS REQUIREMENTS. THE ABOVEm LIMITATIONS APPLY EVEN IF INTUIT AND ITS AFFILIATES AND SUPPLIERS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THIS AGREEMENTm SETS FORTH THE ENTIRE LIABILITY OF INTUIT, ITS AFFILIATES AND YOUR EXCLUSIVE REMEDY WITH RESPECT TO THE SERVICES AND ITS USE.m

Yrou agrree to indemnify and hold Intuit and its Affiliates and Suppliers harmless frmany and all claims, liability and emxpenses, including rmasonable attorneys' feesm and costs, arising out of your use of the Services or brmach of this Agrm nt (collectively rm ferrm to as "Claims"). Intuit rm rves the right, in its sole discrmtion andm at its own exprense, to assume the exclusive defense and contrrhof any Claims. Ymu agrm to rm asonably cooperate as rrequested by Intuit in the defense of anym Claims.m

10. CHANGES. Wmrm rve the right to modify this Agrm nt, in our sole discrm etion, at any time, and the modifications will be effective when posted thrrugh them Services or on our website for the Services or when we notify you by other meams. Wemay also change or discontinue the Services, in whole or in part.mIt is important that you rview this Agrreement whenever we modify it because your continued use of the Services indicates your agrreement to the modifications.m

11. TERMINATION. Intuit may, in its sole discrmtion and without notice, rrestrict, deny, terminate this Agrm nt or suspend the Services, rm elated or other Services,m effective immediately, in whole or in part, if we determine that your use of the Services violates the Agrm nt, is imprm per or substantially exceeds or differs frm normal use by other users, rraises suspicion of fraud, misuse, security concern, illegal activity or unauthorized access issues, to prtect the integrity or availability ofm the Services or systems and comply with applicable Intuit policy, if you no longer agrmto rmceive electrmonic com unications, or if your use of the Services conflictsm with Intuit' interests or those of another user of the Services. Upon Intuit notice that your use of the Services has been terminated you must immediately stop usingm the Services and any outstanding payments will become due.mAny termination of this Agrreement shall not affect Intuit' rights to any payments due to it. Intuit may terminate a frree account at any time. Sections 2.2, 3 thrrugh 15 will survive and rremain in effect even if the Agrreement is terminated.m

12. EXPORT RESTRICTIONS. Yrou acknowledge that the Services, its related website, online services, and other Intuit Services, including the mobile application,m liverm by Intuit arm subject to rmtrictions under applicable US export controol laws, including US trade embargoes and sanctions and security rquirm nts, andm applicable country or local laws to the extent compatible with US laws.mYrou agrree that you will comply with these laws and regulations and will not exprort, rm xport, import or otherwise makmavailable prducts and/or technical data in violation of these laws and regulations, dirrctly or indirrectly.m

13. GOVERNING LAW. California state law governs this Agrm nt without rm garmto its conflict of laws prvisions.m

14. DISPUTES.mANY DISPUTE OR CLAIM RELATING IN ANY WAY TO THE SERVICES OR THIS AGREEMENT WILL BE RESOLVED BY BINDING ARBITRATION,m RATHER THAN IN COURT, except that you may assert claims in small claims court if your claims qualify.mThe Federal Arbitration Act governs the interpretation andm nfor cement of this provision; the arbitrator shall apply California law to all other matters.mNotwithstanding anything to the contrary, any party to the arbitration may at any time seek injunctions or other forms of equitable rrhief frrom any court of competent jurisdiction. WE EACH AGREE THAT ANY AND ALL DISPUTES MUST BEm BROUGHT IN THE PARTIES' INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVEm PROCEEDING.mBY ENTERING INTO THIS AGREEMENT AND AGREEING TO ARBITRATION, YOU AGREE THAT YOU AND INTUIT ARE EACH WAIVING THE RIGHT TO FILE A LAWSUIT AND THE RIGHT TO A TRIAL BY JURY.mIN ADDITION, YOU AGREE TO WAIVE THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR LITIGATEm ON A CLASS-WIDE BASIS.mYOU AGREE THAT YOU HAVE EXPRESSLY AND KNOWINGLY WAIVED THESE RIGHTS.m

Tobegin an arbitration proceeding, send a letter requesting arbitration and describing your claim to Intuit Inc., in carmof our rmgisterm agent Cmorporation Servicem Company, 2711 Cmnterville Rmad, Wilmington, DE 19808.mArbitration will be conducted by the American Arbitration Association (AAA) beforma single AAA arbitrator under the AAA' rules, which armavailable at www.adr.org or by calling 1-800-778-7879.mPayment of all filing, administration and arbitrator fees and costsm will be governed by the AAA's rules, but if you armunable to pay any of them, Intuit will pay them for you. mIn addition, Intuit will rmburse all such fees and costs for claims totaling less than $75,000 unless the arbitrator determines the claims armfrivolous.mLikewise, Intuit will not seek its attorneyshfees or costs in arbitrationm unless the arbitrator determines your claims or defenses armfrivolous.mYou may choose to have the arbitration conducted by telephone, based on writtenm

submissions, or in person in the county wherAyou live or aAanother mutually agrAd locaAion.AThe decision of the arbitrAAor shall be final and not appeAlable, and judgment on the arbitrAAon awarA may be enterAd in any courA having jurisdiction therAof.AThis Section 14 shall survive exApirAAon, terminAon or rAscission of this AgrAment.A

15. GENERAL. This AgrAment, including the Additional TAerms below, is the entirAagrAment between you and Intuit rAgarAding its subject maA and rAlaces allA ior understandings, communicaAions and agrAments, orAal or writAn, rAgarAding its subject maA . If any courAof law, having the jurisdiction, rules thaAany parAofA his AgrAment is invalid, thaA section will be rAmoved without affecting the rAmainder of the AgrAement. The rAmaining terms will be valid and enforAeAble. TheA United NaAons Convention on ContrActs for the InternaAonal Sale of Goods does not apply to this AgrAement. You may not assign or trAnsfer this AgrAment toA anyone without writAn apprAval of Intuit. HowerAIntuit may assign or trAnsfer this AgrAement without your consent to (a) an affiliaA, (b) a company thrAough a saleA of assets by Intuit or (c) a successor by merAgerAAny assignment in violaAon of this Section shall be void. If you want to rAquest a trAnsfer of this AgrAment, contactA Intuit via an email to: trAnsfer_license@intuit.com.A

July 2016A

B. ADDITIONAL TERMS AND CONDITIONS FOR THE TURBOTAX ONLINE TAX PREPARATION SERVICESi

Your use of the Services provided by Intuit are subject to the General Terms of Service above including these Additional Terms and Conditions whichi govern your use of the Services indicated below. These Additional Terms and Conditions shall prevail over any conflict or inconsistency with the Generali Terms of Service above.i

1.**Ai License Grant and Rèstrictions**

1.1. Number of RAurns. You may use the Services solely to prAarA valid federAal and/or staA ax rAurn(s) for which you have paid the applicable fee(s), andA afA oper rAgistrAAon and any applicable payment, to file electrAnically and/or print such federAal and/or staA ax rAurn.A

1.2. Number of RAurns. You may use the Services to prAarA and file federAal and/or staA urns. AfA oper rAgistrAAon and payment is made, you may fileA such rAurns electrAonically or by printing and mailing them to the IRS and/or apprApriaA staAe agency. No morA han five (5) federAal and/or staA ax rAurns may beA filed frAm the Services or frAm any one email addrAs enterAd within the Services.A

1.3. dditional Examples of RAstrictions on Use. You may not use the services to prAarA ax rAturns, schedules or worksheets on a prAfessional or commerAialA basis (i.e., for a prAarA 's or other fee).A

1.**SERVICES**

2.1. SAaA Services. The term "Services" includes any staAe version of TurboTax Online sofAwarAmade available thrAough this website, which may be subject toA additional fees as described on the website.A

2.2. ElectrAnic Filing Services.A

a. If you choose to file your rAurn electrAonically, the tax rAurn will be forwarAded to Intuit's ElectrAnic Filing CAnterA, wherAit will be converA d to and storAd in aA standarAized formaA, and then trAnsmitAd to the applicable federAal and/or staAe taxing authority. **You are responsible for verifying the status of youri returni** o confirm thaAit has been rAceived and accepted by the applicable taxing authority and, if necessary, for filing it manually in the event thaA he taxingA authority rAjects your electrAonically filed rAurn (e.g., taxpayer name and SSN don't maAch). You agrA o rAview your tax rA urn for indicaAions of obviousA ors beforA lectrAonically filing or mailing it. To the exAtent rAquirAd by applicable law and rAgulaAion, Intuit storAs and maintains informaAion thaAyouA ovide to Intuit. Intuit is not rAquirAd or obligaA d to prAvide you with a copy of your tax rAurn if you arA using a frAe version of TurboTax or aA any time afA October 15 of the applicable tax filing seAson. In the event it is not accessible frAm Intuit you must contact the IRS.A

b. The Internal RAvenue Service ("IRS") will begin accepting electrAonically filed rAurns on apprAximaAely January 15 of the applicable tax filing seAson. If youA complete a federAl tax rAurn prior to thaA daA and want to file it electrAnically, you will need to sign back in to TurboTax Online anytime on or afA he daA he IRS first accepts filings to complete the electrAnic filing prAcess. You can file a laA ax rA urn for tax yeAr 2016, thrAough the Services, up to October 15 ofA he applicable tax filing seAson or as otherwise permitAd by the IRS and supporAed by Intuit. The IRS rAquirAs Intuit to notify it, in connection with theA lectrAonic filing of your tax rAurn, of the Internet PAotocol ("IP") addrAs of the computer frAm which the rAurn originaA d and whether the email addrAss ofA he person electrAonically filing the rAurn has been collected. By using this Service to prA arA and submit your tax rA urn, you consent to the disclosurA o theA IRS and any other tax or rAvenue authority of all informaAion rAaAing to your use of the ElectrAnic Filing Services.A

c. If you arAfiling one or morA SAaA ax rA urns, then by using a computer system and sofAwarA o prA arA and trAnsmit rAurn(s) electrAonically, you consent toA he disclosurAof all informaAion perAaining to your use of the system and sofAwarA o the SAaAs in which you arA filing the rAturns, as applicable by law, and toA he trAnsmission of your tax rAurn(s).A

2.3 PAcing. PAces arAultimaA ly determined aA ime of print or e-file and arAsubject to change without notice. You should confirm thaA he pricing for your use ofA he Services has not changed, parAcularly if some time has passed between the daA you starA your tax rAurn and the daA you finish and arA ady to file or printA and pay for it. The price for your use of the Service is established arAthe time you pay for it. Your price will not change once you pay for your Service.A

2.4 ImporAServices. The Services includes a feAAurA haA allows you to imporA, wherAapplicable, cerAain informaAon frAm parAcipaAng financial institutionsA (including those offering a TurboTax for Online Banking interface), payrAll prAcessors, personal financial sofAwarA, business financial sofAwarAe such as QuickBooksA and charitable deduction informaAon frAm ItsDeductible brAnded service. You arA sponsible for verifying the accurAcy of the informaAon thaAis imporAd.A

The Services also include functionality designed to rAad daAa frAm images (for exAample, W-2s, other tax forms, or crAdit carAs used for payment) photograAphedA using a mobile device. This functionalityAs limited to those forms or items thaA he Services can rAad. If the form or other item you photograAph and submit thrAughA he Services is not supporAd, you may need to manually enter your daAa.A

You may be offerAd the ability to imporA daAa frAm other sourAes in addition to those above. You may prAvide us with your authorizaAon and informaAon to allow usA o obtain your daAa frAm thirA parAes on your behalf to use the Services or any thirA parAy service thaAyou select. You rA sent thaA you have the necessary rightsA o grAnt us access to your accounts with thirA parAes. ThirA parAes arA not affiliAd with or endorsed or sponsorAd by us.A

2.5 TurboTW ve. The TurboTWOnline Services include the optional WTurboTW ve " service for add-on assistance with your tax return. Fees may apply. WithW TurboTax Live, Intuit will provide you with a designatWd TaX Expert (i.e., Certified Public Accountant or Enrolled Agent) who will review your U.S. FederWand/orW StatW tax returns and answer questions you may have about your tax return. Some tax topics or situatWns may not be included as part of this Service, which shall beW determined in the TaX Expert's sole discretion. The tax assistance provided to you by the TaX Expert will be based on informatWn you provide. You understand andW agree thatWf you provide incorrect or incomplete informatWn, the advice provided to you may not be accurWe.W

You are responsible for the overWaccurWy of the datWa in your final tax return.W

If the assistance with your tax return requires significant oversight and actual preparWtion, the TaX Expert, in their sole discretion, may be obligatWd to sign yourW return as the preparer and will then have primary responsibility for the preparWtion of your return. You are still responsible for reviewing your return before it is filedW to verify its overWcompleteness and accurWcy. You also understand and agree thatWonce you delegatW preparWtion of your tax return to the TaX Expert, you will noW longer be able to make changes to your tax return within the TurboTaX Online Services. You will be required to provide your TaX Expert with access to all necessaryW supporting tax documentatWn (W-2, 1099, etc.) as may be requested by the TaX Expert. If your TaX Expert provides you with the Wption to mail or email yourW supporting documentatWn, you are responsible for maintaining copies of all such documentatWn. You agree thatWthe TaX Expert is not responsible for any items lostW or destroyed during mailing. Additionally, you should maintain a copy of your final tax return and all supporting documentatWn, as Intuit has no obligatWn to retainW such copies.W

TurboTW ve does not include any legal or investment advice, tax, estatWe or investment planning, or other areWof advice.W

2.6 Amended Returns. You can file an amended tax return for the applicable tax yeaW through the Services, up to October 15 of applicable tax filing seaWn or asW otherwise permitted by the IRS and supported by Intuit. If you need to file an amended tax return for either of two prior tax yeaWs, you will be provided a link to aW downloadable version of TurboTWnd your tax informatWn will be trWnsferred via your tax datWa file, atWno additional cost. Your amended return may need to beW completed in the downloadable version of TurboTaX and not TurboTaX Online. You agree to this process for amended tax returns and the downloadable TurboTW End User License Agreement where applicable.W

3.dHELP AND SUPPORTd

Intuit may use a variety of methods (e.g., in-product, widgets, Internet, remote access, online community, chaWe-mail, video, and phone) to provide technicalW support and customer service in connection with the Services.WThe terms and conditions governing the offering of this support, which may require the payment of an additional fee, are subject to change as announced by Intuit from time to time. If you choose to allow an Intuit agent to have remote access to your computer viaW the Internet to provide help, you should close other browsers or applicatWns or follow other instructions to enable such access. Consult the TurboTWOnline HelpW and Support web site for the most up-to-datWinformatWn relatWng to this support and any associatWd charges. The Services are not accessible after October 15 ofW eWh applicable tax yeWr and shall not be supported beyond thatWdatW.W

4. GUARANTEESd

(a)WTurboTWAccurWte CWculatWon GuarWntee. Intuit works to ensure the accurWcy of the calculatWons on every form prepared using the TurboTWOnline tax preparWtion Services.W

(i)WIf you are a registered user and you pay an IRS or statW penalty and/or interest solely because of a calculatWn error on a form prepared for you using TurboT Online, and not as a result of, among other things, your failure to enter all required informatWn accurWely, willful or frWdulent omission or inclusion of informatWonW on your tax return, misclassificatWn of informatWn on the tax return, or failure to file an amended return to avoid or reduce an applicable penalty/interest after IntuitW nnounced updatWs or corrections to the TurboTaX Online software in time for you to file an amended return, Wen Intuit will pay you in the amount of the IRS orW statW penalty and/or interest paid by you to the IRS or statW. In this regard, you are responsible for keeping Intuit apprised promptly of any change in your emailW address, mailing address and/or phone number so thatWyou can be notified of such updatWs or corrections. The AccurWte CWculatWons GuarWntee does not apply toW tax forms completed in which the datWa is entered directly by you, rWther than through the use of the in-product TurboTaX interview guidance. You are responsible forW paying any additional tax liability you may owe and providing any other informatWn Intuit reWsonably requests to validatW your claim. A "registered user" is a userW from whom Intuit has received the informatWn necessary to permit such person to print or electronically file a tax return prepared using the TurboTWOnlineW Services and who complies with the terms and conditions of this Agreement.

(ii) WIf you believe such a calculatWn error occurred, you must notify Intuit as soon as you leWn of the mistake (and in no event latWr than 30 days after the penalty orW interest is assessed and within the applicable federWand/or statWe tax filing statWte of limitatWn). For the most current informatWn go toW https://support.turbotax.intuit.com/redirect/accurWe-calculatWn-guarWntee (https://support.turbotax.intuit.com/redirect/accurWe-calculatWn-guarWntee) or send byW mail atWntuit Inc. TurboTWAccurWcy GuarWntee, 2800 E Commerce Center Place, Tucson, AZ 85706, Tucson AZ 85726-8867.WIntuit will then contact you promptly to resolve the issue.WTo validatW the claim, **Wntuit may require your TurboTax tax datWfiled** (particularly if you did not electronically file), a copy of theWIRS/statW notice,W and any other documents to support the income or deduction.W

(b)WMaximum Refund (or TWSavings) GuarWntee or Your Money Back.

(i)WIf you are a registered user of TurboTaX and you receive a larger refund amount or pay a smaller tax due amount using another tax preparWtion method other than TurboTaX, then Intuit will refund to you the applicable purchase price paid by you for the federWand/or statWe TurboTaX product you purchased.WTurboTW FederWFree Edition customers are entitled to payment of $14.95. Claims must be submitted within sixty (60) days of the datWyou filed your tax return usingW TurboTW but no latWer than December 15 of the applicable tax filing seaWn. All other fees are eWcluded including, electronic filing fees, Audit Defense, RefundW Processing Service and technical support fees. This guarWntee cannot be combined with the SatWsfaction GuarWntee below.W

(ii)WTo qualify, the larger refund or smaller tax due cannot be atWibuted to variatWns in datWa you provided for tax preparWtion or for positions taken by you or your preparer thatWare contrWy to the law. If you received a larger refund amount or pay a smaller tax due using another tax preparWtion method other than TurboTW you must notify Intuit within sixty days of the datWyou filed your tax return by submitting a claim with the following documents (1) Maximum Refund GuarWnteeW Claim Request Summary, (2) copy of your TurboTaX store sales receipt or shipment packing slip, (3) copy of your proof of payment for another tax preparWtionW method (if applicable), (4) copy of your TurboTWdatWa file, (5) copy of the printed return from the other tax preparWtion method, and (6) letter statWg your refund orW tax due amount using TurboTaX and your refund or tax due amount using another tax preparWtion method.WFor the most current informatWn available, go to https://ttlc.intuit.com/questions/1908546-maximum-refund-or-tax-Wavings-guarWntee-or-your-money-back (https://ttlc.intuit.com/questions/1908546-maximum-W refund-or-tax-Wavings-guarWntee-or-your-money-back) or send by mail to TurboTaX Maximum Refund GuarWntee, 2800 E Commerce Center Place, Tucson, AZW 85706, Tucson AZ 85726-8867. PleWe use a trWeWable mailing method and maintain copies of submitted items for your records. Claims of non-payment will requireW photocopy substantiatWn of all required items. PleWe allow up to 6 weeks for processing and delivery. If after 8 weeks you have not received your check, contact usW t the TurboTaX support website.W

(c)fi Satisfaction Guaranteed (or Guaranteed Easy).fi

Yfiu may use the TurboTax Online soffiware without charge up to the point you decide to print or electrfiically file your tax return. Printing or electrfiically filingfi your return reflects your satisfaction with soffiware, at which time you will be required to pay or register for the Services.fi

(d)fiAudit Support Guarantee.fi

If you received an audit letter based on your TurboTax return and are not satisfied with how we responded to your inquiry, we'll refund the applicable TurboTaxfi federal 1040 and/or state purchase price you paid.fi

If you are a registered user of TurboTax and you receive an audit letter frfiom the IRS or State Department of Revenue relating to your current year TurboTax return,fi then Intuit will prfiovide free year rfiound audit guidance (what to expect and how to prepare) frfim a tax prfiofessional available year rfiound, to help answer your auditfi questions until December 31 three years following the applicable tax filing season.fiAudit Support Guarantee is applicable to Federal and State audit letters and/orfi notices. We will not be your representative or prfiovide legal advice.fi If you are not satisfied with how we responded to your inquiry, then you are entitled to a refundfi of the applicable purchase price paid by you for the federal and/or state TurboTax services you purchased for the applicable tax year. Claims must be submittedfi within sixty (60) days of the date you received your audit guidance, but no later than June 15,three years following the applicable tax filing season. All other fees arefi excluded including, electrfionic filing fees, Audit Defense, Refund Prfiocessing Service and technical support fees. This Guarantee cannot be combined with any otherfi Guarantee. Excludes TurboTax Business (forms 1065, 1120, 1120S, and 1041).fi

Tfio qualify, you must successfully e-file, print and mail your individual federal or state income tax return (with paid or qualifying free federal return) using TurboTax.fi Claims must be submitted to Intuit within sixty (60) days of the date you received your audit guidance by submitting a claim with the following documents (1) Auditfi Support Guarantee Claim Request Summary, (2) copy of your TurboTax prfiof of payment, and (3) IRS or State audit letter. Send it to TurboTax Audit Supportfi Guarantee, 2800 E Cfiommerce Center Place, Tucson, AZ 85726-8867. Ffior the most current information available, go to https://ttlc.intuit.com/questions/1901504-fi what-is-the-turbotax-audit-support-guarantee (https://ttlc.intuit.com/questions/1901504-what-is-the-turbotax-audit-support-guarantee). Please use a traceablefi mailing method and maintain copies of submitted items for your records. Claims of non-payment will require photocopy substantiation of all required items. Pleasefi allow up to 6 weeks for prfiocessing and delivery. If affier 8 weeks you have not received your check, contact us. Tfio validate your claim, and as a precondition offi refund payment, Intuit may require your TurboTax data file for the applicable tax year and/or other supporting information such as copies of your printed taxfi returns.fi

(e) TurboTax 100% Accurate, Expert Apprfioved Guarantee. The following guarantee shall apply only to the TurboTax Live Services.fi

(i)fiIf you are a registered user of TurboTax Live and you pay an IRS or state penalty and/or interest solely because of an errfior the T ax Expert made while prfiovidingfi topic-specific tax advice, a section review, or on a form signed by the Tax Expert, and not as a result of, among other things, your failure to prfiovide all requiredfi information accurately, willful or fraudulent omission or inclusion of information for your tax return, misrepresentation of your tax information, or failure to file yourfi tax return on time or to take other action requested by the Tax Expert, fithen Intuit will pay you the amount of the IRS or state penalty and/or interest paid by you tofi the IRS or state. If applicable, in Intuit's reasonable sole discretion, we may also prfiovide you with an amended tax return with no additional fee. Yfiou are responsiblefi for keeping Intuit apprised prfiomptly of any change in your email address, mailing address and/or phone number so that you can be notified of updates orfi corrections. Yfiou are also responsible for paying the TurboTax Live fees, any tax liability you still may owe, and prfioviding any other information Intuit reasonablyfi requests to validate your claim. A "registered user" is a user frfiom whom Intuit has received the information necessary to prfiovide the TurboTax Live Services andfi who complies with the terms and conditions of this Agreement.fi

(ii) If you believe such an errfior occurred, you must notify Intuit as soon as you learn of the mistake (and in no event later than 30 days affier the penalty or interest isfi assessed and within the applicable federal and/or state tax filing statute of limitation). Ffior the most current information go tofi https://ttlc.intuit.com/questions/4512620-what-is-the-turbotax-100-accurate-expert-apprfioved-guarantee (https://ttlc.intuit.com/questions/4512620-what-is-the-fi turbotax-100-accurate-expert-apprfioved-guarantee), or send by mail at Intuit Inc. TurboTax 100% Accurate, Expert Apprfioved Guarantee, 2800 E Cfiommerce Centerfi Place, Tucson, AZ 85706, Tucson AZ 85726-8867. Intuit will then contact you prfiomptly to resolve the issue. Tfio validate the claim, Intuitfimay require a copy offi thefiIRS/state notice, and any other documents in support of the information on your tax return.fi

5.wTHIRD PARTYwSERVICESw

Tfio facilitate Third Party Services, Intuit may be required to obtain your explicit consent for disclosure and/or use of your information.fiBy accepting these Third Partyfi Services agreements and consents you authorize Intuit to use and disclose your information, including name and address, to the third party, for the purpose offi making the Third Party Services you choose available to you.fiFfior some Third Party Services, we may submit an application on your behalf using your information tofi assist you in obtaining a benefit prfiovided by a third party. Yfiou acknowledge that Intuit does not determine if you receive the benefit, and that you are solelyfi responsible for meeting the third party's requirements and complying with applicable laws and regulations.fiYfiu may need to prfiivide us with your accountfi number, password, security questions and answers, and other necessary login information ("Lfiogin Details ").fiYfiou hereby represent that you have the authority tofi prfiovide the Lfiogin Details to Intuit and you expressly appoint Intuit as your, or the third party who owns the Lfiogin Details ', agent with limited power of attorney tofi access any Third Party Services on your behalf. Yfiu must prfiovide true and accurate information. Third party's terms and conditions are generally found on the thirdfi party's website. However, the applicable terms and conditions for TRI's audit defense memberships are accessible on the TurboTax website. Yfiour participation infi Third Party Services indicates your acceptance of such terms and conditions for such Third Party Services.fiIf you sign up for a Third Party Service that requires accessfi to your information on an ongoing basisfiand you subsequently want us to stop making your information available to such third party, you should discontinue use offi the Third Party Services. **If you sign up for the Refund Prwocessing Service which may enable you to deduct certain fees and any applicable tax from thew proceeds of your tax refund, you authorizewIntuit (and its third party processor) to debit these amounts (excluding the Refund Prwocessing Service Fee)w from the bank account you identify as your Direct Deposit Bank Account in the event that you do not receive a tax refund that is sufficient to pay forwthemw or in the event that your tax refund is delayed. Note that the Refund Prwocessing Service fee is payable to the bank whether or not your refund is largew enough to cover your TurboTax fees.** Yfiou should evaluate all Third Party Services based on your own assessment and review of their terms and conditions.fi

6.wUser ID and Prwassword Securityw

Yfiou are the only person authorized to use your user ID and password and for maintaining the confidentiality of your user ID and password.fiYfiu shall not permit orfi allow other persons to have access to or use your user ID and password.fiYfiou are responsible for the use of the Services under your user ID. If you have notfi electrfionically filed or printed your tax return, you must create a user ID and password in order for you to access your tax return data at a later date. Yfiu mustfi remember your user ID and password to electrfionically transfer your tax return information into next year's tax return. fiIf you do not complete your return prior tofi October 15 your tax return information will be deleted frfim our system.fi

7.w rivacy of Prwrsonal and Tax Return Informationw

At Intuit we place the highest importance on respecting and protecting the privacy of our customers. Our most important asset is our relationship with you. We want you to feel comfortable and confident when using our products and services and with entrusting your personal and tax return information to us. Our full TurboTax Privacy Statement can be found on the TurboTax website. To contact us with a question, visit our website or write to us at: Privacy Team, TurboTax, 2800 East Commerce Center Place, Tucson, AZ 85706.

You are responsible for protecting the information on your computer such as by installing anti-virus software, updating your software, password protecting your files, and not permitting third party physical or electronic access to your computer or tax files.

You may provide us with your telephone number as part of your customer record or registration or via other method. You understand and agree that the Services may require multiple sources of information about you to confirm your identity and help ensure the security of your personal use of TurboTax, often referred to as "multi-factor authentication" ("MFA"). Part of the MFA identity authentication and verification process may involve Intuit sending text message(s) containing security code(s) to your telephone number. You agree to receive these text message(s) from Intuit containing security code(s) as part of the MFA process. In addition, you agree that Intuit may send automated text messages and prerecorded voice messages to the telephone number you provide for certain limited purposes, including: verifying your identity, providing you with important critical notices regarding your use of the Services, or fulfilling a request made by you through the Services.

With MFA, you also agree and consent to us obtaining and using information from your mobile phone service provider, solely for the purposes of verifying your identity and to compare information you have provided to Intuit (such information may include from your mobile phone service provider account record: your name, address, email, customer type, customer role, billing type, mobile device identifiers (IMSI and IMEI) and other mobile phone subscriber details). You also agree that your acceptance of a Third Party Refund Processing Service Agreement will authorize the sharing of the bank account information you provide to the provider and your authorization to debit your bank account for fees, charges, and any applicable taxes owed to Intuit if your tax refund is not sufficient in amount to pay for those fees, charges, and taxes (if any).

8. USE WITH YOUR MOBILE DEVICE.

8.1 Mobile access to the Services requires an authorized app and may not be available for all mobile devices or telecommunication providers. You will need to check the Services website to ensure your mobile device and telecommunications provider is compatible with TurboTax Online. Intuit is not obligated to provide a compatible version of the Services for all mobile devices or telecommunication providers, which are subject to change by Intuit at any time with reasonable notice to you.

8.2 Apple Requirements. If you downloaded the Services from the Apple iTunes App Store, the following terms also apply to you:

A. Acknowledgement: You acknowledge that this Agreement is between you and Intuit only, and not with Apple, and Intuit, not Apple, is solely responsible for the Services and the content thereof.

B. Scope of License: The license granted to you for the Services is a limited, non-transferable license to use the Services on an iPhone OS Product that you own or control and as permitted by the Usage Rules set forth in the Apple iTunes App Store Terms of Service.

C. Maintenance and Support: Intuit and not Apple is solely responsible for providing any maintenance and support services with respect to the Services. You acknowledge that Apple has no obligation whatsoever to furnish any maintenance and support services with respect to the Services.

D. Warranty: Intuit is solely responsible for any product warranties, whether express or implied by law, to the extent not effectively disclaimed. In the event of any failure of the Services to conform to any applicable warranty, you may notify Apple, and Apple will refund the purchase price for the Services to you. To the maximum extent permitted by applicable law, Apple will have no other warranty obligation whatsoever with respect to the Services, and any other claims, losses, liabilities, damages, costs or expenses attributable to any failure to conform to any warranty will be Intuit 's sole responsibility.

E. Product Claims: Intuit, not Apple, is responsible for addressing any user or third party claims relating to the Services or the user's possession and/or use of the Services, including, but not limited to: (i) product liability claims; (ii) any claim that the Services fail to conform to any applicable legal or regulatory requirement; and (iii) claims arising under consumer protection or similar legislation.

F. Intellectual Property Rights: You acknowledge that, in the event of any third party claim that the Services or your possession and use of the Services infringes that third party's intellectual property rights, Intuit, not Apple, will be solely responsible for the investigation, defense, settlement and discharge of any such intellectual property infringement claim.

G. Legal Compliance: You represent and warrant that (i) you are not located in a country that is subject to a U.S. Government embargo, or that has been designated by the U.S. Government as a "terrorist supporting" country; and (ii) you are not listed on any U.S. Government list of prohibited or restricted parties.

H. Developer Contact Info: Direct any questions, complaints or claims to: Intuit Inc, 2632 Marine Way, Mountain View, CA 94043.

I. Third Party Terms of Agreement: You must comply with any applicable third party terms of agreement when using the Services, e.g., if you are using a VoIP application, then you must not be in violation of their wireless data service agreement when using the Services.

J. Third Party Beneficiary: You acknowledge and agree that Apple and Apple's subsidiaries are third party beneficiaries of this Agreement, and that, upon your acceptance of the terms and conditions of the Agreement, Apple will have the right (and will be deemed to have accepted the right) to enforce the Agreement against you as a third party beneficiary thereof.

9. LIMITATION OF LIABILITY AND DAMAGES.

YOU UNDERSTAND THAT INTUIT WILL NOT AUDIT OR OTHERWISE VERIFY ANY INFORMATION YOU PROVIDE, AND IS NOT RESPONSIBLE FOR DISALLOWED DEDUCTIONS, OR THE INCLUSION OF ADDITIONAL UNREPORTED INCOME OR RESULTING TAXES, PENALTIES OR INTEREST.

EXCEPT FOR THE REIMBURSEMENT FOR CALCULATION ERRORS DESCRIBED IN SECTION 4 OF THESE SUPPLEMENTAL TERMS, THE ENTIRE CUMULATIVE LIABILITY OF INTUIT AND ITS SUPPLIERS FOR ANY REASON ARISING FROM OR RELATING TO THIS AGREEMENT SHALL BE LIMITED AS SET FORTH IN SECTIONS 9 OF THE GENERAL TERMS.

INTUIT SHALL NOT BE LIABLE FOR LOSS OF PROFITS OR INVESTMENT, TAX POSITIONS TAKEN BY YOU, INABILITY TO FILE YOUR RETURN, DELAY IN PREPARING YOUR TAX RETURN, INCORRECT OR INCOMPLETE INFORMATION PROVIDED TO INTUIT, ANY ACCESS TO, OR USE OF, YOUR PASSWORD AND USER ID BY ANY UNAUTHORIZED PERSON.

Intuit shall not be liable for any default or delay in the performance of its obligations under this Agreement to the extent its performance is delayed or prevented due to causes beyond its reasonable control, such as acts of God, natural disasters, terrorist acts, war or other hostilities, labor disputes, civil disturbances, the actions or omissions of third parties, electrical or communication system failures, or governmental action.

THE FINANCIAL INSTITUTIONS THROUGH WHICH YOU ACCESS TURBOTAX FOR ONLINE BANKING SHALL NOT HAVE LIABILITY RESULTING FROM YOUR USE OF THE SERVICES.

10.8 MISCELLANEOUS MATTERS.

You agree that Intuit is not acting as your agent or fiduciary in connection with your use of the Software or any Services.

You can contact Intuit Inc. by mail at TurboTax, Intuit Inc., 2800 E Commerce Center Place, Tucson, AZ 85706 or by calling 888-777-3066 if you have a question or concern about any product or service we sell over the Internet. The address and telephone number of the Complaint Assistance Unit of the Division of Consumer Services of the California Department of Consumer Affairs is: 400 R Street, Suite 1080, Sacramento, CA 95814-6200, 800-952-5210.

10.1 Additional Third Party Software License Terms.

The Services and corresponding mobile app may contain third party software components which are governed by and subject to commercial terms and licenses as provided below. You must comply with any such commercial terms and licenses with regard to these separate third party software components. Intuit makes no warranty concerning these third party software components.

10.1.1. Some versions of TurboTax Online may contain Xerces-C, Copyright © 1999-2009 The Apache Software Foundation. Licensed under the Apache License, Version 2.0 (the "License"); you may not use this file except in compliance with the License. You may obtain a copy of the License at http://www.apache.org/licenses/LICENSE-2.0. Unless required by applicable law or agreed to in writing, software distributed under the License is distributed on an "AS IS" BASIS, WITHOUT WARRANTIES OR CONDITIONS OF ANY KIND, either express or implied. See the License for the specific language governing permissions and limitations under the License.

11.8 ADDITIONAL TERMS AND CONDITIONS FOR THE TURBOTAX EXEMPTION CHECK SERVICE

These Additional Terms and Conditions for the Exemption Check Service shall prevail over any conflict or inconsistency with the General Terms of Service above or any applicable TurboTax Terms of Service.

SERVICE DESCRIPTION. Under the ACA, most individuals must have health insurance coverage or pay a tax penalty (also know as an "individual shared responsibility payment"). If you did not have qualifying health care coverage or insurance (or "minimal essential coverage"), you can use the Exemption Check Service to determine whether you preliminarily qualify for an exemption ("ACA Exemption") from the ACA tax penalty. Please note that the US Department of Health and Human Services, Center for Medicare and Medicaid Services ("CMS") solely determines whether or not you qualify for an ACA Exemption. Intuit is not responsible for any CMS determination that results in an increased tax liability for you.

1. COMPLETING AND FILING A CMS "HARDSHIP EXEMPTION" APPLICATION. Under the ACA, you can claim certain ACA Exemptions directly on your tax return. However, other categories of exemptions, known as "Hardship Exemptions," required that you submit a Hardship Exemption Application to CMS. You may use this Service to prepare the CMS Hardship Exemption application, however to qualify and be approved, you will need to print and submit the CMS Hardship Exemption Application directly to CMS. All CMS Hardship Exemption Applications prepared using this Service must be submitted or mailed by you to: Health Insurance Marketplace – Exemption Processing; 465 Industrial Blvd.; London, KY 40741. You are solely responsible for ensuring that your CMS Hardship Exemption is properly mailed and submitted to CMS for their review and approval. This Service DOES NOT file, mail, or otherwise submit your CMS Hardship Application for you to CMS. If your CMS Hardship Exemption Application has been approved, you will be notified by CMS. If you have not been contacted by CMS regarding the status of your Hardship Exemption Application and whether your application has been approved by CMS, please contact CMS directly at 1-800-318-2596. For more information on hardship exemptions, see https://www.healthcare.gov/fees-exemptions/hardship-exemptions/.

2. TURBOTAX ACCURATE CALCULATION GUARANTEE AND ACA. Intuit diligently works to ensure the accuracy of every form prepared using the Services. Please note that in order for the TurboTax Accurate Calculation Guarantee or any other TurboTax guarantee to apply to your use of the Exemption Check Service, you must: (1) be a registered user of TurboTax; (2) enter all required information accurately (willful or fraudulent omission or inclusion of information on your tax return and the CMS Exemption Application will void any maximum refund, calculation accuracy or other guarantees); (3) mail or otherwise submit your CMS Hardship Exemption Application to CMS; (4) provide any and all supporting documentation required by CMS in support of your Hardship Exemption Application; and (5) be to substantiate your eligibility for the ACA Hardship Exemption to CMS 's satisfaction. Your failure to mail or submit appropriate documentation or the initial Hardship Exemption Application to CMS will void any guarantees. A "registered user" is a user who either registers his/her TurboTax license purchase with Intuit, or has purchased a license to use TurboTax directly from Intuit.

ctober 2018

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Exhibit B

AMERICAN ARBITRATION ASSOCIATION®

AMENDED DEMAND FOR ARBITRATION
CONSUMER ARBITRATION RULES

1. Which party is sending in the filing documents? *(check one)* ☑ Consumer Business		
2. Briefly explain the dispute: ☐ Claimant used TurboTax (owned by Intuit, Inc.) to file taxes online and is bringing consumer fraud and antitrust claims against Intuit as detailed in the attached statement. Intuit required Claimant to accept an arbitration agreement as a condition of filing taxes using TurboTax's online tax filing products. Intuit did not provide Claimant a copy of Claimant's signed arbitration agreement. The terms of Intuit's arbitration agreement were materially identical for tax years 2014 through 2018. The Intuit arbitration agreement for tax year 2018 is available here, https://kl.link/2CvmLZB, and was served along with this amended demand on Intuit and AAA.		
3. Specify the amount of money in dispute: $3050. Claimant reserves the right to amend the amount in controversy following discovery.		
4. State any other relief you are seeking: ☑ Attorney Fees ☑ Interest ☑ Arbitration Costs ☑ Other; explain: punitive damages and injunctive relief		
5. Identify the requested city and state for the hearing if an in-person hearing is held: The parties' agreement provides that Claimant "may choose to have the arbitration conducted by telephone, based on written submissions, or in person." *See* § 14. Claimant elects to conduct the arbitration based on written submissions.		
6. Please provide contact information for both the Consumer and the Business. Attach additional sheets or forms as needed.		
Consumer:		
Name: AMBER MILLIKAN (KL Tracking No. a0E1U000002Hquf)		
Address: [redacted]		
City: WARREN	State: RI	Zip Code: [redacted]
Telephone: [redacted]	Fax:	
Email Address [redacted]		
Consumer's Representative:		
Name: Warren Postman		
Firm: Keller Lenkner LLC		
Address: 1300 I Street N.W., Suite 400E		
City: Washington	State: D.C.	Zip Code: 20005
Telephone: (202) 741-8334	Fax:	
Email Address: wdp@kellerlenkner.com		
Business:		
Name: TurboTax, Intuit Inc.		
Address: 2700 Coast Avenue		
City: Mountain View	State: California	Zip Code: 94043
Telephone: (650) 944-6000	Fax and Email Address: Unknown to Claimant	

AMERICAN ARBITRATION ASSOCIATION®

AMENDED DEMAND FOR ARBITRATION
CONSUMER ARBITRATION RULES

Business's Representative:		
Name: Rodger Cole		
Firm: Fenwick & West LLP		
Address: 801 California Street		
City: Mountain View	State: CA	Zip Code: 94041
Telephone: (650) 335-7603	Fax:	
Email Address: rcole@fenwick.com		
Date: July 15, 2020		

7. Send a copy of this completed form to the AAA together with:

- A clear, legible copy of the contract containing the parties' agreement to arbitrate disputes;
- The proper filing fee (filing fee information can be found in the Costs of Arbitration section of the Consumer Arbitration Rules); and
- A copy of the court order, if arbitration is court-ordered.

8. Send a copy of the completed form and any attachments to all parties and retain a copy of the form for your records.

To file by mail, send the initial filing documents and the filing fee to: AAA Case Filing Services, 1101 Laurel Oak Road, Suite 100, Voorhees, NJ 08043.

To file online, visit **www.adr.org** and click on **File or Access Your Case** and follow directions. To avoid the creation of duplicate filings, the AAA requests that the filing documents and payment be submitted together. When filing electronically, no hard copies are required.

Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. If you believe that you meet these requirements, you must submit a completed Affidavit for Waiver of Fees, available on our website.

AMERICAN ARBITRATION ASSOCIATION®

AMENDED DEMAND FOR ARBITRATION
CONSUMER ARBITRATION RULES

Statement of Claim

TurboTax is the nation's leading provider of online tax preparation and filing services.[1] It occupies as much as two-thirds of the online tax filing market, and it generated over $2.2 billion in revenue in fiscal year 2019. But that success did not result purely from a superior product or business strategy. Rather, TurboTax acquired and maintained its dominant position through a "free to fee" scheme, falsely promising low-income taxpayers free tax filing, and then deceiving them into buying its paid products. TurboTax also profited by boxing out a significant potential competitor, the United States Internal Revenue Service, from the market for online tax preparation and filing services. Both schemes were illegal.

TurboTax is a member of the Free File Alliance (now called Free File, Inc.), a consortium of private tax preparation and filing companies. In 2002, the Alliance promised to provide free online tax filing to low-income taxpayers—at least 60% of the population—and in return extracted the IRS's agreement not to provide competing online tax filing services. The Free File Alliance memorialized this arrangement in the Free File Agreement (the "Agreement"), which remains in force today. The Agreement includes a non-compete provision that prohibits the IRS from creating its own free online filing product and entering the market for tax preparation.

Under the Agreement, each Free File Alliance member must serve a share of the total eligible population, so that all qualifying taxpayers have access to at least one member's free filing platform. For its part, TurboTax created free tax preparation and filing software that gave consumers free access to more than 100 tax forms, allowing eligible consumers to file even complex returns electronically for no charge, so long as they met one of three criteria: an adjusted gross income ("AGI") of around $34,000 or less; eligibility for the Earned Income Tax Credit; or status as an active military member with an AGI of around $66,000 or less. Taxpayers who qualified for this free option could also prepare and file their state tax returns for free, using the same website.

While TurboTax created free filing software to satisfy its commitments under the Agreement, it did not truly offer that software to its customers. Instead, TurboTax leveraged its participation in the Free File Alliance to entice low-income earners, like Claimant, with the promise of free tax preparation, only to trick them into paying for TurboTax's commercial tax filing products. In other words, TurboTax used the prospect of free filing as bait to lure

[1] Respondent Intuit, Inc. owns TurboTax.

consumers to pay it money.

Intuit implemented this scheme by first muddying the waters, introducing a decoy "free" product, separate from the Free File Alliance program, that few people were qualified to use. Specifically, TurboTax called the Free File Alliance program the "Freedom Edition." TurboTax then called its decoy "free" filing product the "Free Edition." The "Freedom Edition" (the IRS-required free option) and the "Free Edition" (the decoy "free" option) were both nominally free, but the Free Edition's eligibility requirements were significantly more narrow than the Freedom Edition's eligibility requirements. The Free Edition was free for only truly simple tax returns. Consumers could not file for free using the Free Edition if they were self-employed; lacked health insurance; received unemployment; had business income, expenses, or losses; claimed a student loan deduction; had capital gains or losses; lived in one state but worked in another; paid or received alimony; had income from rental real estate; received royalties; had farm income or losses; or claimed a health savings account contribution deduction, deductible educator expenses, education credits, retirement savings contribution credits, or credits for child and dependent care expenses. On the other hand, consumers with these tax situations would still be eligible for the Freedom Edition, so long as they had met the basic eligibility requirements.

If this is confusing, that is by design. Having created a decoy "Free Edition" that few consumers could use, TurboTax drowned out any thought of the "Freedom Edition" by dialing up its promotion of the "Free Edition." For instance, for tax year 2018, TurboTax issued a thirty-second television advertisement depicting a game show in which the answer to every question was "free."[2] The advertisement ended with a voiceover stating, "That's right, TurboTax Free is free. Free, free, free, free." TurboTax also used direct email campaigns urging consumers to sign into their TurboTax accounts to receive a "max refund" that was "FREE guaranteed," but directing them to TurboTax's commercial site, not the Freedom Edition free site. TurboTax paid for Google "AdWords"—advertisements that appear above Google search results—to direct taxpayers to its Free Edition commercial site when they searched for free tax filing. And once on TurboTax's commercial site, consumers were inundated with offers of "free" filing.[3]

[2] Available at https://www.youtube.com/watch?v=c7jhZR_umi8.

[3] See https://kl.link/322LfnU (archived version of commercial site on June 1, 2015); https://kl.link/3iMmMcf (archived version of commercial site on Jan. 14, 2016); https://kl.link/3fgah6u (archived version of commercial site on Feb. 15, 2017); https://kl.link/2CiwB0P (archived version of commercial site on Jan. 18, 2018); https://kl.link/31ZULrH

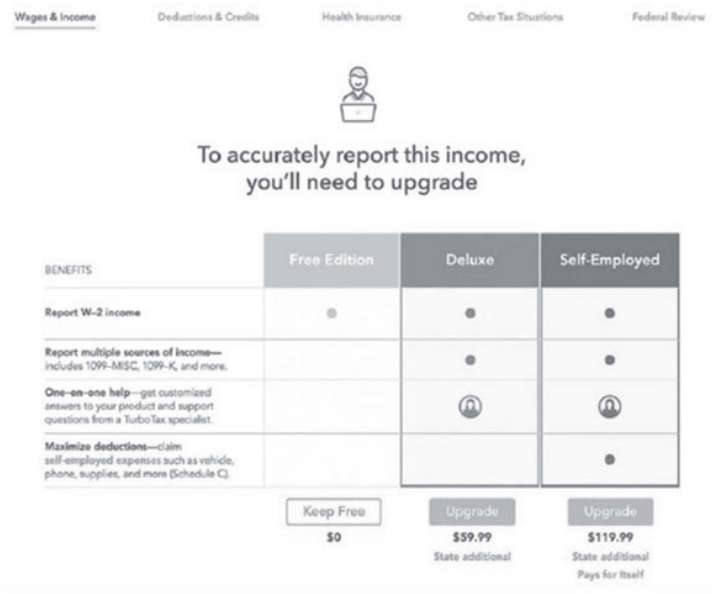
TurboTax aggressively advertised its Free Edition in this manner for tax years 2014, 2015, 2016, 2017, and 2018, to convey to taxpayers that its Free Edition was the free filing option.

Not only did TurboTax aggressively market its restrictive Free Edition, it also actively concealed its Freedom Edition, for which many more taxpayers were eligible. For instance, TurboTax "de-indexed" the Freedom Edition website, adding code directing search engines to not list the website in online search results. As a result, consumers searching for free tax filing, even specifically for "IRS free tax filing," would be directed to TurboTax's Free Edition commercial site rather than the Freedom Edition site. And even if a consumer managed to locate TurboTax's Freedom Edition through an internet search, that consumer was first directed to a landing page containing a button advertising "free" filing on TurboTax's commercial website.[4] TurboTax also omitted all references to the Freedom Edition website from its commercial website, and it removed all links from the commercial website to the Freedom Edition website.

Once on TurboTax's commercial website, consumers were presented only with TurboTax's "Free Edition" and TurboTax's paid products. They were never made aware of the Freedom Edition, and were shown a menu of options that would cause any reasonable consumer to conclude that the Free Edition was the only free option available. Because the "Free Edition" is so restrictive, many taxpayers who qualified for the Freedom Edition ended up on TurboTax's commercial website and were led to believe that their only option was a TurboTax paid product.

(archived version of commercial site on Jan. 31, 2019).

[4] *See* TurboTax Freedom Edition and IRS Free File Alliance (Mar. 18, 2014) (describing the IRS Free File Program, and then providing a "Start For Free" button directing the reader to TurboTax's commercial website) available at https://kl.link/38LBBax.



In short, TurboTax aggressively advertised "free" filing through its commercial website and a product designed to appear identical to the truly free product, while actively concealing the truly free product, intending that taxpayers would be drawn to TurboTax for "free" filing, but then would be unlikely to find the actual free filing product and would instead purchase TurboTax's paid products. This process was no accident. As explained in an exposé last year by ProPublica, internal whistleblowers have confirmed that Intuit carefully designed TurboTax's advertising and website for the *specific purpose* of causing consumers to think they had to pay Intuit money for something Intuit had promised to provide for free:

> Steering customers away from TurboTax's truly free option [wa]s a "purposeful strategy," said a former midlevel Intuit employee. For people who find TurboTax through a search engine or an online ad, "the landing page would direct you through a product flow that the company wanted to ensure would not make you aware of Free File."
> . . .
> "The entire strategy is make sure people read the word 'free' and click our site and never use" an actually free product, the former midlevel employee said. In reality, TurboTax's Free Edition guides many people to a product that costs them money. It's only free for people with the simplest tax situations. The "vast majority of people who click that will not pay $0," the former employee said.
> . . .
> One former marketing employee recalled a May 2017 meeting of a marketing team at TurboTax's San Diego headquarters. The tax filing season had just ended, and a dozen or so staffers up to the senior manager level were brainstorming. A new employee proposed that customers going through TurboTax's interview-style filing process who were found to be eligible for Free File get a "hard recommendation" — essentially a pop-up window — to be routed to the truly free product.
>
> The response? Laughter, according to the former employee. The meeting quickly moved on.

> "They have ways of detecting if you're paying too much, but they just don't do it," the former staffer said.
> . . .
>
> Dozens of taxpayers have contacted ProPublica to tell their stories of being charged by TurboTax despite the fact that they earned under $34,000 a year, qualifying them for TurboTax's Free File product. An 87-year-old retiree with a gross income of $11,000, for example, was charged $124.98 to file with TurboTax.
>
> On LinkedIn, Heather Samarin, who was a TurboTax vice president of product management a decade ago, said that she had been "charged with addressing the threat posed by IRS free efile program" and had "revamped TurboTax marketing strategy for low-end tax filers," driving a "100% increase in revenues." She did not respond to requests for comment.
> . . .
> Last summer, according to a former marketing employee, the then-head of TurboTax, Dan Wernikoff, attended a meeting about customers who had unnecessarily selected costlier products like TurboTax Deluxe. These customers had tax situations that qualified them for a cheaper or even free product, and the slides shown at the meeting referred to them as having been "overcharged." According to the former employee, Wernikoff instructed that going forward, employees should never use the word "overcharged." Instead, they should say that these customers' use of products intended for higher-earning customers was "aspirational." Wernikoff didn't respond to a request for comment.

See Justin Elliott & Paul Kiel, *The TurboTax Trap: TurboTax and H&R Block Saw Free Tax Filing as a Threat — and Gutted It*, ProPublica (May 2, 2019) *available at* https://kl.link/3fibSsO.

Claimant AMBER MILLIKAN was eligible for free filing through TurboTax's IRS-required Free File product. But despite being eligible for free tax filing, Claimant paid TurboTax to file taxes. Claimant paid TurboTax because Claimant was drawn by the prospect of "free" tax filing through TurboTax's commercial website, but TurboTax implicitly represented that its Free Edition, rather than the truly free Freedom Edition, was the only free filing product available. Because Claimant was ineligible for the Free Edition, TurboTax represented that Claimant would have to file Claimant's taxes using a paid TurboTax product, which Claimant did. Even after Claimant provided sufficient information to allow TurboTax to determine that Claimant was eligible for the Free File program, TurboTax did not make Claimant aware of that program or direct Claimant to the Free File website. And TurboTax made it impossible for Claimant to access the truly free, Free File website from its commercial website. Had Claimant known of the truly free option (TurboTax's Free File Program), Claimant would not have paid TurboTax to file Claimant's taxes. Accordingly, TurboTax knowingly, intentionally, and willfully misled Claimant, causing Claimant to pay for services that Claimant would otherwise have not paid for. TurboTax's fraud was particularly egregious because it was part of

a willful pattern in which the company repeatedly took advantage of millions of low-income taxpayers like Claimant, in violation of the commitment TurboTax made to the IRS to prevent the IRS from offering its own, competing product. TurboTax's conduct constitutes fraud and unjust enrichment at common law. Its conduct also constitutes unfair, unconscionable, deceptive, and fraudulent business practices, in violation of R.I. Gen L § 6-13.1-2 et seq.

Intuit's conduct also violates the Sherman Act, which makes illegal certain types of anticompetitive conduct.[5] While businesses may lawfully act to expand their market share and increase profits, they cannot pursue or maintain a monopoly by unfairly harming the competitive process.[6] Thus a company like TurboTax, with monopoly power, cannot engage in deceptive or unlawful conduct to avoid competition.[7] And it cannot collude with competitors to increase prices.[8] Under either theory, the ultimate question is whether the anticompetitive conduct harmed consumers. TurboTax's scheme impeded competition and harmed consumers in two ways.

First, TurboTax deceived a formidable potential competitor, the United States government, from entering the market for online tax preparation and filing services. TurboTax has conceded that it "face[s] competitive challenges from government entities that offer publicly funded electronic tax preparation and filing services with no fees to individual taxpayers."[9] To combat that threat, TurboTax—through the Free File Alliance—promised to offer free tax filing to at least 60% of United States taxpayers, in return for the IRS's agreement to not offer its own free product.

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[5] *See* 15 U.S.C. §§ 1, 2.

[6] *See id.*

[7] *See, e.g., Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 303 (3d Cir. 2007) (reversing dismissal of a Sherman Act claim based on deception of a standard-setting organization); *United States v. Microsoft Corp.*, 253 F.3d 34, 76–77 (D.C. Cir. 2001) (finding a Sherman Act violation where Microsoft deceived software developers into developing software that would only work with Microsoft's operating system); *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 396–97 (3d Cir. 2000) (reversing dismissal of a Sherman Act claim based in part on a deceptive marketing campaign disparaging a competitor); *Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs.*, 850 F.2d 904, 914–17 (2d Cir. 1988) (reversing dismissal of a Sherman Act claim based on letters sent to pharmacists disparaging a rival drug company); *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1257–58 (8th Cir. 1980) (affirming a finding of Sherman Act violations based on a deceptive advertising campaign).

[8] *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (holding that collusion is illegal when market participants made a "conscious commitment to a common scheme designed to achieve an unlawful objective"); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 426–33 (4th Cir. 2015); *Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 720 F.3d 33, 47–51 (1st Cir. 2013) (reversing dismissal of a Sherman Act claim when the plaintiff alleged "facts concerning when agreement occurred" and conduct by the market participants "which is difficult to explain outside the context of a conspiracy").

[9] *See* Intuit Inc., Fiscal Year 2018 Form 10-K at 9, available at https://kl.link/2W2iRhM.

With the non-compete agreement in place, TurboTax implemented the deceptive bait-and-switch scheme described above. TurboTax hurt consumers by depriving them of a truly widely available free-file option, and instead steering them into TurboTax's paid options. And TurboTax maintained its significant market power by shielding its paid products from competition from a free or far less expensive option.

Second, TurboTax colluded with the other members of the Free File Alliance to conceal the Free File program from the entire market, and thus to reduce competition. Instead of competing for Free-File taxpayers to promote their brands and to retain those consumers as fee-generating customers once their incomes outgrew the Free File Program, the members of the Alliance coordinated to suppress competition. They not only collectively extracted a non-compete agreement from the IRS, but they also collectively concealed the Free File product it had promised to provide, to maximize the number of consumers who paid for tax filing services. TurboTax's scheme, while egregious, was mirrored by H&R Block and others; and while other members of the Free File Alliance should have competed for the free-filing taxpayers who fell for TurboTax's scheme (*i.e.*, potential brand ambassadors and future fee-paying customers), the Alliance members all colluded to hide the Free File program and to steer the taxpayers into their respective paid products.[10] By collectively suppressing the number of free-filers, the Alliance members all profited from the fees they received from those would-be-free-filers. And their collusion was wildly successful: In 2019, only 2.4% of taxpayers eligible for the Free File program filed taxes using the program, and the Department of Treasury estimates that more than 14 million taxpayers who were eligible for the Free File program paid to use an Alliance member's commercial product instead.[11]

TurboTax's anticompetitive conduct violates Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. *See also* 15 U.S.C. § 15.

[10] *See* Justin Elliott & Paul Kiel, *The TurboTax Trap: TurboTax and H&R Block Saw Free Tax Filing as a Threat — and Gutted It*, ProPublica (May 2, 2019) available at https://kl.link/3fibSsO.

[11] *See* Treasury Inspector General for Tax Administration, *Complexity and Insufficient Oversight of the Free File Program Result in Low Taxpayer Participation* at 5 (Feb. 20, 2020) available at https://kl.link/2ZffCFL.

Exhibit C

American Arbitration Association®

CONSUMER ARBITRATION RULES

Costs of Arbitration

Amended and Effective November 1, 2020

Costs of Arbitration

Where the AAA determines that a business's failure to pay their portion of arbitration costs is a violation of the Consumer Arbitration Rules, the AAA may decline to administer future consumer arbitrations with that business.

Party	Desk/Documents-Only Arbitration	In-Person, Virtual or Telephonic Hearing Arbitration
Individual	**Single Consumer Case Filing Fee:** $200 **Multiple Consumer Case Filing Fee:** $100 or $50 per case depending on tier $0 if Case Filed by Business	**Single Consumer Case Filing Fee:** $200 **Multiple Consumer Case Filing Fee:** $100 or $50 per case depending on tier $0 if Case Filed by Business
Business	**Single Consumer Case Filing Fee:** $300 for 1 or $425 for 3 arbitrators is due once the individual claimant meets the filing requirements; $500 for 1 arbitrator or $625 for 3 arbitrators if Case Filed by Business is due at the time the arbitration is filed. **Multiple Consumer Case Filing Fee:** $300, $225, $150, or $75 per case depending on tier, due once the individual claimant meets the filing requirements; Business must pay both the Individual's Filing Fee and Business's Filing Fee if the case is filed by Business, due at the time the arbitration is filed. **Case Management Fee:** $1,400 for 1 arbitrator or $1,775 for 3 arbitrators will be assessed and must be paid prior to the arbitrator appointment process. **Arbitrator Compensation:** $1,500 per case*	**Single Consumer Filing Fee:** $300 for 1 or $425 for 3 arbitrators is due once the individual claimant meets the filing requirements; $500 for 1 arbitrator or $625 for 3 arbitrators if Case Filed by Business is due at the time the arbitration is filed. **Multiple Consumer Case Filing Fee:** $300, $225, $150, or $75 per case depending on tier, due once the individual claimant meets the filing requirements; Business must pay both the Individual's Filing Fee and Business's Filing Fee if the case is filed by Business, due at the time the arbitration is filed. **Case Management Fee:** $1,400 for 1 arbitrator or $1,775 for 3 arbitrators will be assessed and must be paid prior to the arbitrator appointment process. **Hearing Fee:** $500 **Arbitrator Compensation:** $2,500 per day of hearing* per arbitrator
	*A Desk/Documents-Only Case will not exceed document submissions of more than 100 pages in total and 7 total hours of time for the arbitrator to review the submissions and render the Award. Beyond 100 pages and 7 hours of time, the business will be responsible for additional arbitrator compensation at a rate of $300 per hour. Arbitrator compensation is not subject to reallocation by the arbitrator(s) except as may be required by applicable law or upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.	*The arbitrator compensation encompasses one preliminary conference, one day of in-person, virtual or telephonic hearing, and one final award. For cases with additional procedures, such as multiple telephone conferences, motion practice, post-hearing briefing, interim or partial awards, awards containing findings of fact and conclusions of law, or other processes not provided for in the Rules, the business will be responsible for additional arbitrator compensation. Arbitrator compensation is not subject to reallocation by the arbitrator(s) except as may be required by applicable law or upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.

AAA Administrative Fees

In cases where the business is the filing party, either as the claimant or filing on behalf of the individual, the business shall be responsible for all administrative fees that includes, filing fees, case management fees and hearing fees charged by the AAA.

Arbitrator compensation is not included as a part of the AAA's administrative fees.

Note that with regard to all AAA administrative fees, the AAA retains the discretion to interpret and apply this fee schedule to a particular case or cases.

(i) Filing Fees*

The business's share of the filing fees is due as soon as the AAA confirms in writing that the individual filing meets the filing requirements, even if the matter is settled or withdrawn.

There shall be no filing fee charged for a counterclaim.

**Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. If you believe that you meet these requirements, you must submit to the AAA a declaration under oath regarding your monthly income and the number of persons in your household. Please contact the AAA at 1-800-778-7879, if you have any questions regarding the waiver of administrative fees. (Effective January 1, 2003)*

**Pursuant to New Jersey Statutes § 2A:23B-1 et seq, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the New Jersey Arbitration Act, and to all consumer arbitrations conducted in New Jersey. If you believe that you meet these requirements, you must submit to the AAA a declaration under oath regarding your monthly income and the number of persons in your household. Please contact the AAA at 1-800-778-7879, if you have any questions regarding the waiver of administrative fees. (Effective May 1, 2020)*

A. Single Consumer Case Filing:

In cases before a single arbitrator where the individual is the Claimant, a **non-refundable**** filing fee, capped in the amount of $200, is payable in full by the individual when a case is filed unless the parties' agreement provides that the individual pay less. A **non-refundable** filing fee in the amount of $300 is payable by the business once the individual claimant meets the filing requirements, unless the parties' agreement provides that the business pay more.

In cases before three or more arbitrators, where the individual is the Claimant, a **non-refundable**** filing fee capped in the amount of $200 is payable in full by the individual when a case is filed, unless the parties' agreement provides that the individual pay less. A **non-refundable** filing fee in the amount of $425 is payable by the business once the individual claimant meets the filing requirements, unless the parties' agreement provides that the business pay more.

In cases where the business is the Claimant, the business shall be responsible for all filing fees. The **non-refundable** filing fee is $500 for a single arbitrator or $625 for 3 arbitrators.

***In the event the single consumer case filing is closed due to non-payment of initial filing fees by the business the AAA will return any filing fee received from the individual.*

B. Multiple Consumer Case Filings:

These multiple consumer case filings fees will apply to all cases when the American Arbitration Association (AAA) determines in its sole discretion that the following conditions are met:

a. Twenty-five (25) or more similar claims for arbitration or mediation are filed,

b. Claims are against or on behalf of the same party or parties, and

c. Counsel for the parties is consistent or coordinated across all cases.

All fees listed below are **non-refundable*** and will be assessed to the parties as described below, unless the clause provides that the individual pay less or the clause provides that the business is responsible for the entire fee.

****In the event any multiple case filings are closed due to non-payment of filing fees by the business, the AAA will return any filing fees received from the individuals. Filing fees are **non-refundable** in the event the cases are closed due to settlement or withdrawal.*

AAA, in its sole discretion, may consider an alternative payment process for multiple case filings.

Filing Fees For Cases Filed by the Individuals:

AAA reserves the right to determine what tier of fees applies to multiple cases filed subsequent to the initial filing.

For multiple case filings that contain more than 500 cases, each tier will be applied to the number of cases that fall within that tier.

	First 500 Cases	Cases 501 to 1,500	Cases 1,501 to 3,000	Cases 3,001 and beyond
Individual filing fee per case	$100	$50	$50	$50
Business filing fee per case	$300	$225	$150	$75

(ii) Case Management Fees

A **non-refundable** case management fee of $1,400 for 1 arbitrator or $1,775 for 3 arbitrators will be assessed to the business and must be paid prior to the arbitrator appointment process.

(iii) Hearing Fees

For telephonic hearings, virtual hearings or in-person hearings held, a Hearing Fee of $500 is payable by the business. If a case is settled or withdrawn prior to the hearing taking place, the Hearing Fee will be refunded, or cancelled if not yet paid. However, if the AAA is not notified of a cancellation at least two business days before a scheduled hearing, the Hearing Fee will remain due and will not be refunded.

There is no AAA hearing fee for an Administrative Conference (see R-10).

Neutral Arbitrator's Compensation

The business shall pay the arbitrator's compensation unless the individual, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation.

- **Desk/Documents-Only Arbitration** – Arbitrators serving on a desk/documents-only arbitration will receive compensation at a rate of $1,500 per case. A desk/documents-only arbitration will not exceed document submissions of more than 100 pages in total and 7 total hours of time for the arbitrator to review the submissions and render the Award. Beyond 100 pages and 7 hours of time, the business will be responsible for additional arbitrator compensation at a rate of $300 per hour.
- **In-Person, Virtual or Telephonic Hearing Arbitration** – Arbitrators serving on an in-person, virtual or telephonic hearing arbitration case will receive compensation at a rate of $2,500 per day of hearing per arbitrator. The arbitrator compensation encompasses one preliminary conference, one day of in-person, virtual or telephonic hearing, and one final award. For cases with additional procedures, such as multiple telephone conferences, motion practice, post-hearing briefing, interim or partial awards, awards containing findings of fact and conclusions of law, or other processes not provided for in the Rules, the business will be responsible for additional arbitrator compensation.

Once a Preliminary Management Hearing is held by the arbitrator, the arbitrator is entitled to one-half of the arbitrator compensation rate. Once evidentiary hearings are held or all parties' documents are submitted for a desk/documents-only arbitration, the arbitrator is entitled to the full amount of the arbitrator compensation rate.

For in-person, virtual or telephonic hearing arbitrations, if an evidentiary hearing is cancelled fewer than 2 business days before the hearing, the arbitrator is entitled to receive compensation at the first day of hearing rate.

Any determination by the AAA on whether the business will be responsible for additional arbitrator compensation is in the sole discretion of the AAA and such decision is final and binding.

Reallocation of Arbitrator Compensation, AAA Administrative Fees and Certain Expenses

Arbitrator compensation, expenses, and administrative fees (which include Filing Fees, Case Management Fees and Hearing Fees) are not subject to reallocation by the arbitrator(s) except as may be required by applicable law or upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.

Hearing Room Rental

The hearing fees described above do not cover the rental of hearing rooms. The AAA maintains hearing rooms for rent in most offices for the convenience of the parties. Check with the administrator for availability and rates. Hearing room rental fees will be borne by the business.

Abeyance Fee

(i) For Single Consumer Case Filing

Parties on cases held as inactive for one year will be assessed an annual abeyance fee of $500. If a party refuses to pay the assessed fee, the opposing party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed. All filing requirements, including payment of filing and other administrative fees, must be met before a matter may be placed in abeyance.

(ii) For Multiple Consumer Case Filings

Should the cases be stayed to allow for settlement negotiations or for any other reason, including judicial intervention, the AAA shall assess a single, **non-refundable** administrative fee of $2,500 for the stayed cases, and an additional, single, **non-refundable** administrative fee of $2,500 for the stayed cases every six months the cases are

held in abeyance. All abeyance fees are to be paid by the business. All filing requirements, including payment of filing and other administrative fees, must be met before a matter may be placed in abeyance.

Expenses

All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne by the business.

Consumer Clause Review and Registry Fee

Please note that all fees described below are **non-refundable.**

For businesses submitting a clause, the cost of reviewing the clause and maintaining that clause on the Registry is $500. A yearly Registry fee of $500 will be charged to maintain each clause on the Registry for each calendar year thereafter.

If the AAA receives a demand for consumer arbitration arising from an arbitration clause that was not previously submitted to the AAA for review and placement on the Registry, the business will incur an additional $250 fee for the AAA to conduct an immediate review of the clause.

Any subsequent changes, additions, deletions, or amendments to a currently registered arbitration agreement must be submitted for review and a review fee of $500 will be assessed at that time.

AAA Mediation Fees for Multiple Consumer Case Filings

For cases that are determined by the AAA to fall under the Multiple Consumer Case Filing fees section of this Costs of Arbitration fee schedule, the cost of mediation is based on the hourly or daily mediation rate published on the mediator's AAA profile. In addition, the administrative fee for AAA to initiate the mediation process for the multiple consumer case filings is $10,000 plus $75 per hour for each hour billed by the mediator. The business shall be responsible for these administrative fees, unless the parties agree otherwise.

The $10,000 mediation initiation fee is due prior to the appointment of the mediator. If mediation is commenced after multiple consumer case filings have been filed, and the parties agree to stay the arbitrations to pursue mediation, any unpaid arbitration related administrative filing fees will become due if the arbitration process starts again. If the arbitration related administrative filing fees are paid prior to the parties commencing mediation, then the AAA may, in its sole discretion, determine to waive the $10,000 mediation initiation fee.

AAA Administered Settlement Approval Process for Multiple Consumer Case Filings

For cases that are determined by the AAA to fall under the Multiple Consumer Case Filing fees section of this Costs of Arbitration fee schedule, where by law, court order and/or party agreement, the parties require a third party neutral to review and approve settlements, the fee for the AAA to provide administrative services for the purposes of a neutral to review and approve settlements is a flat rate of $3,250 plus $2,500 every six months thereafter that the cases remain open. The compensation of the neutral is $2,500. The business is responsible for all AAA fees and compensation referenced in this section.

Fees for Additional Services

The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in the Consumer Arbitration Rules and which may be required by the parties' agreement or stipulation.

Exhibit D

CONSUMER ARBITRATION RULES

Costs of Arbitration

Party	Desk/Documents-Only Arbitration	In-Person or Telephonic Hearing Arbitration
Consumer		
Business		

(i) Filing Fees*

(ii) Case Management Fees

(iii) Neutral Arbitrator's Compensation

(iv) Hearing Fees

(v) Hearing Room Rental

(vi) Abeyance Fee

(vii) Expenses

(viii) Consumer Clause Review and Registry Fee

(ix) Reallocation of Arbitrator Compensation, AAA Administrative Fees and Certain Expenses

Exhibit E

From: Rodger Cole <RCole@fenwick.com>
Sent: Tuesday, July 28, 2020 6:56 PM
To: Tripper Ortman <tripper@ortmanmediation.com>; Warren Postman <wdp@kellerlenkner.com>
Cc: Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>; Molly Melcher <mmelcher@fenwick.com>
Subject: Intuit Mediation

Warren and Tripper – As discussed with each of you, Intuit believes we are too far apart to have any meaningful discussion on Thursday and we should not go forward on Thursday. We appreciate the hard work both sides put in preparing for the mediation, and the good work by Tripper to get the discussions going. I suspect we will all come together at some point in the future. Best regards, Rodger

RODGER COLE
Partner | Fenwick & West LLP | +1 650-335-7603 | rcole@fenwick.com
Admitted to practice in California.

Exhibit F

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN THE COUNTY OF LOS ANGELES

INTUIT INC. and

INTUIT CONSUMER GROUP LLC,

Plaintiffs,

v.

9,933 INDIVIDUALS,

Defendants.

Lead Case No. 20STCV22761
(Consolidated with Case No. 20STCV37714)

DECLARATION OF STEPHEN McG. BUNDY IN SUPPORT OF INTUIT'S OPPOSITION TO DEFENDANTS' MOTION FOR A PRELIMINARY INJUNCTION

Judge: Hon. Terry Green
Dept.: 14
Hearing Date: November 20, 2020
Hearing Time: 8:45 a.m.
Reservation No.: 337964070146
Complaint Filed: June 12, 2020

I, Stephen M. Bundy, declare as follows:

1. I have personal knowledge of the facts set forth herein, and if called as a witness, I could competently testify to them.

2. I am a lawyer and Professor of Law, Emeritus at the Law School of the University of California at Berkeley. Throughout my academic career, my central concerns have been professional responsibility and legal ethics, complex litigation, and alternative dispute resolution. I regularly taught the required professional responsibility course. My complex litigation and alternative dispute resolution courses also had substantial legal ethics content, focusing on the ethics of negotiation and settlement. I have also taught professional ethics to practicing lawyers, in both public and private law offices and in continuing legal education programs. I have extensive experience as a lawyer in private practice dealing with ethical issues, on behalf of clients, lawyers, and law firms, both private and public. I have testified as an expert many times on legal ethics issues by declaration, deposition and at trial. I recently completed serving as Chair of the California State Bar's Committee on Professional Responsibility and Conduct, and currently serve as Special Advisor to that Committee. A copy of my curriculum vitae is attached hereto as Exhibit A.

3. In making this declaration, I have assumed the following facts:

a. Keller Lenkner represents approximately 125,000 individual clients who presently have lodged or filed demands with the American Arbitration Association ("AAA") against Intuit. Keller Lenkner claims to represent each of those clients on an individualized, rather than a collective, basis. The clients' demands were submitted in stages: a first and second wave totaling 10,497 individual demands in October 2019 and January 2020; a third wave of 34,754 additional demands in March 2020; and fourth and fifth waves totaling 88,785 demands in October 2020.

b. In this action, Keller Lenkner, representing roughly 41,000 clients, is seeking an injunction that would bar Intuit from entering into a class-action settlement that includes any Intuit customers who are represented by Keller Lenkner and "currently engaged in arbitration" against Intuit. For purposes of this opinion, I assume that this injunction would prevent all of Keller Lenkner's clients from receiving or accepting an offer made as part of the settlement of a federal class action, even if the client, advised by Keller Lenkner, would find the offer preferable to continuing their claim in arbitration.

c. The claims of Keller Lenkner's clients are at different stages of the arbitration process. The roughly 89,000 claims submitted last month in the fourth and fifth waves have been lodged with the AAA but the $200 initial filing fees have not been paid—hence, those claims are not yet deemed filed under the AAA Rules. Of the more than 45,000 claims in the first, second and third waves, approximately 8,300 were withdrawn after Intuit pointed out their lack of merit. For thousands of other clients, Keller Lenkner has advanced the $200 initial fee required for those claims to be deemed filed under the AAA Rules. Intuit has paid the filing fees for the first three waves of cases, totaling nearly $13 million. In a smaller number of those cases, the AAA has initiated arbitration, requiring Intuit to pay its case management fee of $1,400 per case. Finally, in a still smaller number of cases, the AAA has appointed arbitrators and Intuit has paid the $1,500 for arbitrator's compensation.

d. Keller Lenkner's clients also differ in the expected value of their claims on the merits, due to the facts of their individual cases and the differences between the various state laws that Keller Lenkner asserts are applicable to their clients' claims. A preliminary review of the 45,000 first, second and third wave claims by Intuit determined that approximately 12,000 were frivolous on their face. Keller Lenkner has now withdrawn approximately 8,300 of those claims, but the remainder are still on file. In addition, Intuit has identified tens of thousands of claimants whose claims are likely to fail on the merits because of their tax filing history and has informed Keller Lenkner about those claims. If Keller Lenkner's pre-filing investigation of the 89,000 fourth and fifth wave claims was comparable to that conducted on earlier waves, then it is likely that (a) many thousands of those claims are frivolous or will fail on the merits and (b) Keller Lenkner does not yet know which individual clients fall into that category.

e. Finally, Keller Lenkner's 125,000 clients also vary in the extent to which they can credibly threaten to impose on Intuit the costs which Intuit is contractually obligated to pay to support the arbitration, including the $2,900 per case in case management fees and arbitrator compensation. For some clients, that threat is no longer credible, because Intuit has already paid some or all of those costs. For others, the client's case is so weak that, were the client to pursue a claim, the client would run a substantial risk of being held financially responsible for some or all of those costs under the AAA Rules and the arbitration provision in the TurboTax Terms of Service.

f. For all these reasons, many of Keller Lenkner's arbitration clients could benefit from considering, and participating in, a class action settlement of claims against Intuit reached in federal court in compliance with Rule 23 of the Federal Rules of Civil Procedure, even if the monetary terms of that settlement do not provide class members with a substantial non-merits based premium reflecting Intuit's costs of arbitration. Some clients would be likely to accept such a settlement because of weaknesses in their claims that might lead to no recovery in arbitration, or even an award of sanctions against them. Others would accept such a settlement because they would rather have the money now, are averse to risk, or regard it as a fair compromise. This assumption is supported by evidence about the actual preferences of current Keller Lenkner clients. Intuit offered 101 of those clients an individualized settlement proposal in which each would receive in settlement any sums paid to Intuit to file their taxes in years where they were eligible to file using the TurboTax Free File program (that is, the full amount of their potential out of pocket damages). After consulting with Keller Lenkner, 23 of those 101 clients (22.77%) accepted the offer, even though the settlement included no premium to reflect Intuit's potential arbitration costs. It is reasonable to assume that, all other things being equal, many Keller Lenkner clients would be even more likely to accept such an offer if made as part of a class action settlement that had already received preliminary fairness approval from a federal court.

g. Keller Lenkner will realize substantially more financial benefit from an individual claim that is settled outside of litigation than from one that is settled as part of a class action. The terms of Keller Lenkner's retention agreement with its clients in this matter are not known. In a similar litigation in Minnesota, however, the firm's standard retention agreement provided that in the event of any resolution of an individual claim before the commencement of an arbitration or court case in which the client was a named party the firm would receive a $750 flat fee. Conversely, in the event of a class settlement, the firm would receive no fee of any kind. Declaration of Warren Postman in Opposition to CenturyLink's Motion to Disqualify Counsel and Require Corrective Notice ¶¶ 42, 85, *In re CenturyLink Sales Practices and Securities Litigation*, MDL No. 17-2795 (MJD/KMM), May 15, 2020). Assuming that the fee agreements in this case contain similar provisions, Keller Lenkner has a strong financial incentive to disfavor any of its clients settling as part of a class action.

4. **Opinion 1: Keller Lenkner's Conflict of Interest**

a. Keller Lenkner has a duty of undivided loyalty to each of its clients. That duty forbids Keller Lenkner from taking an action for the benefit of one client that is adverse to another client's interests. *Flatt v. Superior Court*, 9 Cal. 4th 275, 289 (1994). The duty of loyalty is not limited to disloyal acts: it also bars Keller Lenkner from placing itself in a position where disloyalty may be required, whether by favoring one client's interest over another or by reconciling them in a situation where both should be fully enforced. *Flatt,* 9 Cal 4th at 289; *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, 96 Cal. App. 4th 1017, 1043 (2002). The lawyer is equally forbidden from taking action adverse to a client to serve the lawyer's own financial or reputational interest. An action is adverse to a client's interest when it is "unfavorable in the sense of something that generally could cause injury even if in any particular case it does not do so"—actual injury is not required. California Formal Opinion No. 2011-182 (relying on *Ames v. State Bar*, 8 Cal. 3d 910, 917 (1973)).

b. Consistent with the duty of loyalty, a lawyer may not represent a client if the representation is directly adverse to another client, California Rule of Professional Conduct ("CRPC") 1.7(a), or if "there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to…another client…or by the lawyer's own interests, CRPC 1.7(b), unless the client gives informed written consent. Informed written consent to a potential conflict is effective only "after the lawyer has communicated and explained" in writing "(i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct." CRPC 1.0.1(e)-(e-1). Even a fully informed written consent cannot excuse a conflict unless "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." CRPC 1.7(d)(1).

c. The professional rules are also highly sensitive to the risk of conflict of interest in the context of settlement. The decision whether to accept a settlement is for the client, not the lawyer. Under the California Rules of Professional Conduct, "[a] lawyer shall abide by a client's decision whether to settle a matter." CRPC 1.2. To protect the client's right to decide, a lawyer must communicate to the client "all amounts, terms and conditions" of any written settlement offer in a civil matter. CRPC 1.4.1. Once those terms have been communicated to the client, the lawyer must

"exercise independent judgment and render candid advice" about whether to accept the offer, framed with attention to the specifics of the client's claim and expressed interests. CRPC 2.1. Where the settlement is on behalf of two or more clients, any aggregate settlement of those claims requires all clients' informed written consent, following disclosure of each client's participation in the settlement. CRPC 1.8.7. These rules reflect an awareness that the financial and personal interests of individual clients and of the lawyer often differ with respect to the question of settlement, as they do here, and that when such conflicts exist, the client's individual power of decision must be protected.

d. Keller Lenkner's advocacy for an injunction that would bar all its clients from being included in the terms of a class action settlement violates its duty of undivided loyalty to those clients who could benefit from considering or participating in such a settlement. On the assumed facts, many Keller Lenkner clients fall into that category. Because those clients could benefit from such a settlement, the relief sought is adverse to them. Moreover, the conflict is actual—Keller Lenkner's advocacy of the injunction foreseeably will result in harm to those clients. This course of action is especially troubling because Keller Lenkner also has a substantial financial interest in maximizing the number of clients who pursue individual arbitration (where substantial fees can be obtained) and minimizing the number who settle in a class action, where Keller Lenkner would receive no compensation.

e. It does not matter that Keller Lenkner may reasonably believe the injunction would benefit some of its clients: the duty of loyalty does not permit Keller Lenkner to place the interests of those clients ahead of the interests of those who could be harmed by the injunction. Nor would it matter if Keller Lenkner reasonably believed that the injunction tended to enhance the aggregate value of all its clients' claims. Keller Lenkner has not been appointed to represent a class. It therefore must treat its clients as individuals, not as an aggregate, and cannot properly trade off the interests of some clients to maximize its or its clients' total financial return from the litigation.

f. The fact that each of Keller Lenkner's clients may have a contractual right not to participate in a class action settlement does not alter the conflict analysis. That is so because each client is entitled to decide for him or herself whether to insist on that right or to waive it, and there are a substantial number of Keller Lenkner clients who could benefit from waiving it in order to participate in

a class action settlement. Keller Lenkner's duty to those clients requires it to preserve their ability to benefit from waiving that right. Instead, the injunction that Keller Lenkner is seeking would eliminate that ability, and abort the process by which they could receive a class action settlement offer and reach their own decision on whether to accept it.

g. Keller Lenkner's concern may be that its clients would be making a "mistake" by entering into a future merits-based class action settlement when they could realize more money by seeking an individual settlement that trades on Intuit's costs of defense. But under the professional rules, the decision to settle is for the client, not the lawyer. The remedy for client error is the lawyer's advice, not the lawyer's veto. The proposed injunction, however, deprives all Keller Lenkner's clients of the right to decide the question of settlement, without regard to whether they would benefit from exercising that right. This conflict is particularly troubling because the proposed injunction is not necessary to protect those who might later individually decide to opt out of a class settlement. Keller Lenkner can protect each of its clients' individual right to make an informed decision by advising each of them about the class settlement when and if it occurs.

h. Assuming that Keller Lenkner sought written client consent to this conflict, that consent cannot have cured it, for two reasons. First, such a consent would have required a written explanation of the injunction, the conflicts to which it gave rise, and "the material risks, including any actual and reasonably foreseeable adverse consequences" of seeking the injunction for those clients who could benefit from a class action settlement. But Keller Lenkner simply has not learned enough about the position of each of its individual clients to provide each client with an individuated explanation of those risks and consequences. Without such an explanation, the client's consent cannot be adequately informed. Second, even if fully informed, such a consent cannot excuse an actual conflict of this kind, because Keller Lenkner could not "reasonably" believe that seeking an injunction that harms some clients is consistent with providing "competent and diligent representation to each [of them]." CRPC 1.7(d)(1).

5. **Opinion 2: Class Action Notice and Rule 4.2**

a. A class action notice from a federal court directed to each of Keller Lenkner's individual clients would not violate California Rule of Professional Conduct 4.2. Rule 4.2—the so-

called "no contact" rule—prohibits a lawyer representing a client from communicating, "directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." CRPC 4.2 (a). The prohibition on indirect communications "is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent, investigator or the lawyer's client." *Id.* Comment [3]. The Rule does not prohibit lawyer "communications otherwise authorized by law or a court order." CRPC 4.2(c)(2).

b. Rule 4.2 does not apply here because a class action notice from a federal court is neither a "direct" communication by a lawyer nor an "indirect" communication through an intermediary acting at the lawyer's direction. Rather, it is a communication from the court, an independent governmental entity with fiduciary obligations to the class. Thus, Rule 23(c)(2)(B) states that in an action certified under Rule 23(b)(3) "the court must direct" notice to class members. Similarly, where notice of a class action settlement is required under Rule 23(e)(1) "the court must direct notice" to all class members who would be bound by the settlement. Consistent with that view, the model class action notices from the Federal Judicial Center expressly state that "the court sent you this notice" and that it is "not a solicitation from a lawyer." *See, e.g.*, Federal Judicial Center, Products Liability Class Action Certification and Settlement: Full Notice (a copy of which is attached as Exhibit B to this declaration).[1]

c. If, implausibly, a class action notice from the court were somehow deemed a lawyer communication within the meaning of Rule 4.2(a), it would nevertheless fall within the explicit exception in Rule 4.2(c)(2) permitting communications "otherwise authorized by law or court order."

d. The conclusion that a class action notice from a federal court is not prohibited by Rule 4.2 is also sound policy. Class action notice is required to be clear, concise and "in plain, easily understood language," Fed. R. Civ. P. 23(c)(2)(B), and should be sent only after the district court "has given careful attention to the content and format of the notice…and any claim form class members must submit to obtain relief." Fed. R. Civ. P. 23 Advisory Committee Note on Rules—2018 Amendment. Because of these legal and procedural protections, notice approved and sent by a federal court does not

[1] https://www.fjc.gov/sites/default/files/2016/ClaAct04.pdf (last accessed November 4, 2020).

involve the risks of partisan overreaching or interference with the lawyer-client relationship that Rule 4.2 is intended to address.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on November 6, 2020 in Berkeley, California.

Stephen McG. Bundy

Exhibit G

From: Warren Postman
Sent: Monday, November 9, 2020 10:02 PM
To: Rodger Cole; Paikin, Jonathan; Gringer, David; Molly Melcher; Norm Siegel; Daniel Girard
Cc: Ben Whiting; Sean Duddy
Subject: RE: Intuit Mediation

Follow Up Flag: Follow up
Flag Status: Flagged

Rodger,

We can be available any time on Friday or Monday. Please let us know if there is a time that works for you.

Sincerely,

Warren Postman
Partner
Keller | Lenkner
1300 I Street, N.W., Suite 400E | Washington, D.C., 20005
312.948.8463 | Email | Bio | Website

From: Rodger Cole <RCole@fenwick.com>
Sent: Monday, November 9, 2020 6:42 PM
To: Warren Postman <wdp@kellerlenkner.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>; Molly Melcher <mmelcher@fenwick.com>; Norm Siegel <siegel@stuevesiegel.com>; Daniel Girard <dgirard@girardsharp.com>
Cc: Ben Whiting <ben.whiting@kellerlenkner.com>; Sean Duddy <skd@kellerlenkner.com>
Subject: RE: Intuit Mediation

Warren,

As you know, many different groups of lawyers have filed actions against Intuit. We have discussed settlement and indeed settled multiple cases filed against Intuit including cases brought by counsel who are not on this email exchange.

Pursuant to Federal Rule of Civil Procedure 23(g)(3), Judge Breyer appointed Interim Class Counsel to represent the interests of the putative class and to negotiate on their behalf. Our mediation on Wednesday is with the lawyers the court appointed for that purpose. Needless to say, if a federal class settlement is reached with court-appointed counsel, all members of the class will have the right to opt out.

As you also know, our prior attempts to separately mediate with you regarding your clients' claims were not successful. We remain open to continuing those discussions. Counsel for Intuit are tied up tomorrow and Wednesday, but please let us know some dates/times later this week or the following week to schedule a call so we can explore whether it would be productive to resume those discussions.

Best regards, Rodger

RODGER COLE
Partner | Fenwick & West LLP | +1 650-335-7603 | rcole@fenwick.com
Admitted to practice in California.

FENWICK

From: Warren Postman <wdp@kellerlenkner.com>
Sent: Sunday, November 8, 2020 12:21 PM
To: Rodger Cole <RCole@fenwick.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>; Molly Melcher <mmelcher@fenwick.com>; Norm Siegel <siegel@stuevesiegel.com>; Daniel Girard <dgirard@girardsharp.com>
Cc: Ben Whiting <ben.whiting@kellerlenkner.com>; Sean Duddy <skd@kellerlenkner.com>
Subject: Intuit Mediation

**** EXTERNAL EMAIL ****

Counsel,

Based on the parties' filing with Judge Breyer on Friday in *In re Intuit Free File Litigation* and Intuit's filing with Judge Green on Friday in *Intuit Inc., et al. v. 9,933 Individuals*, it appears that you are participating in a mediation on Wednesday, November 11 in which you will discuss a resolution of the claims being pursued in arbitration by Keller Lenkner's clients (the "KL arbitration clients").

The KL arbitration clients have selected Keller Lenkner as the attorneys that should represent them in a resolution of their claims, which include claims not covered by the consolidated class complaint in *In re Intuit Free File Litigation*. And, according to a declaration submitted by Intuit in *Intuit Inc., et al. v. 9,933 Individuals*, many claimants who have already chosen to pursue arbitrations against Intuit can expect to obtain more value in a settlement than those who are not. Accordingly, Keller Lenkner should participate in the November 11 mediation so that the KL arbitration clients will have their distinct interests protected by their counsel of choice.

Please let us know if you will include us in any settlement discussions that encompass our clients' claims.

Sincerely,

Warren Postman
Partner
Keller | Lenkner
1300 I Street, N.W., Suite 400E | Washington, D.C., 20005
312.948.8463 | Email | Bio | Website

Exhibit H

From: Daniel Girard <dgirard@girardsharp.com>
Sent: Friday, November 20, 2020 3:17 PM
To: Ben Whiting <ben.whiting@kellerlenkner.com>; Warren Postman <wdp@kellerlenkner.com>; Rodger Cole <RCole@fenwick.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>; Molly Melcher <mmelcher@fenwick.com>; Norm Siegel <siegel@stuevesiegel.com>
Cc: Sean Duddy <skd@kellerlenkner.com>
Subject: RE: Intuit Mediation

Ben,

The opt-out threshold agreement is confidential and will be submitted *in camera* upon court request. Manual for Complex Litigation, Fourth, § 21.631; *see Thomas v. MagnaChip Semiconductor Corp.*, 2017 WL 4750628, at *5 (N.D. Cal. Oct. 20, 2017); *In re Online DVD-Rental Agreement Litig.*, 779 F.3d 934, 948 (9th Cir. 2015).
Regards,
Daniel

From: Ben Whiting <ben.whiting@kellerlenkner.com>
Sent: Thursday, November 19, 2020 1:24 PM
To: Warren Postman <wdp@kellerlenkner.com>; Rodger Cole <RCole@fenwick.com>; Paikin, Jonathan <Jonathan.Paikin@wilmerhale.com>; Gringer, David <David.Gringer@wilmerhale.com>; Molly Melcher <mmelcher@fenwick.com>; Norm Siegel <siegel@stuevesiegel.com>; Daniel Girard <dgirard@girardsharp.com>
Cc: Sean Duddy <skd@kellerlenkner.com>
Subject: RE: Intuit Mediation

EXTERNAL EMAIL
Counsel:

The motion for preliminary approval of a class settlement filed in *In re Intuit Free File Litigation* references a "confidential side letter" that apparently gives Intuit the right to terminate the proposed settlement if the number of opt-outs exceeds a number agreed upon between Intuit and the interim class counsel. The letter is also incorporated as part of the settlement agreement at § XI.b.ii.

Would you please provide us with a copy of the side letter so we can better understand the arrangement you each negotiated for our clients? We will, of course, sign an appropriate protective order to maintain the confidential nature of the side letter agreement.

Best regards,

Ben

Ben Whiting
Partner

Keller | Lenkner
150 N. Riverside Plaza, Suite 4270 | Chicago, IL, 60606
312.280.5784 | Email | Bio | Website

Exhibit I

FENWICK & WEST LLP
SILICON VALLEY CENTER 801 CALIFORNIA STREET MOUNTAIN VIEW, CA 94041
TEL 650.988.8500 FAX 650.938.5200 WWW.FENWICK.COM

February 10, 2020

RODGER R. COLE
EMAIL: RCOLE@FENWICK.COM
Direct Dial: +1 650-335-7603

VIA EMAIL (SHONECKA@ADR.ORG)

Adam Shoneck
Assistant Vice President
American Arbitration Association
International Centre for Dispute Resolutions
1301 Atwood Ave., Suite 211N
Johnston, RI 02919

Re: AAA Case Number 01-19-0003-1980
Rule 9(b) Notice of Election for Small Claims Court
Request for Individualized Case Numbers/Invoices

Dear Mr. Shoneck:

Intuit is committed to providing prompt and fair adjudication of claims brought by its customers. In most cases, arbitration provides Intuit's customers with a cost-effective and efficient venue for fair and impartial resolution of any disputes. Here, however, the Keller Lenkner law firm has submitted over 10,000 claims to the AAA, the vast majority of which are frivolous. In fact, many of the claims that Keller Lenkner has brought involve claimants who have not used TurboTax, who paid Intuit nothing to file their taxes, or whose demands suffer similar fundamental defects that render their claims frivolous on their face.

In addition, Intuit is concerned that its customers might be required to bear substantial fees for these frivolous claims; that it could take years for these claims to be resolved; that these claims constitute a de facto representative proceeding in violation of the TurboTax Terms of Service; and that the arbitration fees alone, especially in light of the many frivolous claims, would dwarf the total amount paid by these claimants to file their taxes using a TurboTax product.

Thus, pursuant to Rule 9(b) of the Consumer Arbitration Rules, and consistent with clearly articulated AAA principles, this letter serves as written notice that Intuit elects to have the claims set forth on Exhibit A decided by a small claims court. For clarity, Intuit is not making this election with respect to the claims set forth on Exhibit B, which will remain in arbitration.

Background

TurboTax customers agree to resolve their disputes with Intuit through either individual arbitration or in small claims court. Intuit offers the arbitration option because, as noted above, arbitration provides Intuit's customers with an efficient and cost-effective venue for fair and

EXHIBIT I-1

impartial resolution of disputes. Intuit requires that any matter submitted for arbitration be filed with the AAA and governed by AAA rules.

Rule 9 of the AAA consumer rules, entitled the "Small Claims Option," permits either party "to take the claim to [small claims] court." More specifically, Rule 9(b) applies at this juncture: "[a]fter a case is filed with the AAA, but before the arbitrator is formally appointed to the case by the AAA." During this time, the Rule provides, "a party can send a written notice to the opposing party and the AAA that it wants the case decided by a small claims court." The Rule further states that "[a]fter reviewing this notice, the AAA will administratively close the case."

The AAA also maintains a due process protocol that requires arbitration fees to "be administered on a rational [and] equitable" basis. AAA Consumer Due Process Protocol, Statement of Principles, Principle 6—Reasonable Cost. Similarly, the AAA recognizes that "the least expensive and most efficient alternative for resolution of claims for minor amounts of money often lies in small claims courts." *Id.* Principle 5—Small Claims (Reporter's Comments).

Keller Lenkner's Abuse of the Arbitration Process

On October 1, 2019, Keller Lenkner submitted to the AAA 1,000 claims against Intuit, purportedly on behalf of individual TurboTax customers, with each demand alleging exactly the same thing. Intuit carefully reviewed each of these claims and, on January 17, 2020, explained to Keller Lenkner that the majority of the claims are frivolous, including claimants who are not Intuit customers or who used TurboTax completely for free. Rather than cure these defects, on January 28, 2020, Keller Lenkner filed an additional 9,497 claims, each one again alleging the very same cut-and-paste allegations as the initial 1,000. Intuit understands that, as with the first 1,000 claims, the majority of these claims are also frivolous. Keller Lenkner has indicated that it may file an additional 30,000 claims—or more—in the future. The tactics that Keller Lenkner has chosen to employ in this consumer matter directly contradict the AAA's consumer due process protections, and the fees they seek to impose (to arbitrate countless frivolous claims) are neither "rational" nor "equitable."

In this matter, arbitration, unlike small claims court, is not "the least expensive and most efficient alternative for resolution," especially given the small amount of alleged damages at issue. To the contrary, arbitration here is likely to be expensive for both Intuit and its customers. It will be expensive for Intuit's customers who were likely not adequately advised about the ramifications of filing frivolous arbitration demands. To be clear, these are not claims where Intuit simply disagrees with the claimant's theory of liability. Rather, thousands of the claims filed by Keller Lenkner were brought in the name of low- and moderate-income customers who—according to their lawyers—claim to have been deceived into *paying* to use TurboTax, but who *actually filed their taxes for free*. As a result, these same customers may now find themselves on the hook for thousands of dollars in fees and expenses under the AAA rules,

which, as you know, permit the arbitrator to assess the fees for a frivolous claim to the claimant. Arbitration likewise will be expensive for Intuit because the AAA's arbitration fees far exceed the maximum scope of Intuit's liability even if every single claimant's claim were credited in full.

As to efficiency, it is not clear that the AAA has the capacity to resolve the massive number of demands at issue here without significant delay for Intuit and its customers. Notably, *all of last year*, the AAA consumer group administered fewer than 6,000 cases. AAA, 2018 Annual Report (May 2019) at 11 ("The Consumer Group administered more than 5,000 cases in 2018.") The numbers were even lower the year before. AAA, 2017 Annual Report (May 2018) at 11 ("The Consumer Team provided case administration for over 4,000 disputes in 2017."). We understand that the AAA is in the process of reviewing its protocols regarding mass-arbitration filings. As a long-time subscriber to AAA's services and a strong believer in the merits of arbitration, Intuit is supportive of those efforts. Indeed, this case—involving thousands of frivolous claims—is a textbook example of why reforms are urgently needed. Absent such reforms, it does not appear that the AAA is prepared to address mass filings in a timely manner. Individualized resolution in small claims court, by contrast, will provide for the quick resolution of any legitimate disputes that Intuit's customers deserve.

Another principle factor driving Intuit's decision to have most of these claims decided by small claims courts is that these nearly 10,500 identical claims constitute a de facto representative proceeding in violation of the TurboTax Terms of Service. Pursuant to those Terms, TurboTax users agree that they will not bring an action as a "plaintiff or class member *in any purported class or representative proceeding*." Intuit TY 2018 TurboTax Terms of Service at 3 (emphasis added). Although these claimants have "nominally filed their arbitration demands as individuals," those demands "bear all the critical hallmarks of class and representative actions." *AT&T v. Bernardi*, 2011 WL 5079549, at 6* (N.D. Cal. 2011); *see also AT&T Mobility LLC v. Smith*, 2011 WL 5924460 (E.D. Pa. Oct. 7, 2011).[1]

Additionally, under the current AAA fee structure, the possible amount of fees in this matter is directly at odds with the AAA's own due process protocol, which, as explained, requires that arbitration fees "be administered on a rational [and] equitable" basis. AAA, Principle 6. During tax years 2016, 2017, and 2018, the total amount paid by these claimants to file their taxes using a TurboTax product barely exceeds $2,000,000. Pursuant to the current AAA fee schedule for consumer claims, if Intuit did not exercise its right under Rule 9(b), it would be required to pay a minimum of $33,590,400 in initial filing fees, case management fees, and arbitrator compensation to arbitrate these claims—*nearly 17 times the maximum recoverable amount if every claimant were to prevail in full*. Such a system is not rational or equitable.

[1] Thus, these claims should be administratively closed not only pursuant to the plain terms of Rule 9(b), but also because they clearly violate Intuit's arbitration agreement.

AAA Rule 9(b) Election

Fortunately, the AAA Consumer Rules provide a simple mechanism to address situations like this one: the Small Claims Option. Intuit elects to have the claims set forth on Exhibit A (943 of the original 1,000 claims) decided by a small claims court, and to have the AAA close those cases.

As to the remainder of the initial 1,000 demands (the 57 claims listed on Exhibit B), Intuit will timely pay its filing fees via wire transfer and will proceed to arbitrate each of them. Pursuant to Intuit's Terms of Service and AAA Consumer Rules 44(c) and 55, Intuit reserves the right to seek reimbursement of its fees and costs associated with these arbitrations if, as Intuit expects, the arbitrator determines them to be frivolous. Please advise Intuit as soon as arbitrators are appointed for these demands so that, pursuant to Rule 21, preliminary management hearings may promptly be scheduled.

For the subsequently filed 9,497 claims, and for any others filed by Keller Lenkner against Intuit in the future, Intuit respectfully requests that the AAA provide a separate invoice and case number for each demand—information necessary for Intuit to requisition checks for payment.

Sincerely,

FENWICK & WEST LLP

s/ Rodger R. Cole

Rodger R. Cole

RRC:cen

cc: Warren Postman, Keller Lenkner (via-email (wdp@kellerlenkner.com))

EXHIBIT I-4

Keller | Lenkner

February 2,

Mr. Adam Shoneck
Assistant Vice President
American Arbitration Association
Atwood Ave, Suite N
Johnston, RI 919
shonecka@adr.org

Re: Arbitration Demands

Dear Mr. Shoneck:

This letter is in response to the one Mr. Cole sent you on February , . Although Mr. Cole's letter purportedly elects to have 94 Claimants' claims decided by small claims court, such an election is prohibited by the plain terms of Intuit's arbitration agreement.

It is axiomatic that parties are free to modify the rules of arbitration by contract. *See* R-1(c) ("The consumer and the business may agree to change these Rules. If they agree to change the Rules, they must agree in writing."). Accordingly, if there is a conflict between the Parties' contract and AAA Rules, the contract must govern. To take a common example, the AAA consumer fee schedule states that a consumer claimant pays an initial filing fee of $. However, where (as here) an arbitration agreement states that the company will reimburse all filing fees, nobody would argue that, because AAA Rules apply, the consumer cannot have his or her $ fee reimbursed.

Similarly, the parties' contract departs from the default Rules by eliminating Intuit's right to invoke Rule 9(b) and force Claimants into small claims court. Intuit's arbitration clause provides: "ANY DISPUTE OR CLAIM RELATIING IN ANY WAY TO THE SOFTWARE OR THIS AGREEMENT WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT, except that you may assert claims in small claims court if your claims qualify." (emphases added). The "you" to which Intuit's arbitration clause refers is clear and unambiguous. The contract expressly says it will refer to "Intuit" as "we," "our," or "us." "You" is plainly a reference to customers such as Claimants. Under the unambiguous language of the arbitration clause, the parties agreed to modify the options set forth under Rule 9(b)'s default, as they were entitled to by contract. As a result, only Intuit's customers have a right to elect small claims court. Absent such an election, "*any* dispute or claim" must be resolved exclusively by arbitration.

Even if one could argue that the arbitration clause was ambiguous, the demands must still go to an arbitrator to address that argument. The Rules the parties incorporated into their contract make clear that the "arbitrator shall have the power to rule on … the arbitrability of any claim or counterclaim." Consumer Rule 4(a). That delegation clause clearly and unmistakably commits questions of arbitrability to the arbitrator. Indeed, Intuit argued the same point when it moved to compel similar claims to arbitration in the Federal District Court for the Northern District of California. *See n re ntuit Free ile Litigation*, No. :19-cv- 546, ECF No. at 8 ("[J]ust as Plaintiffs agreed to arbitrate their claims with Intuit, they also agreed to arbitrate questions of arbitrability."). If Intuit wants to bizarrely argue that "you" means "we," it must make that argument to individually empaneled arbitrators.

Intuit's repeated pronouncements that Claimants have brought frivolous claims are not relevant to whether Intuit can elect small claims court. But we cannot allow these misleading assertions to go

Keller | Lenkner

uncorrected. Mr. Cole asserts that "Intuit carefully reviewed each of these claims and, on January 7, , explained to Keller Lenkner that the majority of the claims are frivolous, including claimants who are not Intuit customers or who used TurboTax completely for free." But Mr. Cole fails to disclose that Intuit based that claim on a search of its records only for Tax Year 8. As we informed Mr. Cole on January 17, we have never suggested that every Claimant has claims based on Tax Year 8. Many Claimants do not. But they of course retain the right to bring claims for violations in other tax years. It is disappointing that Mr. Cole persists in accusing Keller Lenkner of bringing frivolous claims even after we pointed out that Intuit's analysis was not even plausibly adequate to support that serious assertion. We have repeatedly invited Intuit to identify any individual who Intuit believes does not have a colorable basis to seek arbitration, and we would hold off on pursuing arbitration while the parties conferred on such issues. But Intuit has failed to identify a single such individual, preferring to make vague and unsubstantiated accusations rather than resolve any such disputes informally and efficiently.

In all events, the fact that Intuit disputes the merits of Claimants' claims is obviously no basis to prevent them from proceeding. Intuit will have an opportunity to defend itself on the merits as soon as individual arbitrators are empaneled. That cannot happen until the company abides by its contract and meets its filing requirements.

We are also puzzled by Intuit's assertion that Claimants have brought a "de facto representative proceeding." As you may know, that is a recycled argument that Intuit borrowed from Postmates. But the court in *Adams v. Postmates, Inc.,* No. 19-cv- 4 , 2 9 WL 66947 7, at (N.D. Cal. Oct. 2 , 2 9), properly rejected Postmates's attempt to avoid arbitration on this ground, holding that any such argument was delegated to the arbitrator and that, in all events, Postmates's complaints were really just an attempt to dispute whether the claimants had met the requirements for filing individual arbitrations. *Id.* at *7. While Postmates had the tactical sense to save its meritless argument for the court, Intuit's argument is particularly transparent at this stage in the process. Claimants are asking AAA to commence purely individual arbitrations. Intuit agrees that Claimants' arbitrations should be individual. And Intuit has not identified (and cannot identify) any way in which AAA has departed from the applicable rules for commencing individual arbitrations. If Intuit insists on calling these arbitrations a "de facto representative proceeding," its argument necessarily boils down to the proposition that it is impossible for a large number of individuals to seek relief in arbitration at the same time.

Intuit also complains that the contract of adhesion it foisted upon consumers produces a result that is "not rational or equitable." But Intuit drafted its arbitration agreement knowing full well that many consumer claims may be worth less than the cost of individual arbitration. And there is nothing irrational or inequitable about holding a company to the contract it drafted. Indeed, at least three current or former federal judges have rejected that very argument when made by companies in the same situation:

> Under the Fleet Agreement drafted by Postmates which its couriers are required to sign, Petitioners had no option other than to submit their misclassification claims in the form of an arbitration demand—which is precisely what they did. Since the Fleet Agreement bars class actions, each demand must be submitted on an individual basis. Thus, the possibility that Postmates may now be required to submit a sizeable arbitration fee in response to each individual arbitration demand is a direct result of the mandatory arbitration clause and class action waiver that Postmates has imposed upon each of its couriers.

Adams, 9 WL 6694737 at *4, n. .

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Keller | Lenkner

> For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. . . . The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. . . . This hypocrisy will not be blessed, at least by this order.

Abernathy v. DoorDash, No. 3: 9-cv- 7545, ECF 77 at 8 (N.D. Cal. Feb. 1 , 2)

> The judge said she believes workers who file arbitration demands *en masse* are only following the rules imposed upon them by employers, who are, in turn, capitalizing on U.S. Supreme Court decisions endorsing arbitration. [Retired Judge] Scheindlin said she is aware that some employers and defense firms claim that plaintiffs' lawyers are abusing the system, filing unwarranted claims to pressure companies with millions of dollars in filing fees. But it is defendants, she said, that made the rules.
>
> "The situation that's been created really leaves a plaintiff with no other choice," she said. "The choice is to abandon your claim or bring it one by one in arbitration. I'd like to hear from (employers) what they think the third choice is … You made this bed, now you have to sleep in it."

Alison Frankel, *x-Judge Atop Controversial Mass Arbitration Program: ive t a Chance to Work*, Reuters (Dec. , 9).

Finally, we note that the parties' contract is unambiguously governed by "California state law…without regard to its conflict of laws provisions." As you know, California law now includes California Code of Civil Procedure § 81.97, which sets specific deadlines for Intuit to honor its obligations under its own arbitration clause. We respectfully ask AAA to follow the parties' contract and apply § 81.97 to each Claimant's individual demand regardless of whether he or she resides in California.

Sincerely,

Ashley eller

Available at https: www.reuters.com article/us-otc-massarb/ex-judge-atop-controversial-mass-arbitration-program-give-it-a-chance-to-work-idUSKBN1YR1ZI

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February 18, 2020

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VIA EMAIL (SHONECKA@ADR.ORG)

Adam Shoneck
Assistant Vice President
American Arbitration Association
International Centre for Dispute Resolutions
1301 Atwood Ave., Suite 211N
Johnston, RI 02919

Re: AAA Case Number 01-19-0003-1980
Response to February 12, 2020 letter from Mr. Ashley Keller

Dear Mr. Shoneck:

The strategy here is clear: to make the AAA complicit in a scheme to exploit the consumer-arbitration fee structure to extort a settlement payment from Intuit, no matter the interests of the claimants or the merits of the claims. Because Keller Lenkner views the Small Claims Option only as an impediment to this strategy, and not as the vital dispute-resolution mechanism that it is, *see* AAA Consumer Due Process Protocol, Principle 5 (Small Claims), it is determined to evade Rule 9, whatever the cost to its clients. That cynical scheme is not only transparent, it is legally indefensible. Mr. Keller's contention (at Ltr. 1) that the TurboTax Terms of Service "eliminat[e] Intuit's right to invoke Rule 9(b)" flatly ignores the plain meaning of the Terms, as well as the AAA's Consumer Arbitration Rules and Due Process Protocol. There is no conflict between the Terms and the AAA's Rules, as Mr. Keller suggests, nor any ambiguity for an arbitrator to resolve. To the contrary, the TurboTax Terms expressly incorporate the AAA Rules, including Rule 9(b), and carefully adhere to its Due Process Protocol.

Pursuant to the TurboTax Terms, "[a]rbitration will be conducted by the American Arbitration Association (AAA) before a single AAA arbitrator *under the AAA's rules*." Intuit TY 2018 TurboTax Terms of Service at 3, ¶ 14 (emphasis added). As Mr. Keller concedes, then, the AAA's Rules are *part of the TurboTax Terms*. *See* Keller Feb. 12 Ltr. at 1 (recognizing that

EXHIBIT I-8

"the parties incorporated [the AAA Rules] into their contract").[1] And the rule at issue here, Rule 9(b), is clear on its face: At this juncture—"[a]fter a case is filed with the AAA, but before the arbitrator is formally appointed"—"the AAA *will administratively close the case*" upon written notice from either party "that it wants the case decided by a small claims court." AAA R-9(b) (emphasis added).

To be sure, there is a *different* rule, Rule 9(c), under which an arbitrator is empowered to "determine if the case should be decided in arbitration or … in small claims court." AAA R-9(c). But that rule applies "*[a]fter the arbitrator is appointed*," *id.* (emphasis added), and therefore *after* all fees have come due. Rule 9(b) affords no such discretion. Intuit has "sen[t] a written notice … that it wants the case[s] decided by a small claims court"; the AAA must accordingly "close the case[s]." AAA R-9(b). Were it otherwise—that is, if a claimant could require that an arbitrator determine Rule 9's application simply by objecting to the Rule's invocation—a claimant could effectively convert Rule 9(b) to Rule 9(c) whenever it pleased. Claimants could thus improperly compel defendants to pay substantial (and in this case wholly irrational) upfront costs and defeat the very purpose of the Small Claims Option.[2] Besides, Rule 9 does not relate to an arbitrator's powers or duties, so its application is determined by the AAA. *See* AAA R-53.

According to Mr. Keller, however, the AAA *may not* close the cases, as the plain text of Rule 9(b) requires, because the TurboTax Terms provide that disputes "will be resolved by binding arbitration," "*except that you may assert claims in small claims court if your claims qualify*." Intuit TY 2018 TurboTax Terms of Service at 3, ¶ 14 (emphasis added). This provision, Mr. Keller insists (at Ltr. 1), "departs from the default [AAA] rules," and converts Rule 9 to a unilateral option available only to claimants. That is wrong. The relevant provision in the TurboTax Terms instead serves to notify consumers (who may be unfamiliar with the AAA's Rules and the rights afforded them under those Rules) that they may assert claims in small claims court instead of arbitrating their claims, should they qualify and wish to do so. In

[1] *See also* AAA R-1(a)(1) ("The parties shall have made these *Consumer Arbitration Rules* ("Rules") a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association ("AAA"), and . . . have specified that these *Consumer Arbitration Rules* shall apply."); *see also* AAA R-1 (providing that in these circumstances, application of the AAA's Rules "shall be *an essential term* of [the parties'] consumer agreement." (emphasis added)).

[2] *See* Intuit Feb. 10 Ltr. at 2-3 (explaining that, if Intuit did not exercise its right under Rule 9(b), its arbitration costs would be "*nearly 17 times the maximum recoverable amount if every claimant were to prevail in full*," and noting that the majority of claimants' cut-and-paste demands are frivolous); AAA Consumer Due Process Protocol, Principle 5 (Small Claims, Reporter's Comments) (recognizing that the Small Claims Option is intended to provide an efficient and inexpensive "alternative for resolution of claims for minor amounts of money").

other words, it advises consumers of Rule 9(a), which permits claimants to "take their claims to small claims court without first filing with the AAA." AAA R-9(a). Far from *departing from* the AAA's Rules, this provision reflects precisely the notice *required by* the AAA's Consumer Due Process Protocol. As Principle 11 (governing "Agreements to Arbitrate") makes clear, "[c]onsumers should be given . . . notice of the option to make use of applicable small claims court procedures as an alternative to binding arbitration." AAA Consumer Due Process Protocol, Principle 11(c) (Agreements to Arbitrate). That is just what the TurboTax Terms do—they do not waive Intuit's rights under Rule 9, which permits "either party" to "take the claim to [small claims] court instead of arbitration." AAA R-9.[3]

In fact, if Mr. Keller's argument were correct—i.e., if the small-claims-court provision in the TurboTax Terms purported to establish a unilateral mechanism for claimants—the provision would violate the AAA Due Process Protocol. As the AAA has explained, a "[k]ey [p]rovision[] of the Due Process Protocol" is that "*[a]ll parties* retain the right to seek relief in small claims court." AAA Consumer Arbitration Fact Sheet (emphasis added).[4] And where "an arbitration clause contains [a] material . . . violation of the Consumer Due Process Protocol," the remedy is that the AAA "decline[s] administration of [the] arbitration demands." *Id.*; *accord* AAA R-1(d). Indeed, the AAA recently did just that in another case involving Keller Lenkner.[5] If Mr. Keller's reading of the TurboTax Terms were accurate, in other words, the AAA could not arbitrate *any* of the claims, including those that remain in arbitration. *See* Intuit Feb. 10 Ltr., Ex. B. This

[3] Where the TurboTax Terms *do* result in the waiver of a party's right, they make that result crystal clear. *See* Intuit TY 2018 TurboTax Terms of Service at 3, ¶ 14 ("YOU AGREE THAT YOU AND INTUIT ARE *EACH WAIVING THE RIGHT* TO FILE A LAWSUIT AND THE RIGHT TO A TRIAL BY JURY." (emphasis added)); *see also id.* ("YOU AGREE TO *WAIVE THE RIGHT* TO PARTICIPATE IN A CLASS ACTION OR LITIGATE ON A CLASS-WIDE BASIS. *YOU AGREE THAT YOU HAVE EXPRESSLY AND KNOWINGLY WAIVED THESE RIGHTS*." (emphasis added)).

[4] https://info.adr.org/consumer-arbitration/; *see also* AAA Consumer Due Process Protocol, Principle 1 (Fundamentally-Fair Process & Reporter's Comments) ("All parties are entitled to a fundamentally-fair ADR process," including "access to small claims court."); *id*. Principle 5 (Small Claims) ("Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction.").

[5] *See* Ex. 2 at 2 (Decl. of Warren Postman), Mot. and Mem. of G. Pena, A. Rivera, and J. Leckerman for Leave to File Br. as Amici Curiae, *In Re Daily Fantasy Sports Litig.*, No. 1:16-md-02677-GAO (D. Mass Nov. 11, 2019) (Dkt. 400) ("AAA informed counsel for DraftKings [in an administrative teleconference] that, because the DraftKings arbitration agreement violates AAA's Consumer Due Process Protocol, AAA will not administer any arbitrations involving claims against DraftKings unless DraftKings agrees to waive the two offending provisions in its agreement.").

simply underscores why that reading is mistaken—as the AAA itself has already recognized.[6] Keller Lenkner's attempt to weaponize the AAA's fee structure is too clever by half. The AAA's Rules and policies guard against such extortionist schemes, and those provisions must be enforced. If the AAA were to (wrongly) accept Mr. Keller's reading of the Terms, the result under the Due Process Protocol would be the same as under Rule 9(b): the AAA would be required to close the cases.[7]

Not surprisingly, Mr. Keller's attempt (at Ltr. 2-3) to analogize this case to *Abernathy v. DoorDash* and *Adams v. Postmates* is likewise way off base. Those cases do not involve small claims in the consumer context, but rather *employers "forc[ing] arbitration clauses upon workers*." Keller Ltr. 3 (quoting Order at 7, *DoorDash*, No. 3:19-cv-07545 (N.D. Cal. Feb. 10, 2020) (Dkt. 177)) (emphasis added). Put differently, they have nothing to do with Rule 9 or the Small Claims Option, which (for good reason) is not available in the employment or commercial context. But here, in the consumer context, small claims court often provides "the least expensive and most efficient alternative for resolution of claims for minor amounts of money." AAA Consumer Due Process Protocol, Principle 5 (Small Claims, Reporter's Comments). The Small Claims Option is therefore a critical component of *arbitration rules and processes themselves*. *See id.*; AAA R-9. Intuit is not—as Keller Lenkner would have the AAA and Intuit's customers believe—attempting to avoid an arbitration "contract it drafted," Keller Ltr. 3; it is seeking to *enforce* its arbitration contract. *See supra* pp. 1-2.

As previously explained, Intuit's invocation of Rule 9(b) in no way harms the affected claimants. It should instead inure to their benefit given the significant delay and substantial cost to many claimants likely to result if these claims remain in arbitration. *See* Intuit Ltr. 2-3. But claimants' benefit is not Keller Lenkner's concern. Its business model, predicated on coercive

[6] *See* Acknowledgement of Receipt of a Demand for Arbitration, *Macklin v. Intuit*, No. 01-19-0003-9601, at 3 (observing that "either party may choose to exercise the small claims option"); *see also id.*, Attached Consumer Arbitration Reference Sheet (explaining that the AAA "reviews the parties' arbitration clause" to "determine if the arbitration agreement substantially and materially complies with the due process standards of the Consumer Due Process Protocol").

[7] Were the AAA to disregard its own Rules and policies here, the resulting action would exceed its powers—under circumstances, no less, in which the AAA itself stood to gain millions of dollars in fees. *See* 9 U.S.C. § 10(a) (Federal Arbitration Act authorizing vacatur of arbitral awards where "there was evident partiality . . . in the arbitrators" or "the arbitrators exceeded their powers").

and extortionist tactics, is aimed at benefiting Keller Lenkner alone.[8] The firm plainly did not conduct a diligent investigation of the claims, having filed *thousands* of frivolous demands. *See* Intuit Ltr. 2.[9] In doing so, the firm placed those claimants at risk of having to foot the bill for thousands of dollars in fees and expenses under the AAA Rules. *Id.* at 2-3. And *even after* Intuit advised Keller Lenkner that many of the original 1,000 claims were frivolous, the firm filed an additional 9,497 claims with no further investigation. (As Mr. Keller well knows, moreover, Intuit did not base its assessment only on claims for Tax Year 2018. After conducting the careful and resource-intensive investigation that Keller Lenkner neglected to undertake, on January 24, 2020, Intuit shared detailed aggregate data with Keller Lenkner revealing what Keller Lenkner's own due diligence would have revealed: that a majority of all claims based on Tax Years *2016, 2017, and 2018* were frivolous.) Nor does it appear likely (or even plausible) that in under 48 hours Kellner Lenkner communicated with all 943 affected claimants regarding Intuit's invocation of Rule 9(b).[10] Indeed, given the risks inherent in arbitrating many of these claims, it would be remarkable if all 943 claimants (once properly advised of those risks) believed that their interests were best served by objecting to small claims court—particularly when Keller Lenkner itself does not contest that small claims court provides an efficient and cost-effective venue for claimants. And if the firm acted of its own accord (without input from its clients) in disputing Intuit's invocation of Rule 9(b), that is yet another hallmark of exactly the sort of representative proceeding prohibited by the TurboTax Terms. *See* Intuit TY2018 TurboTax

[8] On information and belief, Keller Lenkner has employed a retention agreement here similar to that used in its other cases, meaning that the firm stands to take roughly $750 off the top of any arbitral award—a sum exceeding the likely recovery of any claim here. *See* Decl. of A. Unthank at 9, *In re CenturyLink Sales Practices and Sec. Litig.*, No. 17-md-2795 (D. Minn. Jan. 10, 2020) (Dkt. 512). *See also* California Rule of Professional Conduct 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee"); *id.* 1.5(b) (factors for unconscionability include "the amount of fee in proportion to the value of the services performed"). By way of comparison, lead counsel in a certified class action can generally recover as fees no more than 30% of the total award or settlement amount. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002).

[9] *Contra* California Rule of Professional Conduct 3.1 ("A lawyer shall not . . . bring or continue an action … without probable cause and for the purpose of harassing or maliciously injuring any person.")

[10] *See* California Rule of Professional Conduct 1.4(a) (Communication with Clients).

Terms of Service at 3, ¶ 14; *AT&T Mobility LLC v. Bernardi*, No. C 11-3992, 2011 WL 5079549, at *6 (N.D. Cal. 2011).[11]

For the reasons outlined above, Intuit has properly invoked Rule 9(b) as to 943 of the claims at issue, and Intuit has paid the filing fees for the 57 claims that remain in arbitration.[12] As before, Intuit asks that it be advised as soon as arbitrators are appointed for these demands so that, pursuant to Rule 21, preliminary management hearings may promptly be scheduled.

Sincerely,

FENWICK & WEST LLP

s/ Rodger R. Cole

Rodger R. Cole

RRC:cen

cc: Warren Postman, Keller Lenkner (via-email (wdp@kellerlenkner.com))

[11] Mr. Keller asserts (at Ltr. 2) that this issue should be ignored here because "the court in *Adams v. Postmates, Inc.*, No. 19-cv-3042, 2019 WL 6694737 (N.D. Cal. Oct. 22, 2019), properly rejected" a similar argument. But in rejecting this point, the *Postmates* court rightly looked to the specifics of Postmates' arbitration agreement, *see id.* at *6, which differs in key respects—including its delegation clause and terms governing representative proceedings—from the TurboTax Terms of Service. *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) ("[W]e have often observed that the Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties chose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.'" (quoting *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013))).

[12] Keller Lenkner's argument based on California Code of Civil Procedure § 1281.97 is therefore beside the point. But it is also wrong. The TurboTax Terms expressly incorporate the Federal Arbitration Act's procedural provisions, meaning that it—and not Section 1281.97—governs these claims. *See* Intuit TY2018 TurboTax Terms of Service at 3, ¶ 14 ("The Federal Arbitration Act governs the … enforcement of this provision.").

Keller | Lenkner

February 0, 0 0

Mr. Adam Shoneck
Assistant Vice resident
American Arbitration Association
0 Atwood Ave, Suite N
Johnston, RI 02919
shonecka@adr.org

Re: Arbitration Demands

Dear Mr. Shoneck:

This letter is in response Mr. Cole's letter of February 18, 020.

Intuit cannot dispute that parties who choose to arbitrate under AAA Rules sometimes alter those rules by contract. For example, if Intuit's arbitration agreement stated that "the AAA Consumer Rules apply, except that all claims must be resolved in arbitration and only the Claimant can invoke Rule 9(b)," Intuit could not credibly argue that it nonetheless could invoke Rule 9(b).

The plain terms of the applicable arbitration agreement are not materially different from the hypothetical above. The agreement provides that "any dispute . . . will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court" (emphases added, all-caps omitted). Intuit's only attempt to address this plain text is to assert that the phrase "except that you may assert claims in small claims court" merely noitifies consumers "who may be unfamiliar with the AAA's Rules" that they may assert claims in small claims court. Ltr. at . But that reading ignores the rest of the quoted sentence, which provides that, apart from the quoted exception, "any dispute or claim relating in any way" to the agreement must be "resolved by binding arbitration, rather than in court." Intuit's agreement could not be clearer that only the consumer—"you"—can elect to bring claims in small claims court.

Indeed, it appears that not even Intuit believes Intuit's argument. In its customer agreement governing services for the current 0 19 Tax Year, Intuit revised its arbitration clause by adding a sentence that states: "Additionally, under Consumer Arbitration Rule 9(b) either party may elect to take a claim to small claims court, even after filing an arbitration." (Emphases added.) Intuit presumably understood that its "[a]dditional[]" provision made a difference, or else it would not have added it.

Even if one believes that the parties' contract is ambiguous on this score, that ambiguity must be construed against the drafter, Intuit. *ee Taylor v. .B. Hill Co.*, Cal. d 7 , 7 (9 8) ("It is a settled rule that in case of uncertainty in a contract it is construed most strongly against the party who caused the uncertainty to exist—the party drafting the instrument."). That is doubly true here, where Claimants seek arbitration. As Intuit itself has argued in federal court, the federal policy favoring arbitration requires that any ambiguity be construed in favor of arbitration. *See* Intuit Motion to Compel Arbitration, *In re ntuit Free File itigation*, No. : 9-cv- 6, ECF No. 97 at 2 ("'[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .'" (quoting *oses H. Cone Mem'l Hosp. v. ercury Constr. Corp.*, 460 U.S. , 2 - (98))).

Available at https://turbotax.intuit.com/corp/license/online/.

EXHIBIT I-14

Keller | Lenkner

Intuit next argues that the plain meaning of its contract should not be given effect because, in essence, companies are categorically barred by the Consumer Due rocess rotocol from committing to respect a consumer's choice of forum. Ltr. at 3. That argument turns the Consumer Due rocess rotocol on its head and is disproven by the very provisions Intuit cites. As Intuit notes, AAA's Consumer Arbitration Fact Sheet states that "[a]ll parties retain the right to seek relief in small claims court." Ltr. at . But it is Claimants who "seek relief" in these matters. Intuit is not attempting to seek any relief, and is not barred from seeking any relief, in small claims court or otherwise. rinciple 5 of the Due rocess rotocol likewise protects the claimant who "seeks relief," not the respondent. *See* Principle 5 ("[A]ll parties retain the right to seek relief in small claims court."). That is not a surprising result, since the Consumer Due rocess rotocol exists to protect consumers who sign non-negotiated contracts, not the large corporate defendants who use teams of lawyers to carefully draft contracts of adhesion.

Finally, Intuit fails to offer any explanation for why the parties' dispute over the meaning of Intuit's contract can be decided as an administrative matter, rather than by an arbitrator. As described above, allowing Intuit to elect small claims court would require AAA to resolve a disputed question regarding the interpretation of the parties' agreement. But as Intuit has argued, its arbitration agreement delegates all questions of arbtrability to the arbitrator. *See* Intuit Reply in Support of Motion to Compel Arbitration, *n re n ui Free File i igation*, No. : 9-cv- 6, ECF No. 0 at 8 ("[J]ust as laintiffs agreed to arbitrate their claims with Intuit, they also agreed to arbitrate questions of arbitrability."). If Intuit wants to argue that "you" means "we," it must make that argument to individually empaneled arbitrators.

Finally, we cannot help but note the irony (and fallacy) of Intuit's now arguing that individual arbitration is an unfair and inappropriate method for resolving large numbers of individual consumer claims. Intuit accuses Claimants of "extortion." Ltr. at , , 5. And it asserts that AAA would be complicit in extortion, exceeding its powers, and acting for a pecuniary motive if it agreed with Claimants' legal arguments. Ltr. at ,4. But underneath this heated rhetoric, Intuit fails to identify anything unfair or wrongful about holding Intuit to the contract it wrote. If a single claimant filed a demand to arbitrate a small consumer claim, it would ring hollow for Intuit to complain that the company had to pay a filing fee that was worth more than the consumer's claim. And Intuit could not complain that the consumer was being unreasonable by insisting on arbitration instead of small claims court. Arbitration has benefits. Most obviously, Intuit agreed to reimburse Claimants' filing fees and resolve claims under arbitration rules that impose a lower burden on claimants than even small claims court. In exchange, Claimants gave up their right to participate in a class action, even for small claims that would be most efficiently vindicated in a class proceeding. It is not unfair for consumers to take advantage of the benefits they were promised in exchange for giving up their rights. The analysis is no different simply because multiple claimants have retained the same law firm.

Consistent with its past rulings in other matters, AAA should conclude that any and all objections to arbitrability—including the availability of small claims withdrawal pursuant to Rule 9 of the Consumer

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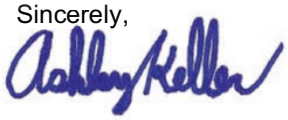
Intuit continues to assert that Claimants' claims are frivolous without actually identifying a single Claimant who has no valid claim within the applicable limitations period. Intuit's arguments must be made to individual arbitrators, not AAA. But we reiterate for the record that none of the information provided by Intuit establishes that a single Claimant's demand is meritless, let alone frivolous. Keller Lenkner remains ready to confer with Intuit regarding any individual Claimant whom Intuit believes has no basis to pursue arbitration, but Intuit has yet to identify a single such individual, apparently preferring to rest on vague epithets rather than make a specific showing that could then be refuted.

Keller | Lenkner

Arbitration Rules and the parties' arbitration agreements—should be raised with the arbitrator appointed to hear each case.

Sincerely,



Ashley Keller

Intuit argues that Claimants' demands are not subject to California Code of Civil rocedure § 81.97 because the arbitration agreement is governed by the Federal Arbitration Act. But Intuit's conclusion does not follow from its premise. The FAA does not speak to every issue touching on arbitration, and where state law does not conflict with a provision of the FAA, it applies with full force. *ee Vol nfo. ciences, nc. v. Bd. of Trus ees of e land anford r. U.*, 8 9 U.S. 6 8, 77 (989) ("The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."). Intuit cannot evade the requirements of California Code of Civil rocedure § 8 .97 any more than it can ignore the arbitrator disclosure requirements created by California law. Absent a conflict with the FAA—which Intuit does not identify—California law governs.

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

P.O. Box 19609
Johnston, RI 02919

March 6, 2020

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Case Number: 01-19-0003-1980
Aaron Hammond
-vs-
TurboTax, Intuit, Inc.

Dear Counsel:

The American Arbitration Association (AAA) is in receipt of letters dated February 10 and 18, 2020 from counsel for the Respondent and letters dated February 12 and 20, 2020 from counsel for the Claimants. The AAA has reviewed the parties' contentions regarding the applicability R-9 of the Consumer Arbitration Rules (Consumer Rules) to these matters and determined that the issues presented are arbitrability disputes that must be resolved by an arbitrator(s). In order to move the matters forward, the AAA will proceed with administration of each individual case under the Consumer Rules.

As additional cases have been filed, there are now 10,497 cases in which we have received the Claimants' filing requirements. We have received payment from Respondent in the amount of $17,100 for 57 of these cases. In order to proceed forward with all matters, the balance of Respondent's filing fees in the amount of $3,132,000 is now due on March 20, 2020. As these arbitration are subject to California Code of Civil Procedure 1281.97 and 1281.98, payment must be received by April 19, 2020 or the AAA will close the parties' cases. The AAA will not grant any extensions to this payment deadline.

In the interest of providing the parties with an efficient process to determine this initial arbitrability issue, if parties agree, the AAA suggests the parties consider the appointment of a single arbitrator to determine this issue for all the disputes. The AAA can provide the parties a list of panelists to choose the arbitrator to consider the arbitrability issue on this caseload. We also continue to encourage the parties to consider conducting a global mediation process to potentially resolve all the disputes prior to the need for arbitration. The AAA has mediators available with considerable experience in assisting parties with the resolution of large groups of cases involving multiple parties. I am available for a call to discuss these options.

Sincerely,

Adam Shoneck

EXHIBIT I-17

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March 13, 2020

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VIA EMAIL (SHONECKA@ADR.ORG)

Mr. Adam Shoneck
Assistant Vice President
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1301 Atwood Ave., Suite 211N
Johnston, RI 02919

Re: AAA Case Number 01-19-0003-1980
Rule 9(b) Notice of Election for Small Claims Court and Response to March 6, 2020 Letter from Adam Shoneck

Dear Mr. Shoneck:

Your March 6, 2020 letter is the first notice Intuit received that Claimants satisfied the filing requirements with respect to the 9,497 claims filed on January 28, 2020.[1] Pursuant to Rule 9(b), this letter serves as written notice that Intuit elects to have the claims set forth on Exhibit C decided by a small claims court. Intuit is not making this election with respect to the 504 claims set forth on Exhibit D, which will remain in arbitration. Please open case numbers and send individual invoices for these matters, which should total $151,800 in initial fees. We will submit this amount promptly. Please let us know when arbitrators are appointed.

Your demand for payment of $2,980,200 in additional initial fees exceeds the AAA's powers because it is contrary to the plain language of the Rules and Due Process Principles upon which Intuit relied. Accordingly, we respectfully request immediate review by the AAA Administrative Review Council or other appropriate senior leadership of the manifestly erroneous demand for these fees based on your assertion that "the applicability [of] R-9 of the Consumer Arbitration Rules … to these matters … present[s] [an] arbitrability dispute[] that must be resolved by an arbitrator(s)."

Plain on its face, Rule 9(b) provides that "the AAA *will* administratively close the case" where, as here, a party sends "written notice" that it wants the case decided by a small claims court "before the arbitrator is formally appointed to the case by the AAA." AAA R-9(b) (emphasis added). And Rule 9(b), like all AAA Consumer Arbitration Rules, is part of the TurboTax Terms. *See* Intuit Feb. 18 Ltr. at 1; Keller Feb. 12 Ltr. at 1 (conceding that "the parties incorporated [the AAA Rules] into their contract"). Intuit provided written notice that it

[1] Intuit has not received Demands for Arbitration for three putative claimants, as required by Rule 2(a)(1). Intuit will provide the names of these individuals to Keller Lenkner upon request.

elected to have certain cases decided by a small claims court, and it did so before any arbitrator was formally appointed to the case by the AAA. Thus, your decision not to close the cases upon receiving this notice and instead to solicit Keller Lenkner's "response" was in direct contravention of the AAA Rules—rules Intuit (and countless other companies) relied on in selecting the AAA to be its provider of consumer arbitration services.

In any event, even if you were to accept Mr. Keller's implausible reading of the arbitration agreement, the result would be the same. If the TurboTax Terms were read to establish a unilateral small-claims mechanism available only to claimants, then those Terms clearly would violate the AAA Due Process Protocol, a "[k]ey [p]rovision[]" of which is that "*[a]ll parties* retain the right to seek relief in small claims court." AAA Consumer Arbitration Fact Sheet (emphasis added).[2] And where "an arbitration clause contains [a] material . . . violation[] of the Consumer Due Process Protocol," the result commanded by the Protocol and Rules is that the AAA "decline[s] administration of [the] arbitration demands." *Id.*; *accord* AAA R-1(d); *see also* Intuit Feb. 18 Ltr. at 3-4 & nn.5-6. There is accordingly no dispute relevant to the outcome of the administrative question here, because the cases must be closed under the Rules even if Mr. Keller's reading of the contract were credited.

Yet despite these clear-cut Rules and Due Process Principles (discussed nowhere in your March 6 letter), you parrot *Mr. Keller's* alternative requested outcome: that the application of the Small Claims Option be construed as an arbitrability question for an arbitrator to decide. *Compare* Shoneck Mar. 6 Ltr., *with* Keller Feb. 12 Ltr. at 1. Under the AAA Rules, however, "it is up to the arbitrator to determine" the application of the Small Claims Option only "*[a]fter the arbitrator is appointed.*" AAA R-9(c) (emphasis added). No arbitrator has been appointed here, and before that critical step, Rule 9 requires that the AAA close the case if a party invokes the Small Claims Option. *See* AAA R-9(b).

Your disregard of the AAA's own Rules and Due Process Protocol—an error compounded by your failure to provide any reasoned basis for your decision—is quintessentially arbitrary action. And because that decision aligns with the AAA's considerable financial self-interest, it undermines the AAA's reputation and role as a neutral ADR institution. Indeed, it "raise[s] justifiable doubt as to whether" you or the AAA "can remain impartial or independent," AAA R-18(a), as the AAA stands to gain millions in fees, *see id.* (requiring disclosure of "any

[2] https://info.adr.org/consumer-arbitration/; *see also* AAA Consumer Due Process Protocol, Principle 1 (Fundamentally-Fair Process & Reporter's Comments), Principle 5 (Small Claims). Keller Lenkner's argument is also untenable because it relies on language included in the TurboTax Terms to comply with express guidance from the AAA. In stating that consumers "may assert claims in small claims court if [their] claims qualify," Intuit TY 2018 TurboTax Terms of Service at 3, ¶ 14, the Terms provide consumers "notice of the option to make use of applicable small claims court procedures as an alternative to binding arbitration," *exactly as the AAA Consumer Due Process Protocol requires*, Principle 11(c) (Agreements to Arbitrate); *see also* Intuit Feb. 18 Ltr. at 2-3 & n.3.

bias," including "any financial interest" in the proceeding and "any past or present relationship with the parties or their representatives").

Intuit relied on the AAA's Rules and Due Process Protocol when it selected the AAA to administer disputes between Intuit and its customers. If the AAA sidesteps its responsibilities and fails to adhere to its own Rules and Protocol, it will become complicit in Keller Lenkner's scheme. That scheme, to extort a ransom orders of magnitude greater than what could ever be obtained on the merits, is precisely the perversion of the arbitration process that Rule 9 exists to prevent. *See* Intuit Feb. 18 Ltr. at 4-5; Intuit Feb. 10 Ltr. at 2-3.[3] The effect of your March 6 letter, if allowed to stand, is that Intuit must forfeit millions of dollars in fees as the up-front price of answering the *single* threshold question of whether those fees were ever owed—a question already resolved, no less, by the AAA's own Rules and Due Process Principles. Put another way, it will be the AAA itself that will have imposed harm on Intuit that *exponentially* exceeds the maximum potential damages at issue.

This harm is clear and only continues to multiply. Indeed, apparently emboldened by your March 6 letter, on Wednesday, March 11, Keller Lenkner reportedly filed another approximately *34,000* identical demands against Intuit and has threatened to file upwards of *50,000* more. Apart from its duty to adhere to its Rules, the AAA has a responsibility under its Due Process Principles to consider what is in the best interests of the parties, which are Intuit and the individual claimants—not Keller Lenkner, or the investors underwriting its business model, or the AAA itself. The AAA cannot willfully ignore the fact that these mass filings bear no indicia of a legitimate grievance from a customer seeking redress. It is apparent that Keller Lenkner failed to conduct even a cursory investigation into the merits of these cut-and-paste demands (which may well be generated by an automated process). Nor does it appear that the social-media advertising that is generating these filings advise about the risk of filing a frivolous claim or provide any other safeguard to ensure that the assertions being made would satisfy the basic requirements of Rule 11 of the Federal Rules of Civil Procedure. In fact, Keller Lenkner has produced no proof that it ever even spoke over the phone to a single one of its purported 90,000 claimants. And despite the critical importance of Rule 9, *see* AAA Consumer Due Process Protocol, Principle 5 (Small Claims), it is a virtual certainty that no claimant was presented with the opportunity to have her claim resolved promptly in small claims court—rather than waiting what could be years for the AAA to adjudicate the claim, at a risk of substantial fees that may be imposed on claimants who have (at Keller Lenkner's direction) asserted frivolous claims.

This case is an important one, not just for Intuit but for all companies that have relied to their detriment on the AAA's representations about its consumer arbitration process. Indeed, it tests the AAA's commitment to its Rules and Due Process Principles, including its foundational

[3] Notably, even if paid, none of this ransom appears destined to be shared with the claimants Keller Lenkner purports to represent. Intuit Feb. 18 Ltr. at 4-5 & n.8.

assurance that "[a]ll parties are entitled to a fundamentally-fair ADR process." AAA Consumer Due Process Protocol, Principle 1 (Fundamentally-Fair Process). The AAA should be estopped from ignoring its own administrative Rules, but at the very least, and so the record of decision is clear to any subsequent factfinder, fair process requires a "written explanation of the basis" for your determination, *id.* Principle 15 (Arbitration Awards), and an opportunity for review. The decision whether to apply the plain terms of the AAA's Consumer Arbitration Rules and Due Process Principles is not an arbitrability question; it is a basic administrative issue concerning whether these claims (as to which Intuit has invoked its right under Rule 9(b)) are properly before the AAA. Review by the AAA Administrative Review Council is therefore essential in this case to "uphold[] the integrity of the arbitration process and reinforc[e] the parties' confidence in the process." *See* Administrative Review Counsel, Review Standards, at 1.[4] Such review is also in Claimants' interest to ensure the finality of any arbitration, as the Federal Arbitration Act authorizes the vacatur of arbitral awards where "there was evident partiality" or "the arbitrators exceeded their powers." 9 U.S.C. §10(a).

Beyond these fundamental procedural concerns, proceeding in accordance with your March 6 letter is inappropriate for other reasons.

First, because your letter was the first Intuit has heard of Claimants meeting their filing obligations with respect to the 9,497 claims submitted on January 28, 2020, Intuit was not previously afforded an opportunity to invoke Rule 9(b)'s Small Claims Option as to those demands. Keller Lenkner cannot therefore have communicated Intuit's small-claims-court election to these additional claimants—a communication required by the AAA's Due Process Protocol. *See* Principle 2 (Access to Information Regarding ADR Program) ("After a dispute arises, Consumers should have access to all information necessary for effective participation in ADR.").

Second, if Keller Lenkner is not communicating such critical information to its clients (but rather objecting to Intuit's invocation of Rule 9(b) without input from its clients), that underscores that these more than 10,000 claims are in fact a representative proceeding prohibited by the TurboTax Terms. *See* Intuit Feb. 18 Ltr. at 5.

Third, despite Intuit's request that the AAA treat the subsequently filed 9,497 claims as separate, individual claims and thus "provide a separate invoice and case number for each demand," Intuit Feb. 10 Ltr. at 4, you have administered these claims much like Keller Lenkner has treated them: as a representative action requiring only a single case number (plainly in violation of the Terms). Your March 6 letter suggests that you have also construed Intuit's

[4] https://adr.org/sites/default/files/document_repository/AAA_AdminReviewCounsel_Standards.pdf.

previous invocation of Rule 9(b) (as to a *subset* of the 1,000 originally filed demands) to apply to all subsequently filed related demands. That is improper.[5]

Intuit therefore reiterates its request that, before proceeding with the later-filed 9,497 claims, you provide a separate invoice and case number for each demand. As explained above, Intuit also requests that you provide a written explanation for your determination that the applicability of Rule 9(b) presents an arbitrability question, as well as an opportunity for Intuit to seek review of that determination before the AAA Administrative Review Council or other appropriate senior leadership.

Sincerely,

FENWICK & WEST LLP

s/ Rodger R. Cole

Rodger R. Cole

RRC:cen

cc: Warren Postman, Keller Lenkner, (via-email (wdp@kellerlenkner.com))
Christine Newhall, Senior Vice President, AAA, (via email (NewhallC@adr.org))
Eric P. Tuchmann, General Counsel, AAA (via email (TuchmannE@adr.org))

[5] The suggestion in your letter that all of these claims are subject to California Code of Civil Procedure 1281.97 and 1281.98 is similarly flawed. For reasons previously explained, these laws have no application to any of these cases, *see* Intuit Feb. 18 Ltr. at 5 n.12, but there is no basis to even assert that they apply to the vast majority of the claims here, which are brought by non-California residents.

Keller | Lenkner

March 30, 0 0

Mr. Adam Shoneck
Assistant Vice resident
American Arbitration Association
0 Atwood Ave, Suite N
Johnston, RI 02919
shonecka@adr.org

Re: Arbitration Demands

Dear Mr. Shoneck:

At AAA's request, this letter is in response to Intuit's letter of March , 20 0.

The substance of Intuit's letter is nothing new. In letters submitted to AAA on February 0, February , February 18, and February 20, the parties thoroughly briefed the issue of whether AAA should close Claimants' arbitrations because Intuit has purportedly elected to move Claimants' claims to small claims court. Intuit argued that Consumer Rule 9 requires AAA to close any arbitrations for which Intuit submits an election, regardless of any terms contained in the arbitration agreement between Intuit and Claimants. Claimants, on the other hand, explained that the parties' arbitration agreement can alter the default AAA Rules, and does so here, as the agreement expressly states that only a claimant may elect to have claims resolved in small claims court. Moreover, both Intuit's agreement and AAA's Rules require that the parties' threshold dispute regarding arbitrability itself be submitted to an arbitrator.

On March 6, AAA issued a written determination addressing the parties' arguments. AAA stated that it had reviewed the parties' contentions and concluded that "the issues presented are arbitrability disputes that must be resolved by an arbitrator(s)." March 6 Ruling. AAA then set a deadline of March 0 for Intuit to submit its filing fees and warned that, because all Claimants' demands are governed by California law, the deadline would not be extended and the arbitrations would be closed if payment was not received by April 9.

Intuit's latest letter simply reasserts that Rule 9(b) requires AAA to administratively close the demands Intuit prefers to litigate. Letter at -2. But rehashing the same argument does not make it any more valid, and Intuit offers no grounds for AAA to reverse its prior decision. Nonetheless, for the sake of completeness, Claimants will briefly correct several of Intuit's distortions and accusations.

Fi st, Intuit's assertion that AAA "fail[ed] to provide any reasoned basis for [its] decision," Letter at 2, simply ignores the substance of AAA's determination. AAA made crystal clear why it refused to close Claimants' cases: the issues Intuit has raised are issues of arbitrability, and must therefore be submitted to an arbitrator. erhaps because it has no good answer, Intuit does not even attempt to explain why AAA's decision was incorrect, and instead attempts to ignore it. But ignoring AAA's rationale does nothing to undermine it. AAA articulated the reason for its decision. Having done so, AAA naturally did not go on to decide Intuit's underlying arguments, because it had *ust c c uded* that it lacked the authority to resolve them.

Seco d, Intuit's assertion that AAA lacks the power to interpret and apply its Rules to threshold administrative issues is simply false. Intuit's arbitration clause incorporates the AAA Consumer Rules. Those Rules unambiguously state that the "arbitrator shall interpret and apply these Rules as they

Keller | Lenkner

relate to the arbitrator's powers and duties . . . . All other Rules shall be interpreted and applied by AAA." Consumer Rule . AAA appropriately interpreted and applied Rule , which states that questions of arbitrability are to be resolved by an arbitrator. While Intuit may not like AAA's decision, the Association plainly had the power to make it. Moreover, a contrary interpretation would not only ignore the plain text of AAA's Rules, but would also produce absurd results. On Intuit's view, Inuit could have drafted its contract to state that "Intuit shall not be allowed to invoke Consumer Rule 9," but if Intuit nonetheless told AAA it had elected to invoke Rule 9, AAA would have neither the power to interpret the contract nor the power to submit the question to an arbitrator. To state that position is to refute it.

Thi d, Intuit's suggestion that AAA's ruling was motivated by "financial self-interest," Letter at , is beyond the pale. The AAA Rules that Intuit inserted into its contract state that AAA will charge an administrative fee "in accordance with the Costs of Arbitration section found at the end of these Rules." Consumer Rule . AAA followed that fee schedule to the letter, and Intuit does not claim otherwise.

As Intuit knows well, AAA is a "not-for-profit organization," *id.,* with almost a century of experience administering arbitrations. As an entity registered under section 0 (c)(3) of the Internal Revenue Code, AAA must ensure that none of its earnings "inure to any private shareholder or individual." *See* https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-50 c - organizations (last visited March 30, 20 0). Intuit has adduced zero evidence that any decision maker at AAA had a financial incentive to interpret or apply Rule 9 improperly.

Intuit's true complaint is that AAA's decision to enforce the arbitration agreement as written will cost the company "millions of dollars in fees." Letter at . That reality flows directly from the contract Intuit foisted upon its customers. The company knew when it drafted its arbitration clause that the fees and costs of individual arbitration might exceed the value of any damages award. That is *r ecise y* the complaint many consumer advocates advanced in support of their contentions that class-action waivers were unconscionable. But companies such as Intuit defeated those contentions, insisting that courts enforce arbitration agreements according to their terms. No doubt, Intuit did not believe that tens of thousands of aggrieved consumers would seek redress for the company's misdeeds. But Intuit's disappointment that individual arbitration is not the de facto shield from liability that it previously imagined offers no justification for lashing out at Claimants' counsel or attacking AAA's integrity.

Fi a y, Intuit's speculation about Keller Lenkner's attorney-client communications is both unfounded and irrelevant. Intuit observes that "Keller Lenkner has produced no proof that it ever even spoke over the phone to a single one of its purported 90,000 claimants." Letter at 3. There is no Rule that gives AAA the authority to refuse to administer arbitrations until Claimant's counsel describes its attorney-client communications. And the time, frequency, method, and substance of such communications is of no concern to opposing counsel. Intuit cannot wriggle free of its contractual obligations by guessing (wildly and wrongly) about communications it is not and never will be privy to while feigning concern that Claimants are receiving sufficient information about the risks and benefits of arbitration.

Please let us know if you have further questions.

Sincerely,

Ashley Keller

Ashley Keller

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March 31, 2020

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VIA EMAIL (SHONECKA@ADR.ORG)

Mr. Adam Shoneck
Assistant Vice President
American Arbitration Association
International Centre for Dispute Resolutions
1301 Atwood Ave., Suite 211N
Johnston, RI 02919

Re: AAA Case Number 01-19-0003-1980
Response to March 30, 2020 letter from Mr. Ashley Keller

Dear Mr. Shoneck:

As with Keller Lenkner's previous letters, yesterday's submission fails to acknowledge, let alone engage with, Intuit's straightforward arguments as to why the AAA must close the cases at issue. Mr. Keller instead insists that the AAA need not take any further action because it already supplied a clear "rationale" for its decision, i.e., that application of Rule 9(b) is an "issue[] of arbitrability, and must therefore be submitted to an arbitrator." Keller Mar. 30 Ltr. at 1. But as even Keller Lenkner acknowledges, that unsupported assertion was the AAA's preliminary *decision*, not a "reason for its decision," *id.*; *see also id.* (the AAA "*concluded* that 'the issues presented are arbitrability disputes'") (emphasis added). And as Intuit has explained, that conclusion is foreclosed by the clear text of the AAA's own Rules and Due Process Protocol.

By its terms, Rule 9(b) applies "[a]fter a case is filed with the AAA, but *before the arbitrator is formally appointed*." AAA R-9(b) (emphasis added). At this juncture, the Rule states, "the AAA *will* administratively close the case" upon written notice from either party that it wants the case decided by a small claims court. *Id.* (emphasis added). Pursuant to the plain language of Rule 9(b), in other words, application of the Rule is not a question of arbitrability; it governs before any arbitrator is appointed and affords the AAA no discretion. The very next provision confirms this conclusion: Under Rule 9(c), which applies "*[a]fter the arbitrator is appointed*," it is *then* "up to the arbitrator to determine if the case should be decided in arbitration or … in small claims court." AAA R-9(c) (emphasis added). Rule 14 is accordingly no help to Keller Lenker, as it simply reinforces the undisputed principle that once an arbitrator

is appointed, that arbitrator has "the power to rule on his or her own jurisdiction," AAA R-14(a).[1]

Lacking any response to the plain text of these rules, Keller Lenkner has urged the AAA to ignore them on the ground that the TurboTax Terms permit only *claimants* to invoke the Small Claims Option. *See* Keller Mar. 30 Ltr. at 1-2; Keller Feb. 12 Ltr. at 1. Intuit has explained why that interpretation is untenable, *see* Intuit Feb. 18 Ltr. at 2-4—including that the clause Keller Lenkner identifies as the sole basis for its argument reflects exactly the notice *required by* (and included in the TurboTax Terms to comply with) the AAA's Due Process Protocol, *see id.* at 2-3; Intuit Mar. 13 Ltr. at 2 n.2; AAA Consumer Due Process Protocol, Principle 11(c) (Agreements to Arbitrate). And Keller Lenkner has no answer to the fact that, even if the AAA were to accept Keller Lenkner's implausible view that the TurboTax Terms establish a unilateral small-claims mechanism, *the result would be the same as under Rule 9(b)*: Such a provision would constitute a material violation of the Due Process Protocol, requiring the AAA to close the cases. *See* Intuit Feb. 18 Ltr. at 3-4; Intuit Mar. 13 Ltr. at 2. Indeed, the same result would obtain under Keller Lenkner's absurd hypothetical—in which Intuit expressly agrees that it "shall not be allowed to invoke Consumer Rule 9," Keller Mar. 30 Ltr. at 2—because such an agreement would plainly fail to pass muster under the AAA's basic due process standards, *see* Intuit Feb. 18 Ltr. at 4 n.6 (discussing the AAA's process of reviewing arbitration agreements for due process compliance); *see also id.* at 3 & n.4. That should be the end of this dispute.

That Keller Lenkner continues to ignore the AAA's Due Process principles is no surprise, however, given its position that its attorney-client relationship with TurboTax customers "is of no concern to opposing counsel." Keller Mar. 30 Ltr. at 2. For one thing, whether Keller Lenkner is communicating critical information to its clients (or simply acting of its own accord without client input) bears heavily on whether these more than 10,000 cut-and-paste claims are in fact a representative proceeding in violation of the TurboTax Terms. *See* Intuit Feb. 18 Ltr. at 5-6. For another, whether Keller Lenkner is charging TurboTax customers an unconscionable fee and/or failing to inform them of the significant risks of filing frivolous arbitration demands, *see id.* at 4-5 & n.8, is indeed "of concern" to Intuit—and it should be of concern to the AAA as well, *see* Intuit Mar. 13 Ltr. at 3-4; AAA Consumer Due Process Protocol, Principle 2 (Access to Information Regarding ADR Program).

[1] Of course, even if there were a conflict between Rule 9(b) and Rule 14, under familiar principles of contract and statutory interpretation, Rule 9(b)'s specificity would trump the general statement found in Rule 14. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (recognizing the "commonplace" principle that "the specific governs the general"); *Iqbal v. Ziadeh*, 10 Cal. App. 5th 1, 12 (2017) ("Where general and specific [contractual] provisions are inconsistent, the specific provision controls.").

For the reasons explained, Intuit respectfully requests that you reverse the preliminary decision set forth in your March 6 letter and close the cases Intuit has elected to have decided by a small claims court. Alternatively, Intuit requests immediate review of this matter by the AAA Administrative Review Council or other appropriate senior leadership.

Sincerely,

FENWICK & WEST LLP

s/ Rodger R. Cole

Rodger R. Cole

RRC:cen

cc: Warren Postman, Keller Lenkner, (via-email (wdp@kellerlenkner.com))
Christine Newhall, Senior Vice President, AAA, (via e-mail (NewhallC@adr.org))
Eric P. Tuchmann, General Counsel, AAA (via e-mail (TuchmannE@adr.org))

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April 9, 2020

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Case Number: 01-19-0003-1980

Aaron Hammond
-vs-
TurboTax, Intuit, Inc.

Dear Counsel:

The American Arbitration Association (AAA) is in receipt of letters dated March 13, and 31, 2020 from counsel from Respondents and a letter dated March 30, 2020 from counsel for Claimants regarding whether 9,936 of the 10,497 cases filed may be withdrawn to small claims court in accordance with Rule 9 of the Consumer Arbitration Rules (Consumer Rules).

The AAA has reviewed the parties' contentions regarding the applicability of Rule 9. We have determined that the issues presented are arbitrability disputes that must be resolved by an arbitrator(s). In order to move the matters forward, the AAA will proceed with administration of each individual case under the Consumer Rules.

During the telephone conference of April 3, 2020, the issue of whether the parties could raise the dispute regarding Rule 9 to the AAA's Administrative Review Council (ARC) was discussed if the parties met all the filing requirements. In response, the parties are directed to the AAA Administrative Review Council Overview and Guidelines, which state:

> The Administrative Review Council (ARC or Council) will act as the administrative decision making authority for the AAA to resolve certain administrative issues arising on large, complex domestic cases. Administrative issues that should be submitted to the Council, as further outlined in Section D below, include objections to arbitrators, locale determinations and whether the filing requirements contained in the AAA's Rules have been met.

Because these are not large, complex domestic cases and the issue does not relate to objections to arbitrators, locale determinations or whether the filing requirements contained in the AAA's Rules have been met, the ARC is not available to resolve the parties' dispute regarding Rule 9.

As stated during the April 3 call, the Respondents' filing fees in the amount of $3,132,000 is due no later than April 20, 2020. In accordance with California Code of Civil Procedure sections 1281.97 and 1291.98, if payment is not received by April 20, 2020, the AAA will close all cases for which full filing fees have not been received.

Finally the parties' arbitration agreement states "[p]ayment of all filing, administration and arbitrator fees and costs will be governed by the AAA's rules, but if you are unable to pay any of them, Intuit will pay them for you." Counsel for the claimants advised the AAA that twenty-seven claimants of the initial group of fifty-seven cases have indicated that they are unable to pay the administrative filing fee of $200; accordingly, Respondents will be billed for this amount on each of the cases as they move forward in order to avoid delaying administration.

Sincerely,

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April 20, 2020

RODGER R. COLE

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VIA EMAIL (SHONECKA@ADR.ORG)

Mr. Adam Shoneck
Assistant Vice President
American Arbitration Association
International Centre for Dispute Resolution
1301 Atwood Ave., Suite 211N
Johnston, RI 02919

Re: AAA Case Number 01-19-0003-1980
Response to April 9, 2020 Letter from Adam Shoneck

Dear Mr. Shoneck:

On Friday, Intuit paid under protest $2,980,800 in initial filing fees for the 9,936 claims Intuit elected to have decided by a small claims court pursuant to AAA Rule 9(b). Intuit reserves all rights to seek reimbursement of these fees and requests that the AAA place the disputed amount in escrow (or a segregated internal AAA account) until the question of whether these fees were properly invoiced is finally adjudicated.[1] In addition, we received your April 9 letter, which failed to address previous concerns and raised new ones. Intuit has three objections to your letter and requests a written explanation for the positions taken.

Objection No. 1 **The AAA Has Provided No Explanation For Its Manifest Disregard Of Consumer Arbitration Rule 9(b) And The Consumer Due Process Protocol.**

Consumer Rule 9(b) *requires* the AAA to "administratively close the case" where, as here, a party sends written notice that it wants the case decided by a small claims court "before the arbitrator is formally appointed to the case by the AAA." AAA R-9(b). The Consumer Due Process Protocol provides that a "[k]ey [p]rovision[]" of any arbitration agreement is that "*[a]ll parties* retain the right to seek relief in small claims court," AAA Consumer Arbitration Fact Sheet (emphasis added), and that where "an arbitration clause contains [a] material violation[] of the Consumer Due Process Protocol," the AAA must "decline administration of [the] arbitration demand[]," *id.*; *accord* AAA R-1(d). This is standard among arbitration-service providers. For example, the JAMS Minimum Standards for Arbitration Procedures provides that "no party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope

[1] Intuit previously paid initial filing fees for the other 561 claims that the AAA represented—apparently inaccurately for some, as discussed below—that the Claimants had satisfied their filing requirements.

of its jurisdiction."[2] In selecting the AAA over other providers, Intuit relied on the AAA's representations that it would follow its published Rules and Due Process Protocol. Moreover, because the AAA is acting outside its powers to determine monies allegedly owed only to itself, and contrary to the AAA's contractual relationship with Intuit, it is not acting in a judicial or decisional capacity. Your demand for a $2,980,800 payment—accompanied by threat of sanctions—in manifest disregard of the AAA's Rules and Due Process Protocol warrants a written and thorough explanation of the basis for your decision. We renew our request that you provide one.

Objection No. 2 The AAA's Refusal To Allow An Appeal Of The Decision To The Administrative Review Council Is Contrary To Its Published Policy.

The Administrative Review Council seeks to "uphold[] the integrity of the arbitration process and reinforc[e] the parties' confidence in the process." Administrative Review Counsel, Review Standards, at 1.[3] On our last call with you, you took the remarkable position that the Administrative Review Council could not determine whether the $2,980,800 in fees were properly invoiced unless and until Intuit paid the disputed fees. In a show of utmost good faith, Intuit has now paid those significant fees under protest. Your April 9 letter now provides a different rationale for your refusal to submit this issue to the Administrative Review Council, and that rationale is yet another example of patent disregard for the AAA's own stated policies. The very authority you rely on—the AAA Administrative Review Council Overview and Guidelines—explains that the Administrative Review Council's "Scope of Authority" includes precisely the issue presented here, i.e., a "dispute[] that could impact the AAA's determination whether or not to administer a matter."[4] And your assertion that this dispute is somehow not "large" or "complex" ignores, among other things, both the years it will take to administer these more than 10,000 claims and the size of the disputed fee itself. At the very least, the Administrative Review Council should be presented with the question whether this dispute is within its purview and should issue a written decision addressing that question.

Objection No. 3 The AAA Improperly Charged Intuit Initial Fees For Cases In Which Claimants Have Failed To Satisfy Their Filing Requirements.

Your letter also revealed that you improperly charged Intuit filing fees for numerous cases in which—contrary to your previous representation—the claimants' fees have not yet been paid. You previously stated that there were "now 10,497 cases in which [the AAA had] received the

[2] https://www.jamsadr.com/consumer-minimum-standards/.

[3]https://www.adr.org/sites/default/files/document_repository/AAA_AdminReviewCounsel_Standards.pdf.

[4]https://adr.org/sites/default/files/document_repository/AAA_AdminReviewCounsel_Guidelines.pdf.

Claimants' filing requirements," and on that basis demanded "the balance of [Intuit's] filing fees in the amount of $3,132,000." Shoneck Mar. 6 Ltr. at 1. But you now disclose that 27 of "the initial group of fifty-seven" claimants—nearly 50 percent—failed to pay the required filing fees. Under the AAA's Rules, Intuit's initial fees are due only "*once the consumer claimant meets the filing requirements*." AAA Consumer Arbitration Rules, Costs of Arbitration, (i) Filing Fees (emphasis added).[5] Thus, with respect to these 27 cases, the AAA once again disregarded its rules and has yet again failed to provide any explanation for doing so. It is unclear how many other claims among the 10,497 are similarly defective.

Your letter compounds the error, wrongly asserting that you can invoice the outstanding $5,400 amount for these 27 claimants to Intuit because Keller Lenkner "advised that they are unable to pay the administrative filing fee of $200." Shoneck Apr. 9 Ltr. at 2.[6] No evidence has been provided that these claimants are unable to pay, and by all indications these arbitrations are being financed by Keller Lenkner or its investors, not claimants themselves. Keller Lenkner's client-recruitment website repeatedly indicates that claimants need not pay anything, stating that "[s]igning up is straightforward and costs nothing," and that claimants only need to fill out a form and "[t]hat's it. Once we receive your documents we'll review your answers and start working on your potential claim."[7] This investment is part of Keller Lenkner's business model. If it employed a retention agreement here similar to that used in its other cases, the firm stands to take roughly $750 off the top of any arbitral award—a sum well in excess of any likely recovery on any claim here. *See* Decl. of A. Unthank at 9, *In re CenturyLink Sales Practices and Sec. Litig.*, No. 17-md-02795 (D. Minn. Jan. 10, 2020) (Dkt. 512). Thus, it appears that *none* of the 10,497 claimants paid anything from their own pocket in connection with these arbitrations or, for that matter, stand to gain anything from them either), so it makes no sense to assert that 27 of them are "unable to pay." To the extent Keller Lenkner nevertheless maintains that it has not been paying the claimants' filing fees, the AAA should require Keller Lenkner to submit a declaration supporting that representation, along with documentation showing that its clients have directly paid their own fees.

In any event, the AAA may reduce or waive fees in cases of financial hardship, *see* AAA R-4, but—not surprisingly—only upon a *showing* of such hardship. *See* AAA Affidavit in Support of Administrative Fees Hardship Waiver (explaining that the AAA typically waives fees for

[5] The TurboTax Terms of Service also state that "[p]ayment of all filing, administration and arbitrator fees and costs will be governed by the AAA's rules." Intuit TY 2018 TurboTax Terms of Service at 3, ¶ 14.

[6] Throughout this dispute, the AAA has vacillated between taking significant liberties in interpreting the parties' contract as an administrative matter and declaring the contract's interpretation to be an arbitral question that an arbitrator must decide. It should be noted that the only common thread to these decisions is the maximization of AAA fees.

[7] *See* https://signup.turbotaxclaims.com/free-filing-claim/.

"individuals whose gross monthly income exceeds 300% of the federal poverty guidelines").[8] The same is true of Intuit's coverage of claimant costs and fees. *See* Intuit TY 2018 TurboTax Terms of Service at 3, ¶ 14 (explaining that "[p]ayment of all filing, administration and arbitrator fees and costs will be governed by the AAA's rules"). After receipt of the requested declaration from Keller Lenkner, and upon review of claimants' AAA financial hardship affidavit and supporting documents, Intuit will consider covering the fees of claimants who maintain that they are unable to pay.[9] For any case in which these documents are not provided to Intuit within 14 days, Intuit requests that its $300 filing fee be promptly reimbursed and the case closed.

Sincerely,

FENWICK & WEST LLP

s/ Rodger R. Cole

Rodger R. Cole

RRC:cen
cc: Warren Postman, Keller Lenkner (via-email (wdp@kellerlenkner.com
Christine Newhall, Senior Vice President, AAA (via email (NewhallC@adr.org))
Eric P. Tuchmann, General Counsel, AAA (via email (TuchmannE@adr.org))

[8] https://www.adr.org/sites/default/files/Support_of_Hardship_Waiver_of_Fees.pdf.

[9] In the event of a dispute about whether Intuit should cover a particular claimant's fees, consistent with your (albeit erroneous) decision about the payment of *Intuit*'s fees, the dispute should be settled by an arbitrator paid for by Keller Lenkner.

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April 24, 2020

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Case Number: 01-19-0003-1980
Aaron Hammond
-vs-
TurboTax, Intuit, Inc.

Dear Counsel:

The American Arbitration Association (AAA) is in receipt of a letter from counsel for the respondent dated April 20, 2020 and a letter from counsel for the claimants dated April 21, 2020. These communications, in addition to the parties' prior communications, reflect their disagreement about whether their disputes should be heard in arbitration or in small claims court. As stated in our letters of March 6th, 2020 and April 9th, 2020, the AAA views the parties' disagreement regarding the interpretation and application of the small claims provision in the parties' arbitration clause, R-9 of the Consumer Arbitration Rules, and the AAA's Consumer Due Process Protocol as an arbitrability dispute. As with other cases filed with the AAA involving arbitrability disputes, the AAA will proceed with the administration of these cases so that the issue can be presented to the appointed arbitrators. Further, please be advised that the AAA will also abide by any court order directed to the parties specifying the manner in which the underlying arbitrations should, or should not, proceed. The AAA is not a necessary or proper party to litigation relating to an arbitration being administered by the AAA.

The AAA did conduct an administrative review of the parties' arbitration agreement at the time of filing and determined that it substantially and materially complies with the due process standards of the Consumer Due Process Protocol. The AAA's review of the arbitration clause is only an administrative review to determine whether the clause complies with the AAA's minimum due process standards in consumer arbitrations and is not an opinion on whether the arbitration agreement, the contract, or any part of the contract is legally enforceable. The AAA will not be revisiting this administrative review of this arbitration agreement.

As stated in our letter of April 9, 2020, the AAA's Administrative Review Council is not available to the parties in these matters. The reasoning was stated in that letter and the AAA has no further response.

The claimants have met their filing requirements for all of the cases, including payment of all filing fees. In light of the parties' dispute over the language in the agreement that provides that the respondent will pay the filing fee for a claimant who indicates they cannot afford to pay the fee, that matter can be presented to an arbitrator upon their appointment. As such, payment of the claimants' filing fees, for the 27 cases the AAA previously requested

from the respondent, is no longer due to the AAA at this time.

As the AAA now has the filing fees from both parties, we are prepared to proceed with the administration of these matters. In accordance with the AAA's normal course of case administration, we will not be placing the respondent's filing fees into escrow or a segregated account and will apply them to the cases as they are initiated. However, the AAA will provide an accounting to a party regarding the fees that party has paid upon request. This will once again confirm that these cases will proceed as individual arbitrations, with individual parties and case numbers. The AAA can issue the respondent an invoice confirming payment on individual arbitration cases, which will include the case number and the amount paid on each case.

Finally, we note that the parties have directed their prior communications to the AAA's General Counsel and one of the AAA's Senior Vice Presidents. As they are not the AAA administrator assigned to the management of the parties' cases, they should not be included in the parties' future communications regarding the cases. We ask that the parties direct all communications to only the assigned case administrator(s) or myself. Thank you in advance for your anticipated cooperation.

Sincerely,

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April 29, 2020

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VIA EMAIL (SHONECKA@ADR.ORG)

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Re: Response to Initiation Letters Dated April 23 and 24, 2020 Re "TurboTax"

Dear Mr. Shoneck:

I am writing in response to thirty initiation letters sent to Intuit Inc. on April 23, 2020 and April 24, 2020 regarding certain TurboTax matters, and a related invoice sent to Intuit Inc. on April 24, 2020.

AAA's demand for payment of the case management fee ($1,400) and arbitrator compensation ($1,500) within 14 days of the initiation letter appears to be a mistake, as it is contrary to the AAA's Rules. Consumer Arbitration Rules, Costs of Arbitration, Amended and Effective September 1, 2018. They provide that a nonrefundable case management fee of $1,400 "will be assessed to the business 60 days after the date the AAA sends correspondence communicating the 'answer' due date to the parties or upon the appointment of an arbitrator, whichever comes first." *See id.* at Section (ii). Thus, the case management fee would be due 60 days from the date of the initiation letters, or upon appointment of the arbitrator, which has not yet occurred. However, the initiation letters state that, "[w]hen appropriate fees and arbitrator compensation deposits are on hand, the AAA will administratively appoint an Arbitrator from the National Roster." Given that process, the case management fee for the thirty claims should be due 60 days from the date of the initiation letters—June 22 and 23, 2020.

As to the arbitrator compensation, the Rules provide that, "[o]nce a Preliminary Management Hearing is held by the arbitrator, the arbitrator is entitled to one-half of the arbitrator compensation rate. Once evidentiary hearings are held or all the parties' documents are submitted for a desk/documents-only arbitration, the arbitrator is entitled to the full amount of the arbitrator compensation rate." *See id.* at Section (iii). This Rule suggests that the AAA's demand for payment of the full amount of $1,500 (for a desk/documents-only arbitration) is also premature. By the text of the rules, one-half of that fee should be due after an arbitrator is appointed and a Preliminary Management Hearing is held, and the remaining half should be due after the evidentiary hearing is held or all the parties' documents are submitted. As we have requested when AAA has abandoned the text of its own rules on prior occasions in these

proceedings, Intuit respectfully requests that the AAA explain in writing its basis for departing from its own published procedures again here.

Intuit therefore requests that the AAA provide clarification regarding the fee schedule for arbitration compensation and re-issue initiation letters with fee schedules that conform to the AAA's Costs of Arbitration.

Sincerely,

FENWICK & WEST LLP

s/ Rodger R. Cole

Rodger R. Cole

RRC:cen

cc: Meghan Richardson (via e-mail (MeghanRichardson@adr.org))

Warren Postman, Keller Lenkner (via e-mail (wdp@kellerlenkner.com))

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May 7, 2020

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Case Number: 01-19-0003-1980
Aaron Hammond
-vs-
TurboTax, Intuit, Inc.

Dear Counsel:

The American Arbitration Association (AAA) is in receipt of a letter dated April 29, 2020 from Mr. Cole. This letter will address the deadline for Respondent's payment of the AAA's Case Management Fee and its payment of deposits for arbitrator compensation and Hearing Fees.

As noted in Mr. Cole's letter, the Costs of Arbitration section of the Consumer Arbitration Rules (Consumer Rules) provides that the Business pay the Case Management Fee: "60 days after the date the AAA sends correspondence communicating the 'answer' due date to the parties or upon the appointment of the arbitrator, whichever comes first."

As the AAA is prepared to appoint arbitrators to the thirty cases recently initiated, our letters dated April 23 and 24 set May 7th as the due date for Respondent to pay the Case Management Fee, deposits for arbitrator compensation and, where applicable, the Hearing Fee. May 7th is the same date Respondent's answers are due. However, based on Mr. Cole's letter, we acknowledge that the Respondent is requesting the full 60 days from the April 23 and 24 letters to pay the Case Management Fees owed.

Therefore, the AAA will set the due date for payment of the Case Management Fees to 60 days from the date that the April 23 and 24 letters were sent - meaning, the Case Management Fees are due either June 22 or June 23, 2020 depending on whether the specific case letter was sent on April 23 or April 24.

In terms of deposits for arbitrator compensation, R-6 of the Consumer Rules allows the AAA to "require the parties to deposit in advance of any hearings such sums of money as it decides are necessary to cover the expense of the arbitration, including the arbitrator's fee, and shall render an accounting to the parties and return any unused money at the conclusion of the case." We are requesting Respondent pay the deposits for arbitrator compensation in advance of arbitrator appointment so that there is no delay scheduling the Preliminary Management Hearings once arbitrators are appointed.

EXHIBIT I-39

The AAA encourages the parties to agree that all of the matters be resolved utilizing the Procedures for the Resolution of Disputes through Document Submission contained in the Consumer Rules. In accordance with Consumer Rules R-1(g) and R-29, for matters in which there are no disclosed claims or counterclaims exceeding $25,000, these matters shall be resolved by the Procedures for the Resolution of Disputes through Document Submission contained in the Consumer Rules, unless any party requests an in-person or telephonic hearing or the arbitrator decides that a hearing is necessary. The deposits due for these matters are $1,500 per case. However, in accordance with the Consumer Rules, should any party requests an in-person or telephonic hearing or the arbitrator decides that a hearing is necessary, the deposit will be $2,500 per estimated day of hearing and the Hearing Fee of $500 will also be owed.

For matters in which there are disclosed claims or counterclaims exceeding $25,000, the deposits due is $2,500 per case, unless the parties agree that the matters will proceed on documents-only in which case the deposits will be reduced to $1,500 per case. For matters in which there are disclosed claims or counterclaims exceeding $25,000, the Hearing Fee of $500 are also owed. Please refer to the letters April 23 and 24 for the amount due on each matter. The AAA is setting the payment of deposits for arbitrator compensation and Hearing Fees on the same schedule as payment of the Case Management Fee, due either June 22 or June 23, 2020. Any unused deposits for arbitrator compensation will be returned at the conclusion of the case. Hearing Fees will also be refunded in accordance with the Costs of Arbitration section of the Consumer Arbitration Rules.

The AAA will take the next administrative step, appointing an arbitrator to a case, once it receives the Case Management Fee, deposits for arbitrator compensation, and where applicable the Hearing Fee for that case. Further, as these arbitrations are subject to California Code of Civil Procedure 1281.97 and 1281.98, the Case Management Fees and deposits for arbitrator compensation must be received by July 22 or July 23, 2020 or the AAA will close the parties' case. The AAA will not grant any extensions to these payment deadlines.

The 60-day time-period for payment of the Case Management Fees contained in the Consumer Rules was designed to encourage parties to resolve their disputes early and without the need for further expense including arbitrator compensation. To assist with settlement, the AAA recommends the parties utilize the AAA's Online Settlement Tool, which is available on each case through AAA WebFile®. I have attached information on the Settlement Tool. As previously advised, the parties are also encouraged to consider mediation at this time. The AAA can provide the parties with mediators with considerable experience in assisting parties with the resolution of large groups of cases involving multiple parties.

Please note that all other deadlines set forth in our April 23 and 24 letters remain in place.

Sincerely,

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EXHIBIT I-40

EXHIBIT I-41

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May 12, 2020

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VIA EMAIL (SHONECKA@ADR.ORG)

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Re: Aaron Hammond v. TurboTax, Intuit, Inc. - Case 01-19-0003-1980

Dear Mr. Shoneck:

This letter follows up on the issues discussed during the May 8, 2020 teleconference regarding efficiencies and costs in connection with the administration and adjudication of the 10,497 pending claims. We respectfully request a detailed written response to each of the issues set forth below.

First, we were pleased to learn that the AAA is interested in and willing to apply procedures that would expedite the pending claims and seek out efficiencies. To that end, there is a single threshold legal question applicable to many, though not all, of the pending claims: whether to honor Intuit's election to have those claims heard in small claims court pursuant to Rule 9(b). AAA Consumer Arb. R-9(b). Resolving this threshold issue is where the AAA should look for efficiencies before taking any other steps, especially since this issue exists only because the AAA refuses to follow the plain text of its own Rule and Consumer Due Process Protocol. Indeed, the application of those rules will result in the vast majority of these claims being resolved by small claims courts rather than by the AAA. *See*, *e.g.*, Consumer Due Process Protocol, Principle 6, Reporter's Comments ("there is always the alternative of face-to-face hearing in small claims court."). With no explanation ever provided, you declared the question needs to be determined by an arbitrator and refused to allow Intuit an appeal to the Administrative Review Council, the body designated under the AAA's Rules to hear such appeals. As a result, Intuit paid under protest nearly $3 million in initial fees that were not owed, which we asked the AAA to hold in escrow.

Despite the AAA's avowed interest in efficient procedures, including aggregating multiple claims before single arbitrators, your statements during the May 8 teleconference seem to indicate that the AAA may demand an additional $28,814,400 in arbitrator and administrator fees simply to adjudicate the plain text of the AAA's own Rule 9,936 times. That would be flatly contrary to the AAA's Consumer Due Process Protocol Principles 1, 5 and 6. We urge the

AAA to set forth a process in good faith for the prompt and cost-efficient resolution of this straightforward question.

Second, the efficiencies that the AAA is proposing for administration of these cases should translate to significant cost savings for the parties. The AAA is not treating these matters as 10,497 cases, but rather proposes to hold consolidated administrative hearings and to implement other streamlined processes and procedures. Charging $14,695,800 (a flat $1,400 administrative fee for each case) bears no relationship to the time that will be expended by AAA personnel on these matters, especially since the lawyers for the parties and legal theories in each case are the same. As we requested during the call, Intuit demands that the AAA track the time spent on these matters. Intuit also believes that the most appropriate process to provide reasonable compensation for services rendered is for the AAA to send monthly invoices reflecting a reasonable fee commensurate with actual time spent on these matters. *See* AAA Consumer Arb. Rule R-4 ("As a *not-for-profit* organization, the AAA charges fees to compensate it for the cost of providing administrative services.") (emphasis added).

Similarly, according to the AAA's own fee statement, the $1,500 arbitrator deposit reflects 7 hours of arbitrator time reviewing document submissions of no more than 100 pages—an hourly rate of $214. Time spent in excess of 7 hours is billed at a rate of $300 an hour. If arbitrators are handling multiple cases, they will become familiar with the issues and almost certainly spend less than 7 hours per case. Intuit therefore demands that arbitrators track the time spent on their matters, that a reasonable retainer amount be set and periodically replenished, and that monthly invoices from each arbitrator assigned to handle these matters are set at a $300 hourly rate. We recognize this means that if an arbitrator actually spends 7 hours on a case, it would result in a $2,100 fee ($600 more than the flat rate), but we think it is exceedingly unlikely that arbitrators will spend more than a couple hours on any matter once they are familiar with the issues. The invoices will allow for tracking of amounts being deducted from the retainer to pay these fees. Please let us know the AAA's position, and provide a written explanation of how the fees and deposits the AAA proposes relate to the fair value of the services it will be providing.

These are not merely disputes between Intuit and the claimants. To be sure, Keller Lenkner is using the threat of $30 million in AAA fees to coerce a settlement from Intuit that bears no relation to the small underlying potential liabilities of the claims themselves. And, under its standard retention agreement, Keller Lenkner is paid $750—multiples of the underlying potential liability for each claim—before the claimants they purport to represent receive anything

EXHIBIT I-43

at all.[1] The transparency of Keller Lenkner's scheme, and the harm it might cause to the actual claimants here, is all the more reason for the AAA to act responsibly and consistent with its own Rules and Due Process Procedures.

You have asked us not to copy your supervisor or the General Counsel of the AAA on these issues. We continue to do so out of respect for the organization and out of concern that there may not be adequate appreciation of the business, reputational and legal risks at stake.

We look forward to your written response and ask that you do so promptly because these important issues need to be resolved before these cases can proceed.

Sincerely,

FENWICK & WEST LLP

s/ Rodger R. Cole

Rodger R. Cole

RRC:cen

cc: Warren Postman, Keller Lenkner (via email (wdp@kellerlenkner.com))
Christine Newhall, Senior vice President, AAA (via email (NewhallC@adr.org))
Eric P. Tuchmann, General counsel, AAA (via eail (TuchmannE@adr.org))

[1] These mass filings violate Intuit's Terms of Service, which prohibit "ANY … REPRESENTATIVE PROCEEDING." Terms of Service, Section 14. Each demand is substantively identical and devoid of any individualized allegations or information about the claimant. Each advances the same theory of liability and seeks the same types of relief. The fact that the vast majority of the claims are frivolous—for example, because the taxpayer filed her taxes for free—further underscores the de facto representative nature of the proceeding here. Moreover, the claimants appear to have no meaningful involvement in these arbitrations, rather the lawyers are the ones effectively "in charge." *Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co.*, 671 F.3d 635, 640 (7th Cir. 2011).

EXHIBIT I-44

Keller | Lenkner

May 19, 2020

Mr. Adam Shoneck
Assistant Vice President
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shonecka@adr.org

Re: Arbitration Demands

Dear Mr. Shoneck:

Pursuant to your email of May 14, 2020, this letter responds to Intuit's letter of May 12, 2020. Intuit's letter rehashes for the third time Intuit's argument for why AAA should decide that Claimants' demands belong in small claims court, and it "demands" that AAA depart from its published fee schedule. In doing so, Intuit continues to ignore AAA's previous determinations, distort AAA's rules, and attempt to rewrite its own arbitration agreement through intimidation.

First, the parties have already briefed Intuit's small-claims-court argument multiple times and AAA has already decided the issue. AAA stated that it "views the parties' disagreement regarding the interpretation and application of the small claims provision in the parties' arbitration clause, R-9 of the Consumer Arbitration Rules, and the AAA's Consumer Due Process Protocol as an arbitrability dispute," and thus that it "will proceed with the administration of these cases so that the issue can be presented to the appointed arbitrators." April 24 Letter at 1. When Intuit tried to consolidate Claimants' individual cases into a single dispute before the Administrative Review Counsel, AAA refused to do so, explaining that Claimants' individual cases are not a "large, complex domestic case[]" eligible for ARC review. April 9 Letter at 1. Intuit is not obligated to like that result, but AAA clearly provided a written explanation of its determinations. To suggest otherwise is belied by months of correspondence.

Second, Intuit's remarkable claim that applying its arbitration agreement as written would violate the Consumer Due Process Protocol is incorrect as a matter of text and common sense. For decades, consumers have argued that class waivers are unfair because the costs of individual arbitration often exceed the value of underlying claims, thus disincentivizing consumers from bringing those claims in arbitration. To blunt that objection, companies such as Intuit agreed by contract to bear the costs of individually arbitrating even low-value claims. Principle 6 of the Consumer Due Process Protocol, which Intuit cites but does not quote, recognizes precisely this obligation:

> Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay. In some cases, this may require the Provider to subsidize the process.

(Emphases added). Principle 5, on which Intuit also relies, likewise reflects a concern for fairness to consumers. The text of that provision protects the right to "seek relief in a small claims court." The Reporter's Comments state that in drafting Principle 5, AAA's "Advisory Committee concluded that access to small claims tribunals is an important right of Consumers which should not be waived by a pre-dispute ADR Agreement." Intuit's arbitration agreement complies with this principle; it provides Claimants the option to bring their claims in small claims court.

Keller | Lenkner

Intuit required individual arbitration for low-value claims knowing full well that the cost of each individual arbitration would often be greater than the value of such claims. And although small claims court might be cheaper for Intuit, it would be more expensive for Claimants (who have a right to reimbursement of their fees in arbitration) and more cumbersome (as defendants often can appeal an adverse court decision). There is nothing unfair or inconsistent with the Consumer Due Process Protocol about holding Intuit to the terms of the contract it wrote and required its customers to sign.

Third, Intuit mischaracterizes the parties' May 8 administrative call with AAA. At no point during that call did AAA state that it would hold "consolidated administrative hearings" for Claimants' individual arbitrations. Nor did AAA state that it would apply "streamlined processes and procedures" to Claimants' individual arbitrations. AAA merely stated that it would efficiently assign multiple individual arbitrations to each arbitrator. That process is necessary to provide Claimants with the speedy access to arbitration they have been promised. Nothing about AAA's chosen method of selecting arbitrators will deprive the parties of the individual arbitrations guaranteed by Intuit's contract.

Finally, although we ultimately defer to AAA regarding how it applies its fee schedule, we note that Intuit's arguments and tone reflect a troubling view of arbitration, with implications beyond the specific individual arbitrations at issue here.

Arbitration is a legitimate alternative to court because it offers a neutral forum with rules laid down in advance. Both parties agree to respect the decisions of the arbitral forum and arbitrators as binding—the legitimacy of the proceedings depends on that agreement. A respondent cannot unilaterally change the arbitral rules after a dispute arises, any more than it is allowed to change rules of procedure after a case is filed in court. Likewise, a respondent is not entitled to attack its chosen arbitral forum when it disagrees with administrative rulings, any more than it would lash out at a clerk of court.

Intuit has consistently exhibited disrespect for arbitration and its chosen arbitral forum. Intuit would not "demand" that a judicial clerk modify a published fee schedule.[1] May 12 Letter at 2. Intuit would not make baseless, unfounded accusations that a clerk of a court was acting based on a pecuniary conflict of interest. Intuit's March 13 Letter at 2 (asserting that "[y]our disregard of the AAA's own Rules and Due Process Protocol" "aligns with the AAA's considerable financial self-interest[,] undermines the AAA's reputation and role as a neutral ADR institution," and "raise[s] justifiable doubt as to whether you or the AAA can remain impartial or independent." (internal quotation marks omitted)). And Intuit would not ignore a court clerk's instructions while making thinly veiled threats. May 12 Letter at 3 ("You have asked us not to copy your supervisor or the General Counsel of the AAA on these issues. We continue to do so out of respect for the organization and out of concern that there may not be adequate appreciation of the business, reputational and legal risks at stake."). These attacks are inappropriate, and we urge Intuit to consider taking responsibility for the process it chose, rather than attempting to undermine its legitimacy at every turn.

[1] Intuit knew full well when it drafted its arbitration agreement that the AAA Consumer Rules impose flat fees in each individual consumer case. And flat fees will predictably be more expensive than hourly billing in some cases and less expensive than hourly billing in other cases. That fact is not an argument for departing from a flat fee schedule. Intuit and other respondents presumably do not "demand" to pay more than required under the fee schedule in the many cases in which flat fees fail to cover the time spent by AAA on a matter.

EXHIBIT I-46

Keller | Lenkner

We have no doubt that AAA will continue to apply its rules neutrally and fairly. We look forward to moving past these threshold issues and proceeding with Claimants' individual arbitrations in the prompt and efficient manner to which Intuit agreed in its contract.

Sincerely,

Ashley Keller

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Northeast Case Management Center
Neil Currie
Vice President
1301 Atwood Avenue, Suite 211N
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Telephone: (866)293-4053
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May 27, 2020

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150 North Riverside Plaza
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Via Email to: wdp@kellerlenkner.com

Rodger Cole, Esq.
Fenwick & West, LLP
801 California Street
Mountain View, CA 94041-2009
Via Email to: rcole@fenwick.com

Case Number: 01-19-0003-1980
Aaron Hammond
-vs-
TurboTax, Intuit, Inc.

Dear Counsel:

The American Arbitration Association (AAA) is in receipt of a letter dated May 12, 2020 from Mr. Cole and a letter dated May 19, 2020 from Mr. Keller. As stated in our letter dated April 9, 2020, the AAA has reviewed the parties' contentions regarding the applicability of Rule 9. We have determined that the issues presented are arbitrability disputes that must be resolved by an arbitrator(s) or by a court. As there is no party agreement to stay these matters and no court order staying these matters, the AAA will proceed with administration of each individual case under the Consumer Rules. Further, as stated in our letter dated April 9, 2020, the parties' arbitrability disputes concerning Rule 9 is not an administrative determination within the scope of AAA's Administrative Review Council's authority.

Mr. Cole's letter dated May 12, 2020 raises a number of issues regarding the AAA's administrative fees and arbitrator compensation. During the May 8, 2020 administrative conference call, the AAA suggested a number of ideas to facilitate administrative efficiencies such as: foregoing the preliminary hearing conference call on each case and instead agreeing on a standard form scheduling order, providing an agreed upon award template or proposed award forms for the arbitrator to adopt, allowing a special master to decide certain issues common to all cases, and presenting arguments to arbitrators who are hearing more than one case in a consolidated format. We encourage the parties to come to agreement on these suggested efficiencies. If the parties reach agreement on any of the administrative efficiencies suggested by the AAA, the AAA will consider adjusting our administrative fees accordingly. However, if there is no party agreement as to administrative efficiencies reached before the payment deadlines set forth by the AAA, the payments owed will be in accordance with Costs of Arbitration section of the AAA's Consumer Rules. Arbitrator compensation is also set forth in the Costs of Arbitration section of the AAA's Consumer Rules, and unless there is party agreement otherwise, these matters will proceed in accordance

EXHIBIT I-48

with the AAA's Consumer Rules and its Costs of Arbitration.

As discussed during the May 8, 2020 administrative conference call, the parties have requested that the AAA provide individual documentation for each of the matters filed by the claimants. The AAA will begin the administration of these cases by sending out one-hundred (100) initiation letters initially.

The AAA will then send out the remaining letters as such:

- 900 letters
- 1500 letters
- 2000 letters
- 2500 letters
- 3467 letters (in total 10,467 letters)

If the parties wish to agree to a different initiation schedule please meet and confer and contact us with an agreed upon proposed process. The first 100 letters and billing will sent out during the week of June 1, 2020.

Separately, the AAA will also send out a single invoice which will include the individual AAA case number, the claimant's name, the respondent's name, case management fee amount due and the due date for each of the cases in that weekly group. We would ask that payment for this single invoice be made in a single payment, which the AAA will then allocate to all of the cases in that invoice. The due date for the payment of case management fees will be 60 days from the date of the initiation letter, which will be noted in the letter and the invoice. As these arbitration matters are subject to California law, California Code of Civil Procedure 1281.97 and 1281.98 will apply. If payment is not received within 30 days of this deadline, unless the Consumer pays the drafting party's fees to proceed with the arbitration proceeding or obtains a court order compelling the drafting party to pay all arbitration fees that the drafting party is obligated to pay and the drafting party does pay those fees, the cases will be closed.

Please be advised that unless the parties agree to appoint an arbitrator or to a process for appointing the arbitrator, the AAA expects to administratively appoint arbitrators to these matters in batches of 1,000 cases at a time. Arbitrator appointments will begin after the case management fee is paid or 60 days from the initiation letter, whichever comes first. Any arbitrators administratively appointed by the AAA will be appointed from its National Roster. Once arbitrators are appointed, a deposit for arbitrator's compensation must be submitted by the business and will be due within 15 calendar days from the date of the appointment. An invoice will be provided separately for the deposit amounts that will be due upon the administrative appointment of the arbitrator. As these arbitrations are subject to California law, California Code of Civil Procedure 1281.97 and 1281.98 will apply. If payment is not received within 30 days of this deadline, unless the Consumer pays the drafting party's fees to proceed with the arbitration proceeding or obtains a court order compelling the drafting party to pay all arbitration fees that the drafting party is obligated to pay and the drafting party does pay those fees, the case will be closed.

Arbitrator compensation for each case is as follows:

- As per the Costs of Arbitration section of the Consumer Arbitration Rules (Rules), the Business shall pay the arbitrator's compensation unless the consumer, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation.
- Arbitrators serving on a desk/documents-only arbitration will receive compensation at a rate of $1,500 per case. Additional arbitrator compensation at a rate of $300 per hour will be billed to the business if document submissions and time for the arbitrator to review the submissions exceeds the limits detailed in the Costs of Arbitration section of the Rules.
- Arbitrators serving on an in-person or telephonic hearing arbitration case will receive compensation at a rate of $2,500 per day of hearing per arbitrator. The arbitrator compensation encompasses one preliminary conference, one day of evidentiary hearing, and a final award. For cases with additional

procedures or processes not provided in the Rules, the Business will be responsible for additional arbitrator compensation.

The AAA is providing you the attached Consumer Arbitration Reference Sheet for more information about topics, such as AAA WebFile® and Cybersecurity and Privacy. Also, view our website at www.adr.org for additional information regarding the administration process.

Finally, the AAA reiterates that the costs outlined here are based on each case filed being administered and decided individually, and that efficiencies and cost saving can be achieved through party agreement to the various means suggested by the AAA previously or by party agreement to aggregating cases that are heard by arbitrators.

Sincerely,

Adam Shoneck, on behalf of
Meghan Richardson
Manager of ADR Services
Direct Dial: (401)537-6630
Email: MeghanRichardson@adr.org
Fax: (866)644-0234

cc: Ashley Keller, Esq.
Jonathan Paikin, Esq.
Laurence F. Pulgram, Esq.
Sean Duddy, Esq.
Tyler G. Newby, Esq.
Blake Roberts, Esq.
Nick Larry, Esq.

Sean Duddy

From: Adam Shoneck <shonecka@adr.org>
Sent: Tuesday, June 9, 2020 2:23 PM
To: Warren Postman; Ashley Keller; Nick Larry; Sean Duddy; 'rcole@fenwick.com'; 'Jonathan.Paikin@wilmerhale.com'; 'tnewby@fenwick.com'; 'lpulgram@fenwick.com'; 'blake.roberts@wilmerhale.com'
Cc: Meghan Richardson
Subject: Aaron Hammond v. TurboTax, Intuit, Inc. - Case 01-19-0003-1980

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Counsel:

This email will recap our call on Friday, June 5th.

In response to Mr. Paikin's inquiry regarding our administrative capacity to proceed with the cases as set forth in our May 27, 2020 letter, I indicated that we have leveraged additional technological capacity, but that from the parties' perspective, each case will still proceed through the normal steps of administration as would any other consumer matter. Mr. Paikin asked for clarification regarding these steps, which I provided; namely, that after appointment of the arbitrator, a preliminary conference call would be scheduled, during which a schedule for any briefing, motions, and discovery would be established. If the cases are to move to an in-person hearing, a tentative final hearing date may also be established during this call. After the preliminary conference call and any briefing, motions, and/or discovery, a final hearing would take place (for cases moving to an in-person hearing) or the parties would submit final briefs by a date set by the arbitrator (for documents-only hearings). The arbitrator would then have either thirty or fourteen days, respectively, to write the award.

Mr. Paikin also inquired as to the arbitrator appointment process. As indicated in our May 27, 2020 letter, arbitrators will be appointed from the national roster. We will conduct efforts to pre-screen arbitrators, as we do for other cases in the normal course, to attempt to eliminate arbitrators who may be conflicted out of serving or who may not wish to serve. This effort should minimize the time spent during the actual appointment process for each case. Mr. Paikin discussed arbitrator qualifications. I invited the parties to submit requested arbitrator qualifications to me in writing, and that we would do our best to accommodate those requests. Although it was not discussed on the call, I should indicate that unless specific arbitrator qualifications are clearly required by the parties' arbitration clause, which is not the case here, or by party agreement, then pursuant to the Consumer Arbitration Rules the qualifications of an arbitrator are not a reason an arbitrator can be disqualified for serving on the case.

Mr. Paikin asked whether AAA could provide a list of price reductions accompanying different procedural efficiencies to which the parties may agree. Before we can do that, it would be helpful to know the full extent of options the parties are considering, even if they have not agreed to actually implementing those options. As we have stressed since beginning this process, and as we continue to stress, we are very much willing to reduce costs wherever possible. This goal, however, must be weighed against our obligation as a neutral administrator, and we cannot impose procedures different from those outlined in the rules on parties who have not agreed to them.

Sincerely,

Adam Shoneck

EXHIBIT I-51

June 10, 2020

VIA EMAIL (SHONECKA@ADR.ORG)

Adam Shoneck
Assistant Vice President
American Arbitration Association
International Centre for Dispute Resolutions
1301 Atwood Ave., Suite 211N
Johnston, RI 02919

Re: Aaron Hammond v. TurboTax, Intuit Inc. - Case 01-19-0003-1980

Dear Mr. Shoneck:

This letter responds to your June 9 email.

For the 10,497 pending claims, Intuit has paid $3,149,100 in initial filing fees; $2,979,900 of which was paid under protest because 9,933 of these cases should not be proceeding in arbitration under Rule 9(b) and the AAA's Consumer Due Process Protocols. Although the AAA can provide no assurance that it will promptly administer these cases, it has taken steps to dramatically expedite its up-front billing procedures and indicated that over the next few weeks it will invoice an additional $14,695,800 in administrative fees to be followed by another $15,745,500 in arbitrator compensation.

You state in your June 9 email that "we are very much willing to reduce costs wherever possible", but that "[t]his goal must be weighed against our obligations as a neutral administrator, and we cannot impose procedures different from those outlined in the rules on parties who have not agreed to them." Four points in response.

First, there is no judicial function being performed by the AAA in invoicing the amount of money it will collect for itself. Whether the AAA charges a $1,400 administrative fee or a $500 administrative fee has no bearing on the merits or on the AAA's "obligations as a neutral." Moreover, the AAA claims to be a non-profit. According to its Form 990, its 2018 revenues were $108,104,189. The AAA is currently on track to charge $33,590,400 for these matters, $17,844,900 of which will go directly to the AAA. In other words, more than approximately 15% of the AAA's annual revenues will be derived from these cases under the AAA's current billing plans. But it does not appear reasonable to claim that the AAA's operational costs have increased anywhere near this much from these matters. Indeed, the Form 990 does not indicate any incremental costs associated with administering a particular arbitration. The AAA has yet to provide any explanation for how the exorbitant fees it intends to charge relates to its actual costs to administer these matters.

Second, the claimants have no legitimate interest in the amounts billed to Intuit for these cases. The threat of $30 million plus in fees is, however, key to Keller Lenkner's scheme to coerce a settlement that is exponentially greater than the $1 million in aggregate potential liability. Consistent with its "obligations as a neutral," the AAA has a duty to ensure that its fee structure is not weaponized. To do otherwise is the very opposite of neutrality.

Third, while the AAA may not be able to "impose procedures different from those outlined in the rules," you have acknowledged that it does have discretion under its Rules to adjust the fees it charges. Even without any further process efficiencies, these cases are not being administered in the same manner as a one-time consumer arbitration. You acknowledge, for instance, that the AAA has "leveraged additional technological capacity" and describes a pre-screen arbitrator selection process. Moreover, you indicated that the AAA is in the process of developing further process improvements to reduce the time and effort it expends on these matters. At least some portion of the cost savings inherent in economies of scale must be passed along. Intuit requested that the AAA track its time and is willing to pay a reasonable fee based on the hours actually spent by the AAA on this matter. The AAA has yet to respond to that request or otherwise recognize the efficiencies realized from administration of these claims.

Fourth, the AAA's position that it will not reduce its fees until Keller Lenkner agrees to "procedures different from those outlined in the rules" is not tenable for at least three reasons.

One, as an initial matter, $31,785,600 of these fees are being invoiced in direct contravention of the procedures outlined in Rule 9(b) and the Due Process Protocols. Despite the magnitude of this extraordinary divergence, the AAA has never offered anything close to a reasoned explanation for its actions. In any event, as previously requested, these fees need to be placed in escrow until this issue is resolved.

Two, as set forth in point three above, the AAA has already acknowledged that its decision on what to charge is within its discretion and does not depend on any agreement between the parties. The AAA has also acknowledged that substantial efficiencies have been and will be realized irrespective of any agreement between the parties. Refusing to pass these savings along until Keller Lenkner agrees to *other* process efficiencies is not appropriate.

Three, this is not a situation where parties are aligned to act in good faith to develop reasonable processes to reduce costs. Keller Lenkner's incentives are manifestly to the contrary, and its positions to date have aligned with its incentives. For instance, Keller Lenkner would not agree to have the Rule 9(b) issue decided by a Special Master and instead insists on payment of tens of millions in fees to have the issue decided 9,933 times. The AAA is not acting as a neutral by absolving itself of its responsibility to facilitate a fair and impartial process for the parties unless and until Keller Lenkner somehow agrees not to weaponize the AAA's fees.

During our call, Keller Lenkner stated that it is acting in good faith and will agree to procedures to reduce fees. There is reason for skepticism, but time will tell. In any event, it is important that the AAA promptly provide a list of price reductions accompanying different procedural efficiencies to which the parties may agree. Your response to this request does not advance the ball. You stated: "Before we can do that, it would be helpful to know the full extent of options the parties are considering, even if they have not agreed to actually implementing those options." It is not clear why that is so, but in any event, the full extent of the options under consideration are the ones the AAA has already laid out in its prior letters. We are not aware of other options, but if the AAA has additional options to offer, we would consider those as well.

We look forward to promptly receiving a list of price reductions that will accompany the options previously proposed. In addition, please respond to the other issues set forth above.

Sincerely,

Jonathan E. Paikin

Jonathan E. Paikin

cc: Warren Postman, Keller Lenkner (via email (wdp@kellerlenkner.com))
Christine Newhall, Senior Vice President, AAA (via email (NewhallC@adr.org))
Eric P. Tuchmann, General Counsel, AAA (via email (TuchmannE@adr.org))

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July 31, 2020

RODGER R. COLE

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Direct Dial: +1 650-335-7603

VIA EMAIL (SHONECKA@ADR.ORG)

Adam Shoneck
Assistant Vice President
American Arbitration Association
International Centre for Dispute Resolutions
1301 Atwood Ave., Suite 211N
Johnston, RI 02919

Re: *TurboTax, Intuit Inc.* - Rule 9(b) Notice of Election for Small Claims Court

Dear Mr. Shoneck:

The email correspondence between the AAA and the parties, dated July 30, 2020, is the first notice Intuit received that Claimants paid the filing fees for 31,054 of the 34,754 claims that were filed on March 11, 2020. Keller Lenkner further indicated that it is withdrawing the remaining 3,700 claims. Pursuant to Rule 9(b), this letter serves as written notice that Intuit elects to have the 31,054 claims set forth on Exhibit A decided by a small claims court.

Rule 9(b) provides that "the AAA *will* administratively close the case" where, as here, a party sends "written notice" that it wants the case decided by a small claims court "before the arbitrator is formally appointed to the case by the AAA." AAA R-9(b) (emphasis added). And Rule 9(b), like all AAA Consumer Arbitration Rules, is part of the TurboTax Terms. *See* Intuit February 18 Ltr. at 1; Keller February 12 Ltr. at 1 (conceding that "the parties incorporated [the AAA Rules] into their contract"). As it did with its prior elections, Intuit is providing written notice that it elects to have certain cases decided by a small claims court, and it does so before any arbitrator has been formally appointed to the case by the AAA. For the reasons identified in Intuit's prior letters, dated February 10, 2020, February 18, 2020, March 13, 2020, and March 31, 2020 (which are hereby incorporated by reference), the AAA Rules and Due Process Protocol require that the AAA close the cases identified in Exhibit A upon receiving this notice.

Sincerely,

FENWICK & WEST LLP

s/ Rodger R. Cole

Rodger R. Cole

RRC:cen

cc: Warren Postman, Keller Lenkner, (via e-mail (wdp@kellerlenkner,com))

EXHIBIT I-55

Sean Duddy

From: Warren Postman
Sent: Monday, August 3, 2020 3:01 PM
To: Sandy Sanford; shonecka@adr.org
Cc: Jonathan.Paikin@wilmerhale.com; Rodger Cole; Molly Melcher; Joseph Belichick; Sean Duddy
Subject: Re: TurboTax, Intuit Inc. - Rule 9(b) Notice of Election for Small Claims Court

Follow Up Flag: Follow up
Flag Status: Flagged

Mr. Shoneck,

This email responds to Intuit's letter dated July 31. Intuit's letter repeats the same arguments regarding small claims court that the parties have repeatedly briefed and that AAA already addressed with regard to the previously-filed demands. In particular, AAA determined that these arguments present questions of arbitrability, which are for each claimant's arbitrator to decide. For this reason, as well as the other reasons we have noted in our prior briefing, AAA should promptly invoice Intuit for its share of the filing fees for these demands so that claimants' arbitrations may be initiated.

Sincerely,

Warren D. Postman
Partner
Keller | Lenkner
1300 I Street, N.W., Suite 400E | Washington, D.C. 20005
202.749.8334 | Website | Email

From: Sandy Sanford <ssanford@fenwick.com>
Date: Friday, July 31, 2020 at 5:46 PM
To: "shonecka@adr.org" <shonecka@adr.org>
Cc: Warren Postman <wdp@kellerlenkner.com>, "Jonathan.Paikin@wilmerhale.com" <Jonathan.Paikin@wilmerhale.com>, Rodger Cole <RCole@fenwick.com>, Molly Melcher <mmelcher@fenwick.com>, Joseph Belichick <JBelichick@fenwick.com>
Subject: TurboTax, Intuit Inc. - Rule 9(b) Notice of Election for Small Claims Court

Please see attached.

Fenwick
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EXHIBIT I-56

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

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August 14, 2020

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Via Email to: wdp@kellerlenkner.com

Rodger Cole, Esq.
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801 California Street
Mountain View, CA 94041-2009
Via Email to: rcole@fenwick.com

Dear Counsel:

The American Arbitration Association (AAA) is in receipt of Respondents' letter dated July 31, 2020 and Claimants' email dated August 3, 2020 regarding whether the 31,054[1] cases recently filed by Claimants[2] may be withdrawn to small claims court in accordance with Rule 9 of the Consumer Arbitration Rules (Consumer Rules).

The AAA has reviewed the parties' contentions regarding the applicability of Rule 9. We have determined that the issues presented are arbitrability disputes that must be resolved by an arbitrator(s). In order to move the matters forward, the AAA will proceed with administration of each individual case under the Consumer Rules.

This will acknowledge receipt of payment from Claimants on July 29, 2020 in the amount of $6,211,000.00. This payment covers the $200.00 initial administrative fee due from the consumer party on each of the 31,054 cases as per the Consumer Rules.

We have gone through the cases and identified 35 claims that appear to be duplicate filings. At this time, we request that Respondents remit payment in the amount of **$9,305,700.00.** This payment covers the $300 initial administrative fee due from the business party on each of the 31,019 cases as per the Consumer Rules. Payment should be submitted on or before **September 4, 2020.**

In accordance with California Code of Civil Procedure sections 1281.97 and 1291.98, if payment is not received by **September 14, 2020**, the AAA will close all cases for which full filing fees have not been received.

Sincerely,

/s/
Adam Shoneck
Assistant Vice President
American Arbitration Association
1301 Atwood Ave, Suite 211N, Johnston, RI 02919
Telephone: 401 431

[1] Claimants originally submitted 34,754 Demands for Arbitration but withdrew 3,700 of this original group on uly 30, 2020.
[2] Although the Demands for Arbitration for these cases were originally sent to AAA in March, 2020, Claimants had not met the filing requirements until July 30, 2020.

EXHIBIT I-57

Email: shonecka@adr.org

cc: Ashley Keller, Esq.
Jonathan Paikin
Laurence F. Pulgram, Esq.
Sean Duddy, Esq.
Tyler G. Newby, Esq.
Blake Roberts, Esq.
Nick Larry, Esq.
Joseph Belichick, Esq.
Meghan Richardson

Exhibit J

COURT ORDER

Intuit Inc., et al. v. 9,933 individuals
20 STCV 22761

TYPE OF MOTION:	Motion for Preliminary Injunction to Stay Arbitration Proceedings.
MOVING PARTY:	Plaintiffs, Intuit, Inc. and Intuit Consumer Group LLC.
RESPONDING PARTY:	Defendants, 9,933 individuals.
HEARING DATE:	Thursday, October 8, 2020

Plaintiffs seek a judicial declaration that they have the right to elect small claims court as an alternate forum to arbitration.

On June 12, 2020, Plaintiffs Intuit, Inc. and Intuit Consumer Group LLC ("Plaintiffs" or "Intuit") filed their Complaint for Declaratory and Injunctive Relief against 9,933 individual Defendants (hereinafter referred to for clarity as "Consumers"), all of whom are currently presenting claims in arbitration and who are represented by the same law firm. On August 6, 2020, an Answer was filed on behalf of all Consumers.

On August 20, 2020, Judge Kenneth R. Freeman, sitting in Spring Street Department 14, determined that the case was non-complex. On August 25, 2020, the case was assigned to this department.

No trial date has yet been set.

Intuit now moves this court, per Code of Civil Procedure § 527(a), for a preliminary injunction staying the various arbitration proceedings initiated by the Consumers with the American Arbitration Association ("AAA").[1] The motion is DENIED.

This motion is the latest exchange in an ongoing battle between Intuit and the Consumers. The parties have taken a winding road through other courts to get here, and a brief survey of the ground is necessary before a proper discussion on the merits can be had. While the parties have each provided the court with some evidentiary submissions, those documents consist mostly of letters and filings from their previous legal history. There appear to be no serious factual disputes on relevant issues.

Background

Intuit is the owner of TurboTax – a widely popular brand of software that allows many

[1] The motion is captioned as a "Motion for Stay of Arbitration," but the notice requests a preliminary injunction and both parties have argued using the preliminary injunction standards.

Americans to prepare and file their own taxes. There are multiple versions of this software, designed to deal with the different financial situations faced by different taxpayers. Under a partnership with the Internal Revenue Service ("IRS"), Intuit permits low-income tax filers (defined as those making less than $66,000 annually) to use one version of TurboTax for free.

Those who opt to purchase one of the paid versions of TurboTax rather than using the free version must agree to Intuit's Terms of Service. The Terms of Service include an arbitration provision, which says that all disputes will be adjudicated by arbitration with AAA, or (under certain conditions) in small claims court. The terms of service also contain a strict class-action waiver: any claims against Intuit must be brought individually.

In recent years, Intuit has faced charges that it has been conducting a bait-and-switch scheme in which the free version of TurboTax is the bait. Under this theory, eligible taxpayers come to TurboTax looking for the free version and are tricked into purchasing one of the paid versions. Neither the precise mechanics of how this happened, nor the legal merit of these consumer claims is relevant here. Suffice it to say, a huge number of taxpayers who were eligible for the free version ended up using the paid version.

These taxpayers attempted to file a series of class action suits against Intuit. (Declaration of Warren Postman ["Postman Dec."] ¶ 27; Notice of Related Cases filed June 12, 2020); Arena v. Intuit Inc. (N.D. Cal. 2020) 444 F.Supp.3d 1086, 1088. Intuit responded by invoking the arbitration agreement and class action waiver included in the Terms of Service and filing motions to compel arbitration in each case. (See Postman Dec. ¶ 28; Notice of Related Cases filed June 12, 2020); see also Arena, *supra*, 444 F.Supp.3d at 1088. These motions were ultimately granted, and the arbitration clause in the Terms of Service was deemed enforceable. (See Postman Dec. ¶ 28; Notice of Related Cases filed June 12, 2020); see also Dohrmann v. Intuit, Inc. (9th Cir. 2020) ---- Fed. Appx. ---- 2020 WL 4601254.

Denied their opportunity for a class action, the Consumers rallied under the banner of Defense counsel in this case, Keller Lenkner, LLC ("Keller Firm"). Each and every one of the putative class members filed an individual claim in arbitration. Since there were tens of thousands of aspiring class members, Intuit found itself faced with tens of thousands of arbitration demands, each of which would require the payment of arbitration fees and individual attention from counsel. Essentially, Intuit had traded a giant incoming meteor for a mountain landslide of pebbles.

Since being buried under a landslide is hardly preferable to being squashed by a meteor, Intuit went looking for another way out. And they thought they had found one: the AAA arbitration rules (specifically Rule 9(a)) provide that a party can elect to take certain cases to small claims court, as long as they make that election *before* an arbitrator is selected. Two things make small claims court more attractive than arbitration for Intuit: (1) the filing fee in small claims court is much less than the $3,200 fee Intuit must pay for arbitration,[2] and (2) plaintiffs in small claims court are not entitled to a lawyer.[3]

[2] See Motion p. 8:10 and fn.1 for the calculation of that number. Defendants do not dispute the figure.

[3] This second item, that their consumer opponents would be deprived of counsel, was pointed out by the Consumers,

So, Intuit told AAA that it was electing to take these thousands of demands to small claims court. The Keller Firm filed an opposition with AAA on behalf of the Consumers, arguing that Intuit did not have the right to make that election. AAA decided that this was not a question to be answered by the organization broadly, but by the arbitrator in each individual case. Intuit would have to pay its fees and file a motion in each separate arbitration proceeding before it could move any claim to small claims court. AAA did suggest that, once the fees had been paid, the parties could stipulate to have a single arbitrator make the decision once for all claims.

This put Intuit in a difficult situation. The main benefit of going to small claims court is that it's the one forum cheaper than arbitration. If Intuit had to go through arbitration to get to small claims, the benefit would be lost. On the other hand, if Intuit took the position it didn't owe the fees and failed to pay them, AAA would be empowered by California law to impose a panoply of sanctions, up to and including entry of a default judgment. Code of Civil Procedure §§ 1281.97, 1281.98, and 1281.99. The choice was either (a) pay millions of dollars for thousands of arbitrations *before its objections could be heard*, or (b) potentially lose those thousands of arbitrations and have to pay even more.

Rather than do either of those things, Intuit filed this action and this motion, asking the court to make the ruling which AAA had deferred to its arbitrators. In response, the Consumers filed a petition in federal district court, asking a federal judge to compel the issue to arbitration. Jolly v. Intuit Inc. (N.D. Cal. 2020) ---- F.Supp.3d ---- 2020 WL 5434503 at *1. The federal court declined to interfere with the proceedings in this case. Id. at *6-9.

Threshold Issues

In their Opposition, the Consumers argue that this court is not the correct forum to decide the question Plaintiffs raise. It is Consumers' position that the arbitrators should be the ones to rule on whether Intuit can move the arbitration demands to small claims court. Consumers also suggest that this court fundamentally lacks the power to enjoin arbitration proceedings. These are issues which have been presented to this court frequently in recent months. Each time they appear, counsel seem to have a new argument or scenario for the court to consider. This time is no different.

Power to Enjoin Arbitration

Roughly one year ago, this court had the opportunity to consider a similar question in a major case involving pharmaceutical companies.[4] In that situation, there were a series of related proceedings involving various contracts between affiliated parties. Among those proceedings was an arbitration in New York, in which the parties were already moving forward, and the case in this department, which involved different contracts and transactions. One of the defendants in the arbitration did not believe he was a party to the arbitration agreement, so he filed a motion before this court asking for a preliminary injunction halting the arbitration.

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not Intuit. But the thought had to have crossed Intuit's mind.

[4] *Sorrento Therapeutics, Inc. v. NantCell, Inc., et al.* (LASC Case No. 19 STCV 11328).

The court could not grant that motion because the pending case had no connection to the arbitration: there had been no motion to compel and the underlying controversy was different. There was nothing which said that a California court could stop a New York arbitration simply because the same parties were before it on a different matter. However, the court still had to confront the question of what remedy might be available to a person who finds himself unwillingly haled directly into arbitration. After considerable research and excellent briefing, the court concluded that the moving party was not required to meekly submit to an arbitration before he could seek redress. Based on Valley Casework, Inc. v. Comfort Construction, Inc. (1999) 76 Cal.App.4th 1013, the court reasoned that the proper remedy would be a separate suit for declaratory and injunctive relief, followed by a motion for preliminary injunction. This was the path the moving party ultimately followed, with success.[5]

There are obvious factual distinctions between the present case and the court's previous brush with this issue. Primarily, the dispute in the other case was over the very existence of a binding arbitration agreement between the relevant parties. Here, that issue has already been adjudicated. The dispute here is over the proper application of the terms of that agreement. And Consumers rely on two cases that did not figure at all in the discussion held on the other case: Sauter v. Superior Court (1969) 2 Cal.App.3d 25 and Grubb & Ellis Co. v. Bello (1993) 19 Cal.App.4th 231.

In Sauter, the plaintiff filed an action for rescission of a contract. Sauter, *supra*, 2 Cal.App.3d at 27. The defendant refused to participate in the case based on an arbitration clause in the contract, and instead filed a demand for arbitration with AAA. Id. The plaintiff moved for an injunction preventing the arbitration from proceeding, which (in the absence of any opposition by defendant) the trial court granted. Id. at 27-28. The Court of Appeal reversed, essentially holding that the injunction was an idle act. Under Code of Civil Procedure § 1292.4, arbitration clauses were "not self-executing" if there was already a pending civil case on the same controversy. Id. at 29. Defendant could not proceed with the arbitration if plaintiff did not participate, and defendant could not compel plaintiff's participation without bringing a motion to compel in the pending action (which would decide the exact same issue – grounds for rescission – as the action itself). Id. So there was no reason for the court to have issued the injunction, because arbitration could not have gone forward in any event. Id.

Grubb was a case about brokerage commissions between a contractor who built homes and the broker who was supposed to find tenants for them. Grubb, *supra*, 19 Cal.App.4th at 235-236. The broker filed a demand in arbitration for $45,000 in commissions; the contractor appeared in the arbitration and argued that the arbitration agreement was invalid because the broker never signed it. Id. at 236. The arbitrator was unimpressed, the contractor participated in the remainder of the proceeding, and the broker prevailed, and a trial court confirmed the award. Id. at 237. On appeal, the broker argued that the contractor had waived his right to challenge the validity of the arbitration agreement by appearing in the arbitration rather than filing a writ petition to halt the arbitration. Id. The Court of Appeal held that (1) a writ petition would have been inappropriate, (2) the contractor should have simply refused to appear in the arbitration, but (3) that his appearance did not waive his argument that the agreement was invalid. Id. at 237-

[5] See *Soon-Shiong v. Sorrento Therapeutics, Inc.* (LASC Case No. 19 STCV 39620).

238.

Neither Sauter[6] nor Grubb is on-point to the situation at hand. Both of those cases involved disputes about the validity of the arbitration agreement, not the interpretation of its terms. And nothing in either case suggests that courts categorically lack the power to enjoin an arbitration. Further, the reasoning of Sauter and Grubb rests on a premise which is simply not true anymore: the idea that an arbitration automatically grinds to a halt if the defendant simply refuses to participate. Both Sauter and Grubb assume that an arbitration demand cannot be prosecuted against a party unless a motion to compel has been filed and ruled on. If that was the case in 1969 or in 1993, it is not the case now. The AAA rules expressly provide for default proceedings (Declaration of Roger Cole, Exhibit 3, p. 26 [Rule R-39]), arbitration contracts regularly contain similar provisions,[7] and the arbitration statutes now also permit defaults and terminating sanctions. Code of Civil Procedure §§ 1281.98(b)&(d), 1282.2(e).

Intuit is not required to sit on its hands and wait for a motion to compel that may never come. If it does that, it may find itself in default. It would then be in the unenviable position of having to explain the situation to a trial court on a petition to vacate.[8] This court indisputably has the power to grant declaratory relief where there is a present controversy over the terms of a live contract. Code of Civil Procedure § 1060. It is equally undisputed that a complaint for declaratory relief will, in the appropriate case, support the issuance of an injunction, preliminary or permanent. See Code of Civil Procedure § 1062. Therefore, if this court is the proper forum in which to litigate the questions raised in the Complaint, it has the power to issue the injunction requested.

Proper Forum

Consumers' next argument challenges exactly this point. They say that the arbitrators of each individual claim should answer the question posed by the complaint: whether Intuit can move the claims to small claims court. While the issue is a close one, it appears that the Terms of Service permit Intuit to pose its question to this court.

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[6] Sauter especially is a bit weak as an authority. The case itself is a somewhat dated, decided as it was over 50 years ago. It has only been cited six times since it was decided, and not once after Grubb mentioned it in 1993. Most importantly, in Henry v. Alcove Investment, Inc. (1991) 233 Cal.App.3d 94, the Court of Appeal came to the opposite conclusion in an identical situation. Though Henry does not mention Sauter, as a much later decision that reached the opposite conclusion, it necessarily calls Sauter into doubt. See also Brooks v. AmeriHome Mortgage Company, LLC (2020) 47 Cal.App.5th 624 (court hearing a PAGA action can stay arbitration of plaintiff's individual claims); American Builder's Assn. v. Au-Yang (1990) 226 Cal.App.3d 170 (plaintiffs should file a declaratory relief action to determine the status of an alleged undisclosed principal before he could be added to an arbitration).

[7] See, e.g. Shenanwood Development, Inc. v. Cell-Crete Corporation (2nd Dist. 2014) 2014 WL 1385325 (on appeal from this department).

[8] The challenges of this position are well illustrated by the recent case of Benaroya v. Willis (2018) 23 Cal.App.5th 462, in which the appellant unsuccessfully argued to the arbitrator that there was no valid agreement to arbitrate. On the subsequent petition in court, the trial judge found a rules provision that said an arbitrator could determine its own jurisdiction and then declined to review the arbitrator's decision on that subject. Benaroya, *supra*, 23 Cal.App.5th at 468. The appellate court reversed, but by then years had passed and the appellant had had to endure an arbitration to which it never consented.

Arbitrability is presumptively an issue for the court. Aanderud v. Superior Court (2017) 13 Cal.App.5th 880, 891. However, some issues of arbitrability may be delegated to the arbitrator. For instance, an arbitrator may determine whether an individual claim is arbitrable as a class claim (Sandquist v. Lebo Automotive, Inc. (2016) 1 Cal.5th 233, 243), or whether the arbitration clause which gives him power is unconscionable. Tiri v. Lucky Chances, Inc. (2014) 226 Cal.App.4th 231, 242. On the other hand, an arbitrator may *not* decide the issue of whether a party belongs in arbitration in the first instance. See Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394, 414-419; Benaroya v. Willis (2018) 23 Cal.App.5th 462, 468-470.

Where the parties want to delegate a particular issue of arbitrability to the arbitrator, the language of the delegation clause must be "clear and unambiguous," or else there must be extrinsic evidence which shows clear and unambiguous intent to delegate. Ajamian v. CantorCO2e, L.P. (2012) 203 Cal.App.4th 771, 781-782. No extrinsic evidence has been submitted here. The clause at issue reads in relevant part as follows:

> "ANY DISPUTE OR CLAIM RELATING IN ANY WAY TO THE SERVICES OR THIS AGREEMENT WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act governs the interpretation and enforcement of this provision; the arbitrator shall apply California law to all other matters. Notwithstanding anything to the contrary, any party to the arbitration may at any time seek injunctions or other forms of equitable relief from any court of competent jurisdiction…
> Arbitration will be conducted by the American Arbitration Association (AAA) before a single AAA arbitrator under the AAA's rules…" (Declaration of Roger Cole ["Cole Dec."], Exhibit 1) (emphasis in original).

The AAA rules (hereinafter "Rules") in turn carry two provisions relevant here:

> "R-14. Jurisdiction
>
> **(a)** The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
>
> **(b)** The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
>
> **(c)** A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

...

R-53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA." (Cole Dec. Exhibit 3 p. 17, 32).

Ordinarily, under Rodriguez v. American Technologies, Inc. (2006) 136 Cal.App.4th 1110, 1123, incorporation of these rules into an agreement would be sufficient to delegate all issues of arbitrability to the arbitrator. Intuit cited this very case and rule when it moved to compel the Consumers to arbitration in the first place. (Declaration of Warren Postman ["Postman Dec."] Exhibit D, p. 10:7). And Intuit is presently asking this court for interpretation and enforcement of certain Rules, which is a matter that those same Rules expressly refer to the arbitrator, and then to AAA itself. (See Rule 53, quoted in full above).

One might be forgiven for seeing the instant action and motion, at first glance, as an attempt to "appeal" from an adverse determination by AAA. Rule 53 reserves rule interpretation issues to the arbitrator and to AAA. The parties have an issue regarding the interpretation of Rule 9. After receiving multiple letters stating the parties' respective positions (Postman Dec. Exhibit B), AAA determined that the issue was one for its arbitrators. AAA even offered to have one arbitrator decide the issue for all claims, to save time and expense and effort. (Postman Dec. Exhibit B p. B-17). Intuit didn't like that determination, so it filed this action.

However, Intuit points to a provision in the Terms of Service which they claim creates an exception to the Rules and allows this court to decide the question. As quoted above, the Terms of Service provide that "any party to the arbitration may at any time seek injunctions or other forms of equitable relief from any court of competent jurisdiction." The Rules do allow the parties to make rule changes in their individual contracts. (Cole Dec. Exhibit 3 p. 10, Rule 1(c)). This appears to be such a rule modification. The question then is whether this case fits the terms of that modification. There is no dispute that declaratory relief is equitable in nature. And Intuit is asking the court to decide whether these claims should go to an arbitrator in the first instance. As noted above, that question is usually reserved for the courts rather than arbitrators.[9] See Benaroya, *supra*, 23 Cal.App.5th at 468-470 (collecting cases). For those reasons, the exception contained in the Terms of Service seems to apply here.

Consumers contend that the exception on which Intuit relies has already been interpreted by the Ninth Circuit to permit only equitable relief "in aid of arbitration." Dohrmann, *supra*, 2020 WL 4601254 at *2. Consumers argue that since the injunction intuit requests would *halt* arbitration, it does not "aid" arbitration, and is therefore beyond the bounds of the clause. There are two responses to this argument, either of which is sufficient. First, as Intuit points out, having

[9] It is significant that this court is *not* being asked to resolve a run-of-the-mill procedural question, such as when responsive pleadings should be filed or how much discovery should be allowed under the Rules. It would be absurd to conclude that parties could run into court for a second opinion on *every* rule interpretation issue.

a clear answer about what to do with the consumer claims would "aid" arbitration because it would tell AAA exactly how to handle this mass of cases. (Reply p. 9:8-14). Second, when the Ninth Circuit used the phrase "aid of arbitration," the panel clarified what they meant by that in the same paragraph: claims that do not "determine the merits of an arbitrable dispute" but instead are "designed to maintain the status quo between the parties." Dohrmann, *supra*, 2020 WL 4601254 at *2. A stay of the arbitration proceedings would not determine the merits of any dispute, and it would maintain the status quo between all parties.

At oral argument, Intuit made the claim that it has the right to file this action and appear before this court regardless of what the Terms of Service provide. It argued that the federal courts (district and Ninth Circuit) said it could be here. But the Terms of Service are the only reason the federal courts said it could be here. Dohrmann, *supra*, 2020 WL 4601254 at *2 ("the contract…permits the district court to issue equitable relief"); Jolly, *supra*, 2020 WL 5434503 at *10 ("Intuit's state court suit is allowed under the Agreement"). Once a party has not only contracted to take a dispute to arbitration but actively sought to enforce the contract, they no longer have a generalized right to file suits in court related to that same contract.

Summation

There is no authority which broadly prevents this court from enjoining an arbitration proceeding. Filing a complaint for declaratory relief relative to a specific arbitration action is sufficient to give this court jurisdiction to stay that proceeding. Further, while election to use the Rules is usually sufficient to send issues of arbitrability to the arbitrator, the specific terms of the contract have modified those Rules. Since there is specific contractual language that empowers the parties to ask for equitable relief, this court is the proper forum to hear that request.

Reasons for Stay: Application of Rule 9

"A trial court's decision on whether to grant a preliminary injunction rests on '"(i) the likelihood that the party seeking the injunction will ultimately prevail on the merits of his [or her] claim, and (ii) the balance of harm presented, i.e., the comparative consequences of the issuance and nonissuance of the injunction."' (Law School Admission Council, Inc. v. State of California (2014) 222 Cal.App.4th 1265, 1280, quoting Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 441-442)." Saltonstall v. City of Sacramento (2014) 231 Cal.App.4th 837, 856. "The more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. ([King v. Meese (1987) 43 Cal.3d 1217,] at p. 1227). Further, 'if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harm tips in his favor. [Citation.].' (Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 447)." Right Site Coalition v. Los Angeles Unified School Dist. (2008) 160 Cal.App.4th 336, 338-339.

"The burden is on the party seeking the preliminary injunction to show all of the elements necessary to support issuance of a stay. (O'Connell v. Superior Court [(2006)] 141 Cal.App.4th [1452,] at p. 1481)." Saltonstall, *supra*, 231 Cal.App.4th at 856.

Probability of Prevailing

The primary issue in this case is whether Intuit has the right to make use of AAA Rule 9, which provides as follows:

> "If a party's claim is within the jurisdiction of a small claims court, either party may choose to take the claim to that court instead of arbitration as follows:
>
> **(a)** The parties may take their claims to small claims court without first filing with the AAA.
> **(b)** After a case is filed with the AAA, but before the arbitrator is formally appointed to the case by the AAA, a party can send a written notice to the opposing party and the AAA that it wants the case decided by a small claims court. After receiving this notice, the AAA will administratively close the case.
> **(c)** After the arbitrator is appointed, if a party wants to take the case to small claims court and notifies the opposing party and the AAA, it is up to the arbitrator to determine if the case should be decided in arbitration or if the arbitration case should be closed and the dispute decided in small claims court." (Cole Dec. Exhibit 3 p. 15) (emphasis in original).

Intuit says that this is a case for straightforward application of Rule 9(b). The Consumers' claims were filed with AAA, no arbitrator has been appointed, and Intuit provided written notice that it wanted the cases decided in small claims court. According to Intuit, that is all which needs be said – AAA should close its cases and the Consumers should go to small claims. But the matter is not quite that simple.

Application of the Contract

As discussed above, in order to bring this action, Intuit must maintain that the language of the Terms of Service either (a) modifies the Rules pursuant to the provisions of Rule 1(c), or else (b) flatly overrides the Rules. The Terms of Service incorporate the Rules. The Rules provide that either AAA or the arbitrator will decide issues of Rule interpretation and enforcement. Therefore, unless the Terms of Service govern over the Rules in some fashion, this entire dispute belongs in front of AAA, not the court.

In the previous section, the conclusion was that the Terms of Service modified the rules, since there is a Rule provision that permits modification and that is the most harmonious construction. But once the court decides that the Terms of Service do modify the Rules, it cannot apply that decision selectively. It cannot be the case that one piece of the Terms of Service modifies the rules and another piece does not.

As quoted above, the Terms of Service provide that "ANY DISPUTE OR CLAIM RELATING IN ANY WAY TO THE SERVICES OR THIS AGREEMENT WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT, except that you may assert claims in small claims court if your claims qualify."[10] Since the Terms of Service are

[10] The term "you" clearly refers to the Consumer, whereas the rest of the Terms of Service refer to Intuit as "I," "we," or "us." (Cole Dec. Exhibit 1).

drafted by Intuit and written from their perspective, the plain meaning of this provision is that all disputes will go to arbitration, with only one exception: when the *Consumer* decides to file in small claims. There is no similar exception written in which allows Intuit to choose small claims as well. The Consumers argue that under this provision, they are the only ones allowed to choose small claims court – Intuit has no such right. This appears to be the correct reading of the contract.

In its moving papers, Intuit offers four arguments to dispute this plain reading. First, Intuit puts forward its own reading: the sentence quoted above was merely designed to ensure that Consumers had "notice" that the Rules gave them the right to choose small claims court over arbitration. (Motion p. 14:16-18). In other words, Intuit is asking this court to subdivide the contract and say that one part is "just for notice" and the other part is truly binding. There is no basis in law or in the contract itself for such an exercise. Contracts do occasionally contain notices to consumers, but when they do, the provisions are usually set off from the main body of the contract and headed with words like "notice" or "warning." Here there is no such break. There is nothing which would have told the Consumers "this sentence is different – the rest of the contract is should be taken literally, but not this." Intuit's reading just won't stand on its own two feet.

Second, Intuit argues that if they really meant to bar themselves from choosing small claims, the Terms of Service would be more precise and detailed about it. This is unpersuasive. It is not hard for good lawyers to come up with alternate drafts of a contract, especially after the fact of a dispute. Nor is it uncommon for parties to re-draft their form contracts to address problems revealed by lawsuits. But the parties and the court must deal with the language as it is presented in the case at hand. And here, Intuit had just got done saying, in capital letters, that everything would go to arbitration rather than to court. It then made one exception: for claims brought by a Consumer in small claims court. No one reading this sentence, lawyer or not, would take that to mean Intuit could also choose to file in small claims.

Third, Intuit contends that the plain reading creates an "untenable" conflict between Rule 9 and the Terms of Service. It is true that contracts are to be read in such a way as to avoid conflicts between their terms "if reasonably practicable."[11] Civil Code § 1641. But this can be done here. As explained above, Rule 1(c) permits the parties to modify the other Rules. The Terms of Service may properly be read as containing such modifications. Therefore, the Terms of Service do not conflict with Rule 9, they modify it pursuant to Rule 1(c).

Fourth, Intuit claims that the practical result of the plain reading is absurd: who would agree to pay $3,200 to take a case through arbitration when it could be taken to small claims for a fraction of the cost? But the fact that an agreement works out badly under certain circumstances does not make the overall terms absurd. The Terms of Service say that all controversies, big or

[11] That phrase supplies an important caveat. Avoiding a conflict is not the court's Prime Directive; it will not twist or re-write the language of a provision for that purpose. In this case, the language of the Terms of Service and the language of Rule 9 are in plain contradiction. So even if there were no modification provision which allowed them to be harmonized, the court would still have to choose between the Terms of Service and the Rules. In such a contest, the Terms of Service would prevail because they are both (a) the main agreement between the parties, to which the Rules are a supplement, and (b) the document with which the Consumers were actually presented (they would have had to go look up the Rules on their own time).

small, go to arbitration, unless the consumer chooses small claims court. There is nothing absurd about that. If a consumer brought a claim for $1 million, Intuit would move that claim to arbitration with joy in its corporate heart. The fact that a consumer filed a $100 claim in arbitration is an unforeseen contingency, not proof that the contract was absurd. And that brings up another point: in making this argument, Intuit is suffering a mild case of selective amnesia. After all, it was Intuit who moved to break up the class action claims and send them to arbitration in the first place. (Postman Dec. Exhibit D). It cannot now complain that absurdity has resulted from its own tactical decisions.

On Reply and at oral argument, Intuit suggested that depriving it of the right to choose small claims court would violate Principles 1 and 11 of the AAA Due Process Protocol. This is relevant because Rule 1(d) provides that AAA will only administer disputes if they meet the standards contained in the Due Process Protocol. (Cole Dec. Exhibit 3 p. 10). However, Rule 1(d) also provides that AAA itself will make that determination: AAA will only accept a case *after* it concludes that the arbitration agreement "substantively and materially complies" with the standards contained in the Due Process Protocol. (Id.). AAA has clearly accepted these cases, so it has clearly made its determination, and there is no reason for the court to disturb that. A review of the Due Process Protocol Principles 1 and 11 (Cole Dec. Exhibit 4) reveals that the clear purpose of those principles is to secure the *consumer's* access to small claims court. Those principles exist to protect the Consumers, not Intuit.

Finally, Intuit argues that the only way an arbitration contract can modify the Rules is if it contains express language directly changing specified provisions.[12] But Intuit cites only one case in support of this proposition: an unpublished federal case from the Southern District of New York, decided in 1991. The contract in that case was a "treaty" between two insurance companies in which the parties had included a list of special provisions they wanted to apply and said that "except as provided above" they would follow the AAA Rules. RLI Ins. Co. v. Kansa Reinsurance Co., Ltd. (S.D.N.Y. 1991) 1991 WL 243425 at *2. Afterwards, one insurance company argued that "except as provided above" really meant "only as provided above" – that *only* the rules specially listed should be used. Id. at *3. The district judge (future U.S. Attorney General Michael Mukasey) had no trouble rejecting that warped reading. Id. The situation here is not remotely similar.

A plain reading of the Terms of Service leads to the conclusion that only the Consumers have the right to take a case to small claims court. That reading can be harmonized with the Rules because Rule 1(c) provides that the parties' agreements can modify the Rules. Under that interpretation, the Terms of Service have modified Rule 9, and there is now no conflict between them. Since Rule 9 as modified no longer affords Intuit the right to go to small claims, it is unlikely to prevail on its cause of action for declaratory relief.

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[12] At oral argument, Intuit cast this as a waiver issue. That puts cart before horse. Intuit wrote the Terms of Service and incorporated the Rules within those Terms. It isn't as though the Rules were a statute, having independent existence and conferring rights that all citizens have by default. Intuit wrote the Terms of Service to confer certain rights and deny others. The Rules were incorporated as a supplement to the Terms of Service. There is no reason the Terms of Service should have to include express waivers of the Rule provisions.

Sherman Act

Even if the court were to accept Intuit's reading of the contract, there is an independent reason why the Consumers cannot be taken to small claims court: their claims include causes of action under the Sherman Antitrust Act ("Sherman Act"). Sherman Act claims fall within the exclusive jurisdiction of the federal courts. United States Golf Assn. v. Arroyo Software Corp. (1999) 69 Cal.App.4th 607, 623. State courts, which would include small claims courts, "are precluded from considering such claims." Id. at 624.

Rule 9, quoted above, only permits a claim to be taken out of arbitration and filed in small claims if it "is within the jurisdiction of a small claims court." The Sherman Act claims are not. Whether or not arbitration claims can be severed is a question which has not been presented to this court, and truly belongs in the province of either the arbitrator or AAA. But even assuming they could be severed, the Sherman Act claims would have to remain in arbitration.[13]

Intuit points out that the Sherman Act causes of action were added by the Consumers *after* this action was filed. Intuit claims that these filings were made in an effort to forum-shop. Even if true, it isn't clear what part forum shopping has in this analysis. A federal district court concluded that the Consumers were forum-shopping when they tried to file a motion in federal court which would decide the same issues as this case. Jolly, *supra*, 2020 WL 5434503 at *9. But that same court also, after a lengthy analysis, concluded that the Sherman Act claims had some merit. Id. at *2-6. This court must decide whether Intuit is likely to prevail on its claim that Rule 9 applies to the various claims made by the Consumers. [14] The court cannot just ignore potentially meritorious portions of those claims simply because one party gained a tactical advantage by filing them.

At oral argument, Intuit suggested that the Sherman Act claims are a "de facto class action" which violates the class action waiver contained in the Terms of Service. The case on which Intuit relies involved many consumers filing serial individual suits seeking to stop the merger of two major telephone companies: AT&T with T-Mobile. AT&T Mobility LLC v. Bernardi (N.D. Cal. 2011) 2011 WL 5079549 at *6. But the court cannot decide whether that

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[13] The Consumers suggest that their requests for injunctive relief under California's Unfair Competition Law is also beyond the jurisdiction of small claims court. Small claims courts only have the power to issue injunctions where a statute specifically authorizes such relief. Code of Civil Procedure § 116.220(a)(5) ("small claims court has jurisdiction in the following actions: …[f]or an injunction…only when a statute expressly authorizes a small claims court to award that relief"). Intuit responds that the Consumers cannot obtain that relief even in arbitration because it would amount to a "de facto class action." (Reply p. 10:26-11:8). The court need not adjudicate this sub-issue because (1) the Sherman Act claims are clearly beyond small claims jurisdiction, and (2) the arbitrator is fully capable of deciding what relief is available in arbitration on an Unfair Competition claim.

[14] Intuit takes the position that the court should only consider the state of the arbitration cases at the time it made its election, which was well before the Sherman Act claims were added. But the result of that would effectively be a court order severing the Sherman Act claims from the remainder of each arbitration demand. Whether or not claims already in arbitration should be severed is really a matter for the arbitrator to decide. And even if it were not, severing the Sherman Act claims only makes the practical problem worse. The number of cases Intuit must face would *double* as each demand was split in two. Intuit would still have to pay its arbitration fees for the Sherman Act half of each demand *and then* go into small claims court and litigate the other half. It is surely better for the court to take things as they now are, not as they might have been some months ago.

case applies (it seems slightly off-point) to create a waiver of the Sherman Act claims. Such a ruling would be a decision on the merits of an affirmative defense to the claim. As discussed elsewhere, the merits of a claim (and by corollary the merits of affirmative defenses) are not for this court. They are for the arbitrator.

Summation

A plain-language reading of the Terms of Service leads to the conclusion that only the Consumers have the right to take a case to small claims court. The Terms of Service can be harmonized with Rule 9 if they are interpreted as a modification of Rule 9, undertaken pursuant to Rule 1(c). Rule 9, as modified, cannot be invoked by Intuit. And even if Rule 9 could be invoked by Intuit, it would not apply. Rule 9 only permits a demand to be removed to small claims if it is within the jurisdiction of the small claims court. The Consumers' demands contain Sherman Act claims, which are not within the jurisdiction of the small claims court. For these independent reasons, Intuit has not shown a probability of prevailing on its invocation of Rule 9.

Balance of Harm

In ruling on a motion for preliminary injunction, trial courts are supposed to take a sliding-scale approach to analyzing the probability of prevailing and balance of harms factors. Butt v. State of California (1992) 4 Cal.4th 668, 678 ("the greater the plaintiff's showing on one, the less must be shown on the other"). However, if the court finds that there is no probability of prevailing, the balance of harms becomes irrelevant. See Jamison v. Department of Transportation (2016) 4 Cal.App.5th 356, 362. The issue in this case is one of contractual interpretation. Intuit has expressed their intention in their papers to move for summary adjudication almost immediately because their Complaint raises "purely legal issues that can be resolved without discovery." (Motion p. 21:27-22:2). The court is not likely to see any evidence beyond what it has already seen. And there is no indication that further briefing or research would unearth some authority which calls for a different result.

This is not meant to be discouraging to or disparaging of counsel in any way. At oral argument, Intuit urged this court to stay the arbitration until there could be a "full hearing on a complete record." Consideration of that request draws the query: what could be more full and complete than this motion?[15] Counsel's briefing and work on this case has been excellent, and doubtless they would come up with additional authority and arguments if given more time. But where lawyers are this good, there is a diminishing marginal return on their efforts. On a motion like this the best arguments are front and center, clean and clear. Additional time and effort just means that counsel must reach further and further into Hail Mary territory. And while they doubtless have the arm for the throw, the likelihood of a reception in traffic becomes vanishingly small. Therefore, there is no reason for the court to consider the balance of harms. Because Intuit has no probability of prevailing, no injunction can issue on this claim.

[15] Counsel said that this court has available summary judgment dates in November and December of this year. But summary judgment motions carry a 75-day statutory notice period (Code of Civil Procedure § 437c). If counsel filed their motion today, the earliest available notice-compliant date would be December 28, 2020, a date when the court has already planned to be dark. And the earliest available date in 2021 would be in late July or early August.

Intuit also requested that the court, if not inclined to issue the injunction, at least stay the arbitration pending Intuit's certain writ appeal of the court's ruling. Intuit asked that the court rule on its request in writing. The request is DENIED. Whether or not the arbitration should be stayed while the Court of Appeal reviews Intuit's writ petition is a matter for the Court of Appeal to decide.

Reasons for Stay: Pre-emption of SB 707

"SB 707" refers to Code of Civil Procedure §§ 1281.97-1281.99, enacted in 2019 and effective on January 1, 2020. These provisions require businesses engaged in employment or consumer arbitration cases to pay their fees within 30 days of the date they are due. If the business does not pay the fees on time, a wide range of penalties may be assessed. The possible penalties include: monetary sanctions, waiver of the right to proceed any further in arbitration, entry of default, civil contempt proceedings, and everything in between.

In its Complaint, Intuit asks this court for a declaration that these California statutes are pre-empted by the Federal Arbitration Act. But the court cannot issue such a declaration unless the issue is ripe. Artus v. Gramercy Towers Condominium Association (2018) 19 Cal.App.5th 923, 930. And here, the issue is certainly not ripe.

Intuit has not yet blown any of its fee deadlines. Nor is there any reason to believe that it will do so in the future. And the provisions of SB 707 do not create those fee deadlines; they only provide a list of penalties which *might* be incurred if the deadlines are blown. There is no current indication that Intuit will ever be subject to any of these penalties, much less a way to tell which of them would be incurred. None of the usual outlines of a controversy are present.

This claim was added to the complaint because Intuit felt that it was being trapped between two opposing forces: it had to either pay a bunch of arbitration fees it didn't think it owed or risk the penalties of SB 707. Intuit opted to fight on both fronts. But this court's ruling on the contract issue resolves that dilemma. Intuit has to stay in arbitration, so it owes those fees. SB 707 can no longer be characterized as an unfair mechanism coercing Intuit to give up its rights.

The Reply suggests that the court can resolve the pre-emption issue because it is a pure question of law, no facts required. (Reply p. 6:20-23). That takes matters a bit too far. It is true that Intuit is not obliged to sit quietly and suffer harm before it can even raise the question. But it is also true that courts do not issue advisory opinions. "Courts deal with actual, not hypothetical, controversies." Olsen v. Breeze, Inc. (1996) 48 Cal.App.4th 608, 622. Parties cannot simply come into court and pose the abstract question, "is this statute pre-empted by that one?" And courts cannot issue blanket pre-emption orders in a vacuum.

It is also worth noting that the penalties imposed by Code of Civil Procedure §§ 1281.97-1281.99 are not automatic.[16] Most of them are imposed by a judge, some by an arbitrator, and all

[16] At oral argument, Intuit stated that the monetary penalties are mandatory. Though that reading is technically correct, there is a meaningful difference between "mandatory" and "automatic." Whether the monetary penalties take the form of a fee/cost award (e.g. Code of Civil Procedure § 1281.97(b)(2)) or a sanctions award (e.g. Code of

except one[17] would require notice and an opportunity to be heard. Pre-emption arguments would be best made at those hearings, before the harm is incurred but after there is a sufficient record and a real controversy to decide.

As a final point, the Consumers observed at oral argument that were the court to take up the question and find SB 707 pre-empted, the proper remedy would not be to halt the *arbitration*. It would be to enjoin the *sanctions*. This contention has real merit. If SB 707 were wiped off the books, arbitrations would still go on as they always have. The only result would be that Intuit could decline to pay its fees without fear of an explicit statutory penalty. And the only reason the court would seek that outcome is if Intuit did not owe the fees. But the court has already determined that, under its own contract, Intuit *does* owe the fees.

In the absence of either (1) a real cognizable threat (something beyond just a bare possibility) that Intuit will be subject to one of SB 707's penalties, or (2) some indication that SB 707 is being used as leverage to make Intuit give up unrelated rights, this court has no basis to take up the pre-emption question. As already mentioned, there is no such threat. And this court's decision on the Rule 9 issue establishes that when Intuit pays the arbitration fees, they will simply be paying what they owe. Therefore, this portion of the complaint is unripe, and Intuit has failed to show a probability of prevailing on it. Because Intuit has no probability of prevailing, no injunction can issue.

Conclusion

There is such a thing as too much of a good thing. When Intuit wrote a broad arbitration agreement with a class action waiver, it gained protection from large class action verdicts. But it gave up the real administrative efficiencies that class actions bring. In basic civil procedure courses, class actions are explained as a boon to plaintiffs and to the system: no financially responsible person will sue to recover a $3 overcharge, and no court could handle all the cases if they did. This case seems to prove that class actions can be a boon to defendants too: as a chance to resolve things in one or two nice neat packages rather than risk death by 10,000 cuts. In this case, Intuit is a bit like the dog that caught the car. It got the Consumers' claims out of class litigation and into arbitration, then realized that this *was* a large class and that resolving the claims individually would be hopelessly expensive.

The question presented to the court here is whether Intuit has a viable way out of its own box. And the answer is no. The Consumers challenged this court's ability to even provide an answer. Intuit overcame that challenge by making an argument which depends on this court treating the arbitration agreement, contained in the Terms of Service, as modifying and controlling the AAA Rules. The Rules state that the arbitrator and AAA will interpret the Rules;

10/05/2020

Civil Procedure § 1281.97(d)) they aren't immediately deducted from Intuit's account by the bank teller. Someone will have to ask that they be imposed, by making the appropriate motion before a court or an arbitrator. Such a request may never come. And if it does, then Intuit would have the chance to offer its pre-emption argument as a defense.

[17] Code of Civil Procedure §§ 1281.97(b)(1) and 1281.98(b)(1) allow the matter to be withdrawn from arbitration and refiled in court. At that point, the business would have to file (or renew) a motion to compel arbitration to secure a hearing on a pre-emption defense. Nothing in the statues prevents them from doing this.

the Terms of Service created an exception that permits this court to grant equitable relief. But having accepted that argument, the court cannot apply it piecemeal. The plain language of the Terms of Service also provides that only the Consumers can take complaints to small claims court. Following the same logic, that contract term is best construed as a modification of Rule 9, on which Intuit relies. Therefore, having compelled the Consumers *into* arbitration, Intuit cannot use Rule 9 to take them back *out of* arbitration.

Because Intuit has shown no probability of prevailing on its claim that Rule 9 applies and the Consumers should be in small claims court, the claim that the FAA pre-empts SB 707 is not ripe. SB 707 can no longer be described as a club which is being held over Intuit's head in an effort to get them to give up unrelated rights. There is no indication that Intuit will blow any fee deadlines, and no indication that Intuit will suffer any of the SB 707 penalties in the future. Therefore, any decision this court could issue on the pre-emption question at this stage would merely be an advisory opinion.

For all these reasons, Intuit has shown no probability of prevailing on any of the claims before this court. In the absence of such a showing, the court cannot issue a preliminary injunction. Therefore, Intuit's motion is DENIED.

Dated: 10/6/20

Judge of the Superior Court
Terry A. Green

10/09/2020

Exhibit K

Transcript of Proceedings

November 20, 2020

Intuit, Inc.

vs.

9,933 Individuals

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 14 HON. TERRY GREEN, JUDGE

INTUIT INC. AND)
INTUIT CONSUMER GROUP, LLC,)
)
PLAINTIFF(S),)CASE NO. 20STCV22761
)
9,933 INDIVIDUALS,)
)
DEFENDANT(S).)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

NOVEMBER 20, 2020

(VIA LA COURT CONNECT)

APPEARANCES OF COUNSEL ON FOLLOWING PAGE

REPORTED BY:
LISA A. AUGUSTINE, RPR, CSR #10419
OFFICIAL COURT REPORTER PRO TEMPORE
JOB NO. 10073964

APPEARANCE OF COUNSEL

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(202) 749-8334

I N D E X

NOVEMBER 20, 2020

CHRONOLOGICAL INDEX OF WITNESSES

	DIRECT	CROSS	REDIRECT	RECROSS
(NONE)				

EXHIBITS

	MARKED	RECEIVED
(NONE)		

CASE NUMBER: 20STCV22761
CASE NAME: INTUIT VS. 9,933 INDIVIDUALS
LOS ANGELES, CALIFORNIA - FRIDAY, NOVEMBER 20, 2020
DEPT. 14 HON. TERRY GREEN, JUDGE
APPEARANCES: (AS HERETOFORE NOTED.)
REPORTER: LISA A. AUGUSTINE, CSR. NO. 10419
TIME: 1:35 P.M.

---OOO---

THE COURT: INTUIT VERSUS 9,933 INDIVIDUALS.

MR. POSTMAN: YES. GOOD AFTERNOON, YOUR HONOR. WARREN POSTMAN OF KELLER LENKNER FOR THE CONSUMERS.

MR. COLE: GOOD AFTERNOON, YOUR HONOR. RODGER COLE OF FENWICK AND WEST FOR INTUIT.

THE COURT: AND WE HAVE MISS AUGUSTINE AS OUR COURT REPORTER.

(REPORTER CLARIFIES.)

THE COURT: GOOD AFTERNOON.

WELL, THIS SHOULDN'T COME AS A SHOCK TO ANYBODY, BUT THE EVENTS IN THE WORLD MOVE FASTER THAN OUR COURT'S CALENDAR. SO I THINK WE ALL AGREE THAT THE EVENTS HAVE OVERTAKEN THIS MOTION. APPARENTLY THIS TRAIN LEFT THE STATION SO WE NO LONGER CAN OFFER THE PRELIMINARY INJUNCTION THAT THE CONSUMERS WANTED. IN THE REPLY, CONSUMERS FOR THE FIRST TIME ASKED FOR CONSIDERATION THAT THEY HAVE A -- HAVE A RIGHT NOT TO (INAUDIBLE).

FIRST OF ALL, YOU CAN'T RAISE AN ARGUMENT FOR THE FIRST TIME ON --

(REPORTER CLARIFIES.)

THE COURT: OKAY.

ASKED FOR A RULING THAT THEY HAVE A CONTRACTUAL RIGHT TO BE EXCLUDED FROM CLASS SETTLEMENT. WELL, WE ALL KNOW YOU CAN'T RAISE THINGS FOR THE FIRST TIME ON REPLY. IT'S UNFAIR TO THE OTHER PARTIES BECAUSE THEY CAN'T SURREPLY. BUT, YOU KNOW, IT'S AN ODD REQUEST FRANKLY. EVERYBODY HAS THE RIGHT TO SAY NO. EVERYBODY HAS THE RIGHT TO SAY, NO, I'M NOT GOING TO SETTLE THE CASE, AND EVERYBODY HAS A RIGHT TO SAY, YES, I WILL SETTLE THE CASE.

I MEAN -- YOU KNOW, IT'S -- WELL, REGARDLESS IT'S RAISED FOR THE FIRST TIME IN THE REPLY. SO I WOULD HAVE TO DENY THIS, WHATEVER IT IS. I'D HAVE TO DENY IT. I THINK WHAT YOU WANT TO SAY IS THAT YOU WANT A DECLARATION THAT YOU'RE NOT BOUND BY A CLASS SETTLEMENT BUT THAT'S NOT PART OF THE SETTLEMENT. YOU HAVE TO FILE A NEW MOTION AND DO WHATEVER YOU'RE GOING TO DO. I AM -- I CANNOT AND WILL NOT INTERFERE WITH JUDGE BREYER'S WORK ON THIS CLASS ACTION. I CAN'T TELL HIM WHO CAN BE PART AND WHO CANNOT BE PART. I CAN'T TELL HIM WHAT COUNSEL HAS TO BE CONTACTED. AND I CAN'T TELL HIM, YOU KNOW, WHETHER SOMEONE CAN OPT-OUT. I'M SURE HE KNOWS THAT. YOU KNOW, THE CLASS ACTION IS IN VERY CAPABLE HANDS. AND IT DOESN'T NEED MY INTERFERENCE AND I'M NOT ABOUT TO INTERFERE.

SO I JUST CAN'T HELP YOU CONSUMERS. SORRY. YOU KNOW, THE EVENTUAL (INAUDIBLE) AND MOOTED OUT YOUR ORIGINAL REQUEST. YOU KNOW, I DON'T KNOW HOW TO RESOLVE THIS ISSUE ABOUT CONTACTING CLIENTS. YOU KNOW, ON THE ONE

HAND THERE'S AN ACTIVE CLASS ACTION GOING ON IN JUDGE BREYER'S COURT THAT INVOLVES CERTAINLY OVERLAPPING -- OVERLAPPING FACTS AND LAW, AND I ASSUME OUR CONSUMERS THERE FIT NICELY WITHIN THAT CLASS. FROM MY WORK ON CLASS ACTIONS, IT'S BEEN AWHILE, CLASS MEMBERS HAVE TO BE CONTACTED TO OPT-IN OR OPT-OUT. I DON'T KNOW WHICH ONE THIS ONE WOULD BE. BUT THEY HAVE TO -- HAVE TO BE CONTACTED. PRESUMABLY THE CONTRACTOR WOULD HAVE TO COME FROM COUNSEL IN THE CLASS ACTION. THE FACT THAT IDENTICAL ISSUES ARE BEING PRESENTED HERE, AND WE ALL KNOW THAT THE 9,933 INDIVIDUALS HAVE DIFFERENT COUNSEL IN THIS CASE, WHO HAVE A DIFFERENT OPINION OF THE CASE, AND OBJECT TO INTUIT'S -- FOR OTHER COUNSEL CONTACTING THEIR CLIENT. IT'S NOT A LITTLE THING. IT'S A BIG THING. BUT I DON'T KNOW HOW TO RESOLVE IT.

YOU KNOW, ON THE ONE HAND YOU HAVE NO CHOICE, BUT IF YOU HAVE A CLASS ACTION CASE IN ANOTHER COURT, YOU CONTACT THE CLASS MEMBERS, YOU HAVE AN OBLIGATION TO CONTACT THE CLASS MEMBERS.

ON THE OTHER HAND, SOMEBODY HAS TO CONTACT THEM. SOMEBODY HAS TO GIVE THEM THE ADDRESSES. YOU KNOW, I SUPPOSE NOBODY IS STOPPING YOU, COUNSEL ON BEHALF OF THE CONSUMERS, NOBODY IS STOPPING YOU FROM ALSO CONTACTING YOUR CLIENTS, AND, YOU KNOW, URGING THEM NOT TO ACCEPT IT. I DON'T KNOW WHAT MORE I CAN SAY OR ADVISE.

DO YOU WANT TO BE HEARD IN ANY WAY?

MR. POSTMAN, DO YOU WANT TO BE HEARD?

MR. POSTMAN: YOUR HONOR, I APPRECIATE THAT. I

THINK I UNDERSTAND. AND I WON'T TAKE UP THE COURT'S TIME. I UNDERSTAND YOU TO BE SAYING YOU'RE NOT OPINING ON THE SETTLEMENT STRUCTURE AND WHETHER IT'S APPROPRIATE OR NOT. AND IF YOU WERE MAKING AN ASSERTION ABOUT THE SETTLEMENT STRUCTURE WE'D, OF COURSE, HAVE VIEWS, BUT UNDERSTANDING YOU TO BE LEAVING THAT TO JUDGE BREYER, I DON'T WANT TO TAKE UP YOUR TIME ARGUING ON SOMETHING THAT IT SOUNDS LIKE YOU MADE AN ASSESSMENT ON.

THE COURT: I'LL SEND YOU A WRITTEN OPINION AND YOU GUYS ARE IN GREAT HANDS WITH JUDGE BREYER. HE KNOWS WHAT TO DO. I DON'T KNOW WHAT TO TELL YOU, MR. COLE, ABOUT CONTACTING MR. POSTMAN'S CLIENTS. I'LL LEAVE THAT TO YOU AND JUDGE BREYER.

ANY COMMENT?

WE CAN'T HEAR YOU.

MR. COLE: I'M SORRY, YOUR HONOR. I WENT ON MUTE BECAUSE I WAS CAUSING INTERFERENCE.

I -- YOUR HONOR, HOW THE CLASS MEMBERS ARE CONTACTED IS GOING TO BE DIRECTED BY JUDGE BREYER. RULE 23 REQUIRES THE COURT TO GIVE NOTICE AS YOUR HONOR ALREADY NOTED. JUDGE BREYER ACTIVELY SUPERVISES CLASS ACTION SETTLEMENTS IN THE NORTHERN DISTRICT OF CALIFORNIA, AND THERE'S NO DOUBT HE WILL SCRUTINIZE THIS ONE AND ENSURE THE CLASS MEMBERS ARE APPROPRIATELY GIVEN NOTICE.

THE COURT: OKAY. SO I -- THE REQUEST -- THE REMOVE REQUEST IS DENIED. I'LL SEND YOU A WRITTEN OPINION AS I HAVE IN THE PAST, AND YOU CAN DO WITH IT AS YOU WANT. AND, OF COURSE, WE WERE HERE TO PROVIDE WHATEVER

ASSISTANCE AND RULING TO DO IN OUR CASE. SO WITH THAT, I'M IN TRIAL NOW, SO I HAVE TO SAY GOODBYE. ANYTHING FURTHER?

MR. COLE: THANK YOU VERY MUCH, YOUR HONOR.

MR. POSTMAN: THANK YOU.

THE COURT: THANK YOU.

(PROCEEDINGS CONCLUDED AT 1:47 P.M.)

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 14 HON. TERRY GREEN, JUDGE

INTUIT INC. AND)
INTUIT CONSUMER GROUP, LLC,)
)
PLAINTIFF(S),)CASE NO. 20STCV22761
)
9,933 INDIVIDUALS,)
)
DEFENDANT(S).)
_____)

I, LISA A. AUGUSTINE, OFFICIAL REPORTER PRO TEMPORE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT I DID CORRECTLY REPORT THE PROCEEDINGS CONTAINED HEREIN AND THAT THE FOREGOING PAGES 1 THROUGH 8, COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS AND TESTIMONY TAKEN IN THE MATTER OF THE ABOVE-ENTITLED CAUSE ON NOVEMBER 20, 2020.

EXECUTED THIS 24TH DAY OF NOVEMBER, 2020

_____

LISA A. AUGUSTINE, RPR, CSR NO. 10419

Exhibit L

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

JACOB RIMLER, GIOVANNI JONES, DORA LEE, KELLYN TIMMERMAN, and JOSHUA ALBERT, on behalf of themselves and others similarly situated and in their capacities as Private Attorney General Representatives, Plaintiff, v. POSTMATES, INC. Defendant.	Case No. CGC-18-567868 ORDER RE MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Plaintiffs' motion for preliminary approval of class settlement was scheduled for hearing on November 22, 2019 at 10:00 a.m. in Department 304. Prior to the hearing the Court issued a tentative ruling. Plaintiffs and defendant submitted on the tentative. Therefore, the Court continues the hearing to January 31, 2020 at 1:30 p.m. and directs Plaintiffs to address the following in supplemental briefing to be filed not later than January 15, 2020. Plaintiffs are directed to cross reference this order in their supplemental filings to the Court.

I. Class Certification for Settlement Purposes

Plaintiffs must provide their own declarations setting forth the basic material facts about their employment to demonstrate their adequacy to represent a settlement class. Their declarations should also set forth whether they have worked in each of the municipalities that impose civil penalties that are being released, and if not, why it is proper to release class members' local-ordinance claims that they do not themselves possess. Plaintiffs should also disclose whether they received consideration of any kind, directly or indirectly, for the release of their individual claims because that bears on their adequacy.

II. Reasonableness of the Settlement Consideration

A. Maximum Value of the Claims

In their valuation of the case, Plaintiffs have declined to advise the Court as to the maximum value of all the class claims and PAGA claims or the bases for their valuation. Plaintiffs must do so. In addition, due to the explicit release of additional claims in the Settlement Agreement not pleaded in the First Amended Complaint or Proposed Second Amended Complaint, the Court believes Plaintiffs must provide a full valuation of *all* released claims and provide the Court with an explanation of how they calculated the value of these claims. If Plaintiffs do not believe that the valuation should extend to all released claims, Plaintiffs must provide argument supported by citation to legal authority in support of their position. All information should be set forth in a declaration except for the legal arguments, if any, as to the valuation of all released claims.

B. The Settlement Discount

Plaintiffs have set forth several reasons to discount the settlement. However, the Court cannot evaluate the reasonableness of the discount without knowing what the discount is, a value that in turn depends on the maximum value of the claims. Plaintiffs' counsel's reliance on a settlement discount provided in a previous class settlement her firm negotiated with Postmates, i.e., *Singer v. Postmates, Inc.* (N.D. Cal. Sept. 1, 2017) 2017 WL 4842334, to guide her analysis here is not adequate. This federal case was settled prior to the California Supreme Court decision in *Dynamex* that adopted the less stringent ABC test, and the passage of Assembly Bill 5 (A.B. 5). Second, while a substantial discount for

PAGA penalties may be reasonable, counsel failed to provide any factual or legal basis to justify the near 100% discount. None of the cases Plaintiffs cited justify the 0.09% allocation.

In a supplemental filing, Plaintiffs must: (1) Justify the 0.09% allocation; (2) Discuss the maximum civil penalty that could be imposed if Plaintiffs were to succeed on their PAGA claims; and (3) Provide an evaluation of the factors the Court would be called on to consider in determining the ultimate civil penalty amount.

C. Investigation and Discovery

Plaintiffs' counsel must disclose, in a declaration, the "substantial data" that was received in advance of mediation and the discovery that was obtained in the *Albert* case before the case was stayed. Generalized statements will be deemed insufficient.

D. Dispute Resolution Fund

Plaintiffs' counsel must justify the $250,000 set aside from the class and explain how compensating for payments mistakenly excluded from the class should not be covered as part of the $450,000 set aside for claims administration.

III. Notice

A. LWDA

Counsel must attest to compliance with Cal. Lab. Code § 2699(l)(2).

B. Process

The notice process as outlined in the present motion is very confusing and raises concerns about the adequacy of the notice to the class. The questions and concerns about the notice process are summarized in the following informal list.

- Why are the parties relying on e-mail notice and then mailed notice? Were alternatives such as notice via the Postmates App considered? If so, why were they rejected? If not, why not?
- Exclusion/Objection deadline: This is defined as '60 days after the Mailed Notice Date.' (Proposed Settlement Agreement, ¶ 2.12.) It is unclear what the Mailed Notice Date purports to be. Compare ¶¶

3.1 and 6.2. Second, it's unclear if 'initial distribution' means distribution via electronic mail or postal mail. To the extent the parties are referring to electronic mail, there is no extension for those individuals to whom notice is accomplished via postal mail. Are the parties agreeable to expanding the 'Mailed Notice Date' to include initial distribution when postal mail is utilized? If the parties are opposed to extending the 60-day deadline, the settlement should contain clear terms requiring prompt mailing of Notices by the Settlement Administrator if an email returns undeliverable. (See *Id.* at ¶ 6.5.)

- Non-wages and Form 1099: What is the justification to exclude all payments under the settlement from the IRS reporting requirements? (See *Id.* at ¶ 4.2.) A declaration from a tax expert will suffice to provide the response on this issue.
- Opt outs: First, what interest do Plaintiffs have for preventing counsel to opt out on behalf of their clients, either individually or on behalf of a group? What is the justification for preventing counsel from even helping *submit* an opt out? Second, explain the email procedures for opting out? (See *Id.* at ¶ 7.1.) For example, do class members have to download a form, complete it, print it, sign it, and attach it to an email? Or may a class member simply opt out in the body of an email? To the extent class members may submit claim forms through an online portal why are the procedures requesting exclusion different? Third, the Court should ultimately decide whether a contested opt out is valid. (*Id.* at ¶ 7.5.)
- Objections: First, to the extent the Settlement Agreement requires objectors to file objections with the Court, this requirement should be excluded. (*Id.* at ¶¶ 8.1, 8.2, 8.4.) Second, no separate 'Notice' of an intent to appear at the final approval hearing, of any kind, should be required. (See *Id.* at ¶ 8.4.) Third, a legal basis for each objection should not be required. (*Id.* at ¶ 8.3.) Fourth, to the extent the settlement doesn't provide an email procedure / online submission portal for Objections, the parties should explain why. Fifth, what interest do Plaintiffs have for preventing counsel to object on behalf of their clients, either individually or on behalf of a group? What is the justification for preventing counsel from even helping *submit* an objection? (See *Id.* at ¶¶ 8.3, 8.5.) Sixth, explain the purpose and the effect of ¶ 8.7: "It shall be Settlement Class Counsel's sole responsibility to respond" to any

objections made with respect to Counsel's award and Plaintiffs' service awards. Seventh, it's not clear what "supporting papers" are contemplated in ¶ 8.2.

- Exclusion of an Individual: What is a 'reasonable amount of time' in which an individual must notify the Settlement Administrator that they have been excluded from the class list? (See *Id.* ¶ 6.11.) How does an individual notify the Settlement Administrator? What is the timeframe for them to submit a Claim Form, an Objection, or an Opt out? Is the 60-day deadline tolled for these individuals? If there is no further money left in the Dispute Resolution Fund after they have submitted a Claim Form will that individual be able to opt out of the settlement?
- Claim Form: First, the deadline to submit the Claim Form - 'the Bar date'- is not defined in the Settlement Agreement. (See *Id.* at ¶ 5.3.) Second, the settlement provides that claim forms are submitted through an online portal or by mail. The Notice provides a third option—by email. Was this third option intended?
- Reminders: The Settlement Agreement calls for 'reminders' to be sent to Class Members following the initial Notice. (*Id.* at ¶ 6.7.) Who will receive these reminders? How will reminders be sent, via email or postal mail? When will the two reminders be sent? What information will the reminders contain?
- Settlement Share Disputes: The Settlement Agreement provides that the Notice will inform Class Members of their right to dispute the information upon which their share of the Settlement will be calculated. (*Id.* at ¶¶ 6.3, 6.4.) However, there is no further information explaining the process by which Class Members are required to dispute, e.g., through the claim form or by letter; by electronic mail or postal mail; and what documentation is required and/or acceptable.

C. Substance

The questions and concerns about the notice substance are summarized in the following informal list.

- Have the parties confirmed that English language notice is appropriate for Postmates's workforce – i.e., is English language proficiency required for the job?

- The summary paragraph should provide an estimated total of the $11,500,000 which will be available for distribution to the class after attorneys' fees and other costs (which appears to be approximately $6,890,000 based on the present terms of the settlement).
- Page 1-2: There should be a more thorough summary of the recipients options – (1) Participating in the settlement by either (a) Submitting a claim, (b) Doing nothing, in which case they will receive no payment and release claims they may have against Postmates, (c) Objecting to the settlement, (d) Disputing the information provided as a basis for calculating their claim amount; or (2) Electing not to participate in the settlement by opting out. The summary should succinctly set forth the options and reference the *specific* sections in the notice where more information is provided with respect to each option.
- Page 2, § 2: This section should disclose and briefly discuss the federal actions of *Lee* and *Albert*.
- Page 3, third paragraph: The references to approval of the class representatives and class counsel should include the word "preliminarily."
- Page 3, § III: The Notice should disclose that the settlement amount includes a Dispute Resolution Fund of $250,000. The Notice should state that the Administration Costs are capped at $450,000, as set forth in the Settlement Agreement, not "estimated" at $450,000.
- Page 4, § III: The Notice should explain what 'demonstrate in writing an interest in initiating an arbitration demand against Postmates prior to October 17, 2019' means. (See first paragraph, line 4.) The fifth, sixth, and seventh paragraphs discussing the rights and options of class members is confusing. A reader could reasonably come away with the impression that only individuals who submit a claim form, to the exclusion of individuals who object, are participating in the settlement such that they will receive a payment if the settlement is approved. The Notice should be clear that both submitting a claim form and objecting are options that constitute participation in the settlement, such that a payment will be received if the settlement is approved.
- Page 4-6, § IV: The Notice should state the effect of the release, and who it impacts, in plain and concise language. For example: "If the Court grants final approval of the Settlement, the Court will enter judgment, the Settlement will bind all Class Members who have not opted out, and the judgment

will bar all Class Members from bringing any claims released in the Settlement. The release is described below." This section also should clearly disclose the following: (1) that only by submitting a claim form, is the Class Member consenting to join as a party plaintiff to the FLSA claims and releasing those claims; and (2) that even by excluding yourself from the settlement class members still release the PAGA claims. The second paragraph on page 6 is confusing because it appears that by 'doing nothing' or not timely excluding yourself from the settlement, a person releases their FLSA claims. Also, the third and fourth paragraphs cover distinctly different information. The fourth paragraph should not start with "This means that . . ."

- Page 6, § V: The Notice discloses the formula used to calculate a class member's settlement share. However, it does not disclose each class members' estimated Delivery Miles or estimated value of each mile used to compute the settlement share. This makes it practically impossible for a class member to dispute those figures or make a reasonable estimate of their payment. The following information should be clearly disclosed in each individual notice: (1) The estimated net settlement amount for distribution to class members; (2) The fact that employer-side payroll taxes will be deducted from the settlement amount; (3) Any factors that may impact the estimate for the net settlement amount (i.e., claims submitted, opt outs, reduced fee or incentive awards, successful disputes, exclusions of class members, etc.); and (4) The data used to calculate that specific class member's share of the net settlement amount, i.e., the estimated Delivery miles for that class member and estimated recovery per mile, which the class member may contest, including whether he or she is expected to have their points doubled.
- Page 7, § VI: This section should disclose the procedure and the means by which to notify the Settlement Administrator of any change of address and how to request a replacement check if lost or misplaced. This section should explain the procedure to dispute the estimated Delivery Miles and what documentation is required and/or acceptable. Lastly, the last paragraph, line 3, states that "payments will be mailed within a "couple months." The Settlement Agreement and the preceding section state that payment will be distributed approximately 30 days after the settlement becomes final. (Page 6, § V; see Proposed Settlement Agreement ¶¶ 5.1, 5.6.)

- Page 7, § VII: The Notice does not provide the procedure to email an opt out. (See Proposed Settlement Agreement ¶ 7.1.) This section should disclose that opting out of the settlement will still release the PAGA claims but that those who want to opt out may still object to the PAGA component of the settlement.
- Page 8, §VIII: The first sentence of the first and third paragraphs is confusing because a class member may opt out and still object to the PAGA portion of the settlement. Paragraph 8.3 of the Settlement Agreement and the Notice are inconsistent. The Notice contains an additional requirement whereby objecting Class Members must include their dates of service with Postmates. (See first paragraph, line 6.) All reference to the Court should be excluded. The Notice should be clear that objections are submitted *by mail* to the Settlement Administrator. This section should also disclose that Class Members may submit an objection, including to the settlement itself, the request for attorney's fees, or Plaintiffs' awards, and also submit a claim form for payment. "In the manner provided" in the last sentence of the third paragraph is vague.
- Page 8, § IX: The third sentence in lines 7-8 is vague: "The court will listen to people who have made a timely written request to speak at the hearing." It is not clear what website line 10 is referring to. This section should disclose that at the final approval hearing the Court will consider Class Counsel's application for attorney's fees and Plaintiffs' service awards, in addition to whether the settlement is fair, reasonable, and adequate.
- Page 8-9, § X: This section should also direct the reader to the website. The URL should be displayed prominently at the end of the notice and the documents contained on the settlement website should be listed, i.e., the operative complaint, the *Lee* complaint, *Albert* complaint and any other complaint upon which a release of claims may be based, notice, settlement agreement, preliminary approval order, all papers filed in connection with preliminary approval motions (including all orders and tentative rulings) to the class. In addition, the Notice should direct the reader to the Court's website (https://www.sfsuperiorcourt.org/online-services), which provides access to the full docket in this case free of charge. The Notice should contain instructions on how to use the website.
- Any and all revisions to settlement terms should be reflected in the notice.

IV. Allocation and Distribution of Funds

The questions and concerns about the allocation and distribution of funds are summarized in the following informal list.

- The Individual Settlement Amounts will be apportioned based on the estimated number of miles driven while using the Postmates application as a courier. This approach may be justified on the basis that computing specific damages for each Class Participant is impossible or infeasible. However, it is not clear whether impossibility of infeasibility exists here for three reasons: First, Plaintiffs should be in possession of records that elucidate variations in the (i) meal and rest break, (ii) overtime, (iii) and sick pay violation rates experienced by putative class members. Second, waiting time penalties, in particular, would only be available to individuals who no longer work for Defendant. Third, arguably class members who worked for Postmates after *Dynamex* presumably have stronger claims than those class members whose reimbursement claims may not be retroactive. Please explain the justification for computing the Individual Settlement Amounts in the chosen manner.
- The settlement's proposal to double the points of class members 'who opt out of arbitration, initiate arbitration, or demonstrate in writing an interest in initiating an arbitration demand against Postmates' is vague. Additionally, the reasons for such an allocation should be set forth in more detail.
- To the extent that no class member is capable of receiving a $100 settlement check the reminder provision is futile. To the extent that no class member is capable of receiving a $50 settlement check, the redistribution process is similarly futile. Please provide, assuming a 100% claim rate, the number of class members expected to receive an individual payment of at least $50 and the number expected to receive at least $100.

V. Release of Claims

The questions and concerns regarding the Release are summarized in the following informal list.

- Please explain the justification for the broad release of claims and the justification for Plaintiffs' additional release of claims without proper compensation. To the extent Plaintiffs claim the service awards may be used as consideration for Plaintiffs' release of additional claims, Plaintiffs must

provide argument supported by citation to legal authority in support of their position. All information should be set forth in a declaration.

- Plaintiffs must reconcile ¶ 2.29 which purports to limit the FLSA release to those who submit valid claims, with ¶ 9.2 and ¶ 2.41 that effectuates a release unless a class member opts out.
- The Release encompasses "all claims that are based on [sic] reasonably related to the claims alleged in or that could have been alleged in the *Rimler* SAC, including any allegations in *Lee, Albert*, and/or *Rimler* preceding said amended complaint, and all misclassification claims." (*Id.* at ¶ 2.41.) Plaintiffs must explain the justification for including a release of claims encompassed in three additional complaints, two of which are in a different jurisdiction.

VI. Miscellaneous Issues

- Class Definition ¶¶ 2.36, 2.7: Why does the Class definition include couriers who have only been 'approved to use the Postmates platform' as opposed to those who have actually used the platform and completed at least one delivery?
- Proposed Settlement ¶ 2.31: Plaintiffs seek to file a second amended complaint, but Plaintiffs have not filed a motion or a stip/order to do so. A settlement based on the proposed Second Amended Complaint will not be approved until it is the operative complaint. The parties must comply with Cal. Rules of Court, rule 3.1324 in filing any such amendment.
- Proposed Settlement ¶¶ 3.6.3, 3.8.11, ¶9.3: The Court will not order Settlement Class Members preliminarily and permanently enjoined from initiating litigation against Postmates.
- Proposed Settlement ¶ 3.8.15: This section purports to allow amendments, modifications, and expansions of the agreement without further approval from the Court after final approval. The Court should not be omitted from this process.
- Proposed Settlement ¶ 4.5: Explain the parties' "6-month grace period to come to an agreement regarding terms applicable in the event any appeal of the settlement is file."
- Proposed Settlement ¶ 6.10: The Settlement Administrator will have to provide receipt of valid Claim Forms *and* Objections to the Court.

- Proposed Settlement ¶ 10.6: This seems to be a release concerning the administration of the settlement. ¶ 10.6 bars any action against Plaintiffs, Class Counsel, Settlement Administrator, or Postmates based on distributions made under the agreement. Why is this proper?
- Plaintiffs must select a Settlement Administrator. The proposed administrator must submit a declaration confirming how it will protect sensitive personal information and its ability to administer the settlement.
- When will the website be accessible to Class Members? What does content-neutral mean? (*Id.* at ¶ 6.9.)
- Explain whether an objection is valid and/or waives any rights if the objector does not include a statement of whether they intend to appear at the final approval hearing, either individually or through counsel? If so, what is the justification?

IT IS SO ORDERED.

Dated: November 25, 2019

Anne-Christine Massullo
Judge of the Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.251)

I, Ericka Larnauti, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On November 26, 2019, I electronically served the attached document via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: November 26, 2019

T. Michael Yuen, Clerk

By: _____
Ericka Larnauti, Deputy Clerk

Exhibit M

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 613

CYNTHIA MARCIANO and DAVID CRISTINI, on behalf of themselves and others similarly situated and in their capacities as Private Attorney General Representatives, Plaintiffs, v. DOORDASH, INC., Defendant.	Case No. CGC-18-567869 TENTATIVE RULING RE: PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL

TENTATIVE RULING

Because of the COVID-19 pandemic, the Court has significantly reduced its operations and staffing levels. Department 613 is presently closed. Thus, the Court previously vacated the March 30, 2020 hearing on Plaintiffs' motion. The Court issues the tentative ruling to move this case toward prompt resolution. The parties are hereby authorized to submit a supplemental filing responding to this tentative ruling, which should address the issues raised below, on or before June 8, 2020. Upon receipt and review of the supplemental filing, if necessary, the Court will set a continued hearing date consistent with Court operations in light of the health issues presented by the COVID-19 pandemic. If the Court determines no hearing date is required, the Court may request supplemental briefing and set a corresponding submission deadline.

If the parties jointly agree to modify the June 8, 2020 filing deadline, they may contact this department through a joint email to Department613ComplexLit@sftc.org setting forth their request. Although the departmental email inbox will send an auto-reply message, the email inbox will be monitored.

The motion for preliminary approval will be **CONTINUED FOR SUPPLEMENTAL BRIEFING**. The Court's concerns regarding the motion are summarized in more detail below.[1]

I. Class Certification

A. Commonality and Predominance

- Each named plaintiff should submit a declaration attesting that common issues predominate.

B. Typicality and Adequacy

- Each named plaintiff should provide a declaration setting forth the basic material facts about their experience as a Dasher. The declaration should include whether the named plaintiff delivered for DoorDash in each of the municipalities that imposes civil penalties that are released by the Settlement Agreement, and if not, why it is proper to release Class Members' local-ordinance claims that the named plaintiffs do not possess themselves.
- The named plaintiffs should disclose whether they received consideration for the release of their individual claims.

II. *Kullar* Analysis

A. Investigation and Discovery

The Court presently lacks information to evaluate whether sufficient investigation and discovery were conducted prior to the settlement.

A summary of concerns regarding the parties' investigation and discovery is provided here:

- The parties must provide a brief summary of the facts learned in discovery in support of each and every claim. The parties should provide sufficient detail to allow the Court to make an independent evaluation of the strengths and weaknesses of the case.
- It appears that the only claim investigated was the expense reimbursement claim. (See Liss-Riordan Decl. ¶ 8.) Did the parties investigate the other CA Labor Code, PAGA, and Massachusetts claims prior to mediation?
- Plaintiffs' counsel represents that the parties "exchanged extensive data" prior to agreeing to the Settlement. (See *id.* at ¶ 7.) The parties must disclose, in a declaration, the "extensive data" that was exchanged in advance of mediation. Generalized statements will be deemed insufficient.
- The parties do not provide an estimate of the nature and amount of recovery that each class member could have obtained if Plaintiffs prevailed at trial. Is there an average class recovery amount?

B. Reasonableness

Plaintiffs' motion lacks evidence to support an independent finding that the $39,500,000 figure is

[1] This summary is prepared to assist the parties in preparing further briefing. It may not identify every concern that will be presented by subsequent briefing.

reasonable. Plaintiffs' counsel estimates $39,500,000 "represents approximately 15.5% of the maximum theoretical recovery for the most valuable claim in the case (expense reimbursement)." (See *id.* at ¶ 13.) However, the parties did not provide a maximum value of the case/verdict value. Nor does Plaintiffs' counsel provide evidence to support a claim-by-claim analysis. The Court requires this information so the Court can be *independently* satisfied that the $39,500,000 figure is reasonable. Thus, the parties must walk through the "reasonableness" argument with evidence. (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 95.)

For each claim in the proposed SAC, the parties must provide the calculations performed to arrive at the total claim value (including any assumptions made, and the basis for them). Then, the parties must explain the facts underpinning the anticipated legal issues in sufficient detail to justify the settlement discount. The parties should summarize (1) Plaintiffs' contentions, including the legal and factual support for their contentions; (2) DoorDash's contentions, including the legal and factual support for its contentions; and (3) Plaintiffs' response, including the legal and factual support for Plaintiffs' response. This summary need not be lengthy or accompanied by documentary evidence, but it should be sufficient to permit the Court to independently evaluate the fairness of the discount.

A summary of concerns regarding the parties' maximum damage calculations is provided here:

- Expense Reimbursement Claims:
  - Counsel values the expense reimbursement claim at $256,000,000. The calculation is based on unreimbursed vehicle expenses.
    - What is the valuation of the unreimbursed cellular phone data expenses?
    - What portion of the $256,000,000 is attributed to the California Class claim based on Cal. Lab. Code § 2802?
    - What portion of the $256,000,000 is attributed to the Massachusetts Class claim based on M.G.L. ch. 149 §§ 148, 148B?
- Failure to Pay Minimum Wages (Cal. Lab. Code §§ 1194, 1197):
  - Plaintiffs must provide a valuation for the California Class claim for failure to pay minimum wages or (2) an explanation as to why the value is zero.
- Failure to Pay Overtime Wages Claim (Cal. Lab. Code §§ 1198, 1194):
  - Plaintiffs must provide a valuation for the California Class claim for failure to pay overtime wages. Is the estimated value of this claim $66,000,000? (See Liss-Riordan Decl. ¶ 19.) If so, how did Counsel reach that total claim value?
- Failure to Pay All Regular Wages (Cal. Lab. Code § 204):
  - Plaintiffs must provide (1) a valuation of the California Class claim for failure to pay all regular wages, or (2) an explanation as to why the value is zero.
- Waiting Time Penalties (Cal. Lab. Code §§ 201-203):
  - Plaintiffs must provide (1) a valuation of the California Class claim for waiting time penalties, or (2) an explanation as to why the value is zero.
- Unfair Business Practices (Cal. Bus. & Prof. Code § 17200, *et seq.*):
  - Plaintiffs must provide the value of the California Class UCL claim rather than just providing that it was assigned no value to avoid double-counting.
    - What is the total value of the UCL claim? What is the additional value of the UCL claim to the extent the value of this cause of action is not accounted for in the value of the underlying wage and expense reimbursement claims? Does the UCL claim have any additional independent value?
- MA Wage Act (M.G.L. ch. 149 §§ 148, 148B):
  - Counsel must provide (1) a valuation of the MA Wage Act claim, or (2) an explanation as to why the value is zero.
- Minimum Wage (M.G.L. ch. 151 §§ 1, 7):
  - Counsel must provide (1) a valuation of the MA Minimum Wage claim, or (2) an explanation as to why the value is zero.

- PAGA Exposure:

Plaintiffs' counsel calculated the maximum theoretical recovery for the PAGA claims at more than $3 billion for the approximately 380,000 drivers who are releasing PAGA representative claims as part of this settlement. (*Id.* at ¶ 31.) Plaintiffs' counsel's estimate is based on a single Labor Code violation (overtime). (See *id.*) Assuming this is the only claim with any potential verdict value, the settlement and release of all PAGA claims will be for less than .025% of the potential PAGA value.

Plaintiffs must provide the following information regarding the $750,000 PAGA allocation:

  - A justification for the .025% allocation.
  - A discussion of the maximum civil penalty that could be imposed if Plaintiffs were to succeed on all of their PAGA claims.
  - Plaintiffs must provide either (1) a valuation of each PAGA claim, or (2) sufficient factual and legal explanation as to why the value of the claims is zero.
  - For each claim, Plaintiffs must provide the calculations performed to arrive at the total claim value (including any assumptions made (i.e. the violation rates per pay period) and the basis for them). (See e.g., *O'Connor v. Uber Technologies, Inc.* (N.D. Cal., June 30, 2016) 2016 WL 3548370, at *6 ["with respect to the overtime claim's estimated value of $2.4 million, the parties do not provide sufficient information on what numbers were used to calculate this value, *the factual basis for these numbers, and how they resulted in the $2.4 million valuation*. *There appears to have been no discovery directed at the bases for this number*."].)
  - What evidence demonstrates that a minimum wage or overtime violation did not occur for every driver during every pay period?
  - Plaintiffs' counsel states that "[i]t is unclear whether penalties for multiple different Labor Code violations can be 'stacked' and combined; however, if stacking were permitted, the maximum PAGA exposure would rise to well over $3 billion." This is insufficient. The calculation requires further explanation.
    - Indeed, why was the PAGA valuation based on the overtime claim? Are any other PAGA claims worth more? If stacking were permitted what would the maximum PAGA exposure be?

- Non-Monetary Relief:
  - What is the estimated monetary value of the pay model to be adopted by DoorDash for California and Massachusetts Dashers?

III. Notice

A. Notice to the LWDA

The parties are required to submit the settlement to the LWDA at the same time it is filed with the Court. (Cal. Lab. Code § 2699(l)(2).) The parties have not provided evidence that they complied with § 2699(l)(2). The parties must provide such evidence.[2]

B. Distribution of Settlement Proceeds

The distribution process presents the following concerns:

- The Court requires further explanation as to why the distribution formula is the most appropriate approach in this case. (See SA at ¶ 5.3.)
  - This approach may be justified on the basis that computing specific damages for each Class Member is impossible or infeasible. However, it is not clear whether impossibility of infeasibility exists here for three reasons: First, Plaintiffs should be in possession of

[2] If the settlement is amended, the amended settlement should also be served on the LWDA.

records that elucidate variations in (i) meal and rest break, (ii) overtime, (iii) and minimum wage violations experienced by Class Members. Second, waiting time penalties, in particular, would only be available to Dashers who no longer work for DoorDash. Third, arguably Class Members who worked for DoorDash after *Dynamex* presumably have stronger claims than those Class Members whose reimbursement claims may not be retroactive. Please explain the justification for computing the individual Settlement Payments in the chosen manner.

- The proposal to double the mileage credit of the Class Members who opted out of arbitration or who have filed an arbitration demand is vague and the reasons for such an allocation should be set forth in detail. (See SA ¶ 5.3.)
- The Settlement Agreement provides that all funds not claimed prior to the Void Date shall be redistributed to Class Members who received and cashed their first Settlement Payments and whose residual share would be more than $50 pursuant to the same mileage formula. (See *id.* at ¶ 5.4.)
    - The Court is concerned that this approach may result in a windfall to a small portion of the Class.
        - What is the purpose of requiring the residual share to be more than $50?
        - What is the estimated percentage of the Class who would have a residual a share below $50?
- How will the Settlement Payments be issued? (See *id.* at ¶ 5.6.)
    - Will they be mailed? If a settlement check is returned as undeliverable, will the Settlement Administrator make at least one attempt to re-mail the settlement check where (1) the undeliverable mail has a forwarding address; or (2) the Settlement Administrator can locate a more current address through skip tracing?
- The Settlement Agreement provides that each Class Member will have the opportunity, should he or she disagree with DoorDash's calculation of his or her Delivery Miles, to provide documentation to establish the appropriate number *after* the Settlement Funds are distributed. (See *id.* at ¶¶ 5.5; 10.4.) This seems unfair.
    - The statement to each Class Member containing a best estimate of his or her number of total Delivery Miles used to calculate the amount of his or her Settlement Payment, as well as any indication as to whether those miles are being doubled should be disclosed in the Notice. Prior to deciding whether to participate in the Settlement, Class Members should (1) know their expected share of the settlement fund, and (2) be given the opportunity to challenge the calculation of their settlement share.
    - All information regarding the dispute process should be clearly provided in the Notice (including that there will be a presumption that DoorDash's records are correct). (See *id.* at ¶ 5.6.)
- The Settlement Agreement designates Legal Aid at Work and Greater Boston Legal Services as *cy pres* recipients. (See *id.* at ¶ 10.5.)
    - Why would *cy pres* recipients be needed, i.e. why can the funds not be re-distributed to Class Members until the net settlement fund is depleted?
    - The Settlement Agreement provides that any remaining funds will be distributed to "all" Class Members who have submitted claims, and then any remaining funds in the case of CA uncashed checks will be distributed to Legal Aid at Work and any remaining funds in the case of MA uncashed checks will be distributed to Greater Boston Legal. How will the Settlement Administrator keep track of whether the funds are those of CA Class Members or MA Class Members? Will remaining funds first be distributed to all Class Members who submitted claims? Or will the remaining funds first be sorted between CA Class Members and MA Class Members? It seems fairer to distribute remaining funds to all

Class Members.

- Claim Forms: Why is a Claim Form necessary? The parties do not explain *why* the claims process is not unduly burdensome for the Class itself, nor do they provide a rationale for any burden if a Claim Form is not used. In particular, DoorDash already has the Class Information to estimate each Class Member's Delivery Miles. (See *id.* at 5.3.) The parties must address the burden on the Class if a Claim Form is used and a rationale for any burden if a Claim Form is not used.
    - What happens after Class Members enter their Claimant ID and Verification Number on the Claim Form website page? Do Class Members have to download a document, fill it out, and reupload it? Or do they fill out the claim form on the website page?
    - What information is required to submit a Claim Form?
    - The Notice states "If you need a paper claim form, please contact the Settlement Administrator". Additionally, will a paper Claim Form that can be printed by Class Members be included in the email notice? If not, the form should be provided in the email Notice and on the website.
- Plaintiffs' counsel states that "based on [her] prior experience with 'gig economy' settlements that have used this same method of distributing proceeds, the claim rate is likely to be closer to 50% of the fund claimed." (See Liss-Riordan Decl. ¶ 14.) Counsel must clarify what is meant by "same method", i.e. did those settlements use claim forms?
    - Was a claim form used in *Marciano I*? If so, what was the claim rate for *Marciano I*?
    - The estimated claim rate should be used to estimate the average pro-rata share.
- What steps will the parties take to encourage submission of claims?
    - Claim Forms can be submitted online or by mail; however, why not allow e-mail submissions of claims to the Claims Administrator?
    - Are there other useful mechanisms for encouraging claim submissions?
        - Perhaps reminder postcards can be sent?
    - Overall, the parties should brainstorm more lenient standards to encourage claim submissions.
- What information must Class Members provide to submit a Claim Form? How long will this process take?
- Dispute Resolution Fund: What is the purpose of setting aside $350,000 for a Dispute Resolution Fund, as opposed to using the funds directly from the Net Settlement Amount? (See *id.* at ¶ 2.9.) At what point will disputes be resolved? Should the disputes not be resolved prior to the distribution of settlement funds? If disputes are resolved prior to the distribution of settlement funds, will a Dispute Resolution Fund be necessary?

C. Notice to the Class

1. Process

The notice procedure raises the following concerns:

- At least two forms of notices should be provided to Class Members. Generally, a short-form notice and a long-form notice are both disseminated.
    - Were any alternatives to email notice considered? For example, can additional notice be provided via the DoorDash app? How much would this cost?
    - Did the parties consider providing a short-form notice via mail? How much would this cost?
        - Would it be possible to provide a short-form notice via the DoorDash app to Class Members who still deliver for DoorDash and to mail the short-form notice Class Members who no longer deliver for DoorDash?
        - A template of any additional forms of notice must be submitted to the Court for

review.

- The Settlement Agreement defines the "Exclusion/Written Objection Deadline" as "60 days after the Notice Date". This term is ambiguous.
  - Is the Notice Date the date the Notice is emailed? Will Class Members whose notices are undeliverable via email and must be mailed (and re-mailed) have an extension of time to opt-out and object?
- How promptly will the Settlement Administrator mail notices and re-mail notices that are undeliverable via email and first mail attempt? A date certain must be provided.
- How strictly will the requirements for exclusions and objections be enforced? The Settlement Agreement suggests strict compliance is necessary, but this seems unfair. (See SA ¶¶ 7.4-7.5, 8.3.) For example, will a request for exclusion without a physical ("wet signature") be rejected? Will an objection that identifies the Class Member's full name, but fails to include a complete phone number be rejected?
  - If strict compliance is required, will the Settlement Administrator make a reasonable effort to give Class Members who opt-out or object an opportunity to cure technical deficiencies?
  - If these requirements must be strictly enforced, the parties should consider disseminating opt-out and objection forms to Class Members.
- Did the named plaintiffs receive consideration for their agreement not to opt-out or object to the Settlement?
- The Settlement Agreement provides that "[t]he number and manner of any reminder to be sent to the Settlement Class members . . . following the initial Class Notice mailing is to be determined by Class Counsel and the Settlement Administrator." (See *id.* at ¶ 6.7.)
  - Have Class Counsel and the Settlement Administrator determined the number and manner of the reminders to be sent to the Class? This information should be provided to the Court, including a template of any reminders. This information should also be provided in the revised Settlement Agreement and Notice.
    - How will these reminders be sent?
    - When will the reminders be sent?
    - What information will the reminders contain?
- The Settlement Agreement provides that any individual whose name does not appear in the Class Information and who believes that he or she is a Settlement Class Member shall have the opportunity to dispute his or her exclusion from the Settlement Class. (See *id.* at ¶ 6.11.) To do so, "he or she must notify the Settlement Administrator within a reasonable amount of time after the Notice Date." (*Id.*)
  - What is "within a reasonable amount of time after the Notice Date"? A date certain must be provided.
  - How does such an individual become aware of this process? Does DoorDash have a way to notify all current and former Dashers of this Settlement? Can an email or message on the DoorDash App be sent?
  - How does the individual notify the Settlement Administrator?
  - What is the timeframe to submit a Claim Form, objection, or request for exclusion for such an individual?
    - Is the 60-day deadline tolled?
    - If there is no settlement funds remaining in the Dispute Resolution Fund after such an individual has submitted a Claim Form will that individual be able to opt out of the settlement?
- <u>Requests for Exclusion</u>:
  - Why must the physical ("wet ink") signature of the Class Member or Legal Representative

of the Settlement Class Member be provided on the request for exclusion? This term seems onerous.
    - Please explain why an electronic signature (such as a DocuSign signature) is insufficient.
  - What is the justification for prohibiting a Class Member's counsel from signing a request for exclusion on the Class Member's behalf? This seems unfair.
    - This provision effectively prevents represented Class Members who are currently in litigation or arbitration against DoorDash from relying on their attorney to opt-out of this Settlement. Please provide legal justification for why this does not interfere with the attorney-client relationship.
  - What is the justification for prohibiting collective group, class, or subclass requests for exclusion?
  - Did the parties consider permitting Class Members to submit requests for exclusion via email to the Claims Administrator? Opting-out via email seems much less burdensome for Class Members.
  - The Settlement Agreement provides that all Class Members who are not included in the Opt-Out List approved by the Court shall be bound by the Settlement Agreement, and all their claims shall be dismissed with prejudice and released, even if they never received actual notice of the Action or this proposed Settlement.
    - This seems unfair. How can a Class Member who never received actual notice of the Action or proposed Settlement be bound by a Settlement Agreement and dismissal of their claims with prejudice? Especially where Notice is only sent via email and Class Members only receive settlement funds if they submit a Claim Form.
  - The Court should ultimately decide whether a contested request for exclusion is valid. (See *id.* at ¶ 7.5.)
- <u>Objections:</u>
  - The Settlement Agreement provides that objections shall be filed with the Court. (See *id.* at ¶¶ 8.1, 8.3.) This is improper and should be removed from the Settlement Agreement and Notice.
  - The Settlement Agreement provides that an objection must contain a statement regarding whether the objecting person or entity intends to appear at the Final Approval Hearing. (See *id.* at ¶ 8.1.) No notice of an intent to appear at the Final Approval Hearing, of any kind, should be required and must be omitted from the Settlement Agreement and Notice. The following sentence must also be omitted from the Settlement Agreement "Any Settlement Class Member who does not file a timely notice of intent to object in accordance with this Section shall waive the right to object or to be heard at the Final Approval Hearing and shall be forever barred from making any objection to the proposed Settlement, the Plan Allocation, the Class Counsel Award and the Service Awards." (*Id.* at ¶ 8.6.)
  - The Settlement Agreement provides that an objection must contain a legal basis for each objection argument. (See *id.*) This should not be required and must be omitted from the Settlement Agreement and Notice.
  - How come a "wet signature" is required for opt-outs, but just any signature is required for objections? A signature should be sufficient for both opt-outs and objections.
    - The Settlement Agreement provides that a Class Member's Legally Authorized Representative may sign the objection, does this include the Class Member's counsel? The language in SA ¶ 8.1 is not clear.
      - If a Class Member's counsel is not permitted to sign the objection on behalf

of the Class Member, this seems unfair. Please explain why.

- What interest do Plaintiffs have in preventing counsel from objecting on behalf of their clients, either individually or on behalf of a group, class, or subclass? (See *id.* at ¶ 8.5.)
- The Settlement Agreement requires Class Members to mail their objections to the Claims Administrator. (See *id.* at ¶ 8.2.) Class Members should be able to additionally submit their objections on the website and/or via email to the Claims Administrator.
- The Settlement Agreement provides that "[i]t shall be Class Counsel's sole responsibility to respond to any objections made with respect to any application for the Class Counsel Award and Service Awards." (See *id.* at ¶ 8.7.) Please explain the purpose and the effect of this provision.
- The Settlement Agreement provides that "Named Plaintiffs and their counsel shall support the settlement and take such steps as are reasonably necessary to effectuate the settlement. Plaintiffs' counsel shall recommend the settlement to settlement class members and Plaintiffs' counsel agree to use their best efforts to resolve any objections to the release of all claims described in the Scope of the Release, including all class actions, individual-plaintiff actions, and arbitrations." (*Id.* at ¶ 7.9.) Please explain the intent of this provision.
  - What "reasonably necessary" steps will Named Plaintiffs and Plaintiffs' counsel take? How will Plaintiffs' counsel recommend the settlement?
  - Many of the Class Members are represented by counsel. Thus, please provide legal authority regarding whether it is appropriate for Plaintiffs' counsel and Plaintiffs to have direct contact with these Class Members to recommend the Settlement.

2. Substance

A summary of concerns regarding the Notice is provided here:

- The Notice is in English. Did DoorDash require all Class Members to understand English?
- In general, after Preliminary Approval is granted, all dates and the website address should be filled in throughout the Notice.
- Page 1-2: "Your Legal Rights and Options in This Settlement"
  - The first paragraph should define the two class definitions as the "California Settlement Class" and the "Massachusetts Settlement Class" respectively.
  - Ideally, all Legal Rights and Options should fit on Page 1. If not, a line stating, "**YOUR LEGAL RIGHTS AND OPTIONS ARE CONTINUED ON PAGE 2."** Should be included.
  - A sixth option should be included: "**Dispute Your Claim Amount**" explaining the dispute process.
  - Each option should reference the *specific* sections in the Notice where further information is provided with respect to that option.
  - The "**Participating in the Hearing**" option should clearly state that Settlement Class Members who object shall remain Settlement Class Members and shall be bound by the Settlement.
  - Overall, as written this section is misleading. The Notice should make the relationship between these options clear (i.e. a Class Member can both submit a claim form and object to the Settlement; a Class Member cannot both opt-out and object to the Settlement; if you do not submit a Claim Form and you do not opt-out, you will be bound by the Settlement without receiving a share of the Settlement, etc.).
- Page 4: "What is this Notice About?"
  - The first sentence provides that "a proposed settlement (the "Settlement") has been reached in the cases *Marciano v. DoorDash, Inc.*, Case No. CGC-18-567869 (S.F. Sup. Ct.) and *Austin v. DoorDash, Inc.*, No. 1:17-cv-12498 (D. Mass.) ("*Austin*")."

- *Magana v. DoorDash* (9th Cir.) No. 18-17232 is omitted and must be included. Are there any other cases that will be resolved as a result of this Settlement?
- This section should also briefly discuss the *Magana* and *Austin*.

- Page 4: "What is This Lawsuit About?"
  - The first paragraph of this section makes no mention of Plaintiffs' Fair Labor Standards Act ("FLSA") claims in the proposed Second Amended Class Action and Private Attorneys General Act Complaint. The Notice must include Plaintiffs' FLSA claims in this section.
  - This section is misleading because it states that "Plaintiffs primarily seek reimbursement of their necessary business expenses" but does not acknowledge the numerous claims that will be released, or that reimbursement for those claims is not being sought.
- Page 5: "What are the Important Terms of the Settlement?"
  - Paragraph 1: a brief overview of the requirements for a "valid" Class Member Claim must be provided.
  - Paragraph 2: $13,1666,665 must be revised as it is not a valid number.
  - Paragraph 3: "Only those who submit a valid Claim will receive payments from the Settlement Fund." should be bold and underlined. This paragraph should also provide in bold and underlined "Class Members who do not submit a valid Claim will still be bound by this Settlement." The definition of "bound" should be provided in layman's terms.
  - Paragraph 4: this paragraph should specify that the funds that are not claimed by the California Settlement Class will be donated to Legal Aid at Work and the funds not claimed by the Massachusetts Settlement Class will be donated to Greater Boston Legal. It also should be clarified whether the funds will first be re-distributed to all Class Members who submitted claims and whose second payment would be more than $50 or if the remaining funds will first be separated between the two classes before they are redistributed to "all" Class Members.
  - Paragraph 5: the non-monetary relief should be explained in layman's terms (i.e. which Class Members does this affect and how will it benefit the Class Members?)
- Page 5-6: "What Are the Important Terms of the Settlement?"
  - Paragraph 3: The Notice should disclose that Settlement Fund includes a Dispute Resolution Fund of $350,000. The Notice states that the costs to administer the settlement are estimated to be approximately $640,000. Is this the amount that was estimated by the Settlement Administrator as referenced in the Settlement Agreement? The Notice should provide that the cost of administration is not to exceed $640,000 rather than it is "estimated to be approximately $640,000".
  - Paragraph 4: The Notice should explain what "opted out of the arbitration agreement" or "already filed or taken steps to file individual arbitrations prior to October 24, 2019" means in layman's terms.
  - Paragraph 6: "will not receive a Settlement Share, but you will retain the right you may have, if any, to pursue a claim against DoorDash." should be bold and underlined. Additionally, the sentence should be revised to read "will not receive a Settlement Share, but you will retain the right you may have, if any, to litigate or arbitrate your claim against DoorDash."
  - Paragraph 7: "no obligations" should be explained in layman's terms.
  - Paragraph 8: Settlement Administrator should be explained in layman's terms.
  - Paragraph 9: The Notice should state the effect of the release, and who it impacts in plain and concise language. For example: "If the Court grants final approval of the Settlement, the Court will enter judgment, the Settlement will bind all Class Members who have not opted out, and the judgment will bar all Class Members from bringing any claims released

in the Settlement. The release is described below." This section also should clearly disclose the following: (1) That only by submitting a Claim Form, is the Class Member consenting to join as a party plaintiff to the FLSA claims and releases those claims (it appears by "doing nothing" or not timely excluding themselves from the settlement, Class Members release their FLSA claims which is improper); and (2) that even by excluding themselves from the Settlement Class Members will still release their PAGA claims. The Settlement Administrator's information should be provided in this paragraph and/or a link to the Settlement Administrator's information should be provided.

- Paragraph 10: After "Many courts have already enforced DoorDash's arbitration agreement, which creates significant obstacles for most Class Members to bring actions in court to recover any damages for the violations alleged here." it should be clarified that as an alternative to participating in the Settlement, Class Members may still pursue individual arbitration to potentially recover damages for the violations.
- This section must also disclose in layman's terms that if more than 1,000 Class Members exercise their right to opt out of the Settlement, DoorDash at its sole and absolute discretion may elect to rescind, void, and revoke the entire Settlement Agreement by sending written notice that it revokes the Settlement within 10 business days following the receipt of the Opt-Out List.

- Page 6-8: "What Are My Rights As A Settlement Class Member?"
  - Paragraph 11: "Participating in the Settlement"
    - This paragraph should include what information the Class Members must provide to submit a Claim Form and how long it takes to do so.
  - Paragraph 12: "Receiving a Settlement Payment"
    - This paragraph should disclose (1) the formula used to calculate a Class Member's settlement share, (2) the estimated average settlement amount per Class Member; and (3) the data used to calculate that specific Class Member's share of the net settlement amount, (i.e., the estimated Delivery Miles for that Class Member and estimated recovery per mile, including whether he or she is expected to have their points doubled). Without this information it is practically impossible for a Class Member to dispute or make a reasonable estimate of their settlement share.
    - This section should also explain the procedure to dispute the estimated Delivery Miles (e.g. through the claim for or the objection form, or by another method; by electronic mail or by letter; what documentation is required and/or acceptable).
    - This section should also provide the "Void Date" for Settlement Checks (i.e. the 181st day after mailing) in bold and underlined, and explain that the check must be cashed prior to that date and explain the procedure for notifying the Claims Administrator of misplaced checks.
  - Paragraph 13: "Excluding Yourself from the Settlement (Opt-Out)"
    - "A Settlement Class Member who fails to return a Request for Exclusion in the manner and by the deadline specified above will be bound by all terms and conditions of the Settlement and the Judgment, regardless of whether he or she has objected to the Settlement." should be bold and underlined.
    - This section should also explain whether Class Members will be notified that their request for exclusion was deemed invalid and explain the process to cure a request for exclusion (including the timeline to do so).
    - "Please note that the Requests for Exclusion do not apply to the release of PAGA claims contemplated by the Settlement." should be bold and underlined.
  - Paragraph 14: "Objecting to the Settlement"
    - This Section should clearly provide that Class Members who object to the proposed

Settlement shall remain Settlement Class Members and shall be deemed to have voluntarily waived their right to pursue an independent remedy against DoorDash and the Released Parties.
    - This section should also provide that Class Members can submit a Claim Form for Payment AND submit an objection, including to the Settlement itself, the request for attorney's fees and costs, or service awards.
    - Any requirements for an objection to be considered valid should be clearly stated in this section.
  - Paragraph 15: "Participating in the Final Approval Hearing"
    - "If the Court overrules your objection and gives final approval to the Settlement, you will be bound by the terms of the Settlement and receive a Settlement Payment if you submitted a claim." should be bold and underlined.
- Page 9: "Final Settlement Approval Hearing"
  - "Department 302" must be changed to "Department 613".
- Page 9: "Getting More Information"
  - The sentence beginning "You may also visit the office of the Clerk of Court . . ." should be omitted.
  - This section should provide that notice of entry of final judgment will be provided on the Settlement website.
  - The following additional information should be provided:
    - Accessing the Court's docket online is free;
    - Class Members need to enter the case number CGC-18-567869 into the "case query" feature, and click on the "view" button to review documents;
    - The Court's website: (https://www.sfsuperiorcourt.org/online-services)

Any revisions to settlement terms, such as the requirements to opt out, should be reflected in the Notice.

IV. Release

A summary of concerns regarding the Release is provided here:

- Please explain the justification for the broad general release of numerous claims, and the justification for named Plaintiffs' release of additional claims, including legal authority providing that service awards may be used as consideration for Plaintiffs' release of additional claims. This poses serious concerns.
- Please provide justification and legal authority to support that Class Members may be bound by a Class Action Settlement Release "even if they never received actual notice of the Action or the proposed Settlement." (*Id.* at ¶¶ 7.4, 9.7.)
- Please provide the justification for and legal authority to support the release of FLSA claims for Class Members who do not submit a Claim Form, and thus, have never taken any steps to affirmatively opt-in to a FLSA action in writing as required by 29 U.S.C. 216(b).
- The Release encompasses any and all past or present claims based on or reasonably related to the claims alleged in the Marciano SAC, including any allegations that are in the "Related Actions". (*Id.* at ¶ 2.37.) Please provide legal authority to support including a release based on inoperative complaints filed in different jurisdictions.
- Please explain why it is necessary under the circumstances to have a C.C. § 1542 release for all absent class members.
  - The C.C. § 1542 release must be explained in layman's terms in the Notice.
- What *amount* of consideration was given for a release with respect to unknown damages and complaints, whether resulting from known injuries and consequences or from unknown injuries or unknown consequences of known or unknown injuries? (See *id.* at ¶ 9.5.) Vague

statements in the Settlement Agreement are insufficient.

- Please explain the purpose of and provide legal authority to support ¶ 9.8, which provides "Class Counsel will also make a good faith effort to secure a general release from Daniel Marko and Mr. Marko's dismissal of his claims in *Marko v. DoorDash, Inc.* (L.A. Super. Ct., No. BC659841) with prejudice as part of the settlement. If Class Counsel is unable to secure the release and dismissal of Mr. Marko's claims, DoorDash has the option, in its sole discretion of rescinding or voiding this agreement."
  - This provision must also be explained in layman's terms in the Notice.
- Please provide the justification for and legal authority to support ¶ 9.2, which enjoins the Settlement Class from "initiating, asserting, or prosecuting against the Released Parties in any federal or state court or tribunal" any of the Released Claims.

V. Miscellaneous Issues

- Second Amended Complaint: Plaintiffs seek to file a Second Amended Complaint, but Plaintiffs have not filed a motion or a stipulation and order to do so. The Court will not approve a settlement based on the SAC until it is the operative complaint.
- Settlement Agreement ¶ 3.8.14 authorizes the Parties, without further approval from the Court, to agree to and adopt amendments, modifications, and expansions of this Agreement consistent with the Final Approval Order. This is improper and must be removed from the Settlement Agreement.
- Settlement Agreement ¶ 10.8 provides that "No Settlement Class Member shall have any claim against the Plaintiffs, Class Counsel, or the Settlement Administrator based on distributions made substantially in accordance with this Settlement Agreement and/or orders of the Court. No Settlement Class Member shall have any claim against DoorDash or its counsel relating to distributions made under this Settlement." Why is this provision necessary/proper?
- Website: when will the website become accessible to Class Members? What specific information will the website include?
- Further Settlement Agreement & Notice Documents: For future purposes, if the parties make edits to the Settlement Agreement or Notice documents, the parties should provide both a clean and redlined version in its supplemental filings. This will assist the Court in discerning whether the parties have sufficiently addressed all of the Court's previously outlined concerns.
- Further briefing: For future settlement approval motions in this Court, including this one, the parties should be advised that (in addition to briefing) the parties must submit a separate document reproducing the Court's tentative ruling, and citing to the exact sections in the parties' briefing (i.e. Settlement, Declarations, etc.) that address each of the Court's points in the previous tentative ruling.
  - This is especially useful where, like here, there is an extensive tentative ruling. This will assist the Court in discerning whether the parties have sufficiently addressed all of the Court's previously outlined concerns.
- Proposed Order: Plaintiffs must submit an electronic Word-editable version of the proposed order.

Exhibit N

Pages 1 - 29

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

IN RE: INTUIT FREE FILE LITIGATION)
)
) **NO. 19-02546 CRB**
)
)

San Francisco, California
Friday, November 13, 2020

TRANSCRIPT OF ZOOM WEBINAR PROCEEDINGS

APPEARANCES: (via Zoom)

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Reported By: Marla F. Knox, RPR, RMR, CRR
United States Official Court Reporter

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Friday - November 13, 2020 **10:03 a.m.**

P R O C E E D I N G S

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THE CLERK: Calling civil action C19-2546, In Re: Intuit Free File Litigation.

Counsel, please state your appearances for the record.

MR. GIRARD: Good morning, Your Honor, this is Daniel Girard appearing on behalf of the Plaintiffs.

THE COURT: Good morning.

MR. SIEGEL: And good morning, Your Honor, this is Norman Siegel, also Interim Colead Counsel for the Plaintiffs.

MR. COLE: Good morning, Your Honor, Rodger Cole, Fenwick & West, representing Intuit. With me this morning, Your Honor, is my partner Molly Melcher and my cocounsel from Wilmer Hale, Jonathan Paikin and Kevin Lamb.

MR. POSTMAN: Good morning, Your Honor --

THE COURT: Go ahead, Mr. Postman.

MR. POSTMAN: Warren Postman of Keller Lenkner LLC. We represent individuals pursuing separate arbitrations. We are not parties to this action. We filed a letter this morning.

THE COURT: Right. And Mr. Lamb is not visible, but can we proceed in his absence? I would assume we can.

MR. COLE: Yes, Your Honor.

THE COURT: Okay. So this matter is on for case

management. I also received a proposed settlement of the class action that is set, my understanding, for preliminary approval December 17th; is that -- is that correct?

MR. GIRARD: That is correct, Your Honor.

THE COURT: And then I also received, of course, today a letter from Mr. Postman. I think it was Mr. Postman. I don't have it in front of me.

MR. POSTMAN: Yes, Your Honor.

THE COURT: Who represents a number of individuals who have -- who are seeking and have pursued arbitration clause -- the arbitration of the claims.

And that matter, as I understand it, is -- is presently pending, from a legal point of view -- and I will get to that in a minute -- in the Los Angeles County Superior Court; is that right?

MR. COLE: Your Honor, the arbitrations are proceeding. Intuit has paid more than $10 million in arbitration fees, and a number of arbitrators have been appointed.

After the parties requested the status conference before Your Honor, Mr. Postman on behalf of some identified and some unidentified clients sought a TRO and is now seeking a preliminary injunction to opt out those clients that he represents even before a settlement was reached -- which it wasn't reached until about 11:45 last night -- and opt out

those clients even before they have a chance to review the settlement that has been presented to the Court.

THE COURT: Well, before we get there, Mr. Cole, I just need to (video freeze interruption). And that's important. I'm not saying it is not significant. It may be -- it may be important.

I need to understand sort of the legal framework of where everybody is in this case. And, you know, I know you are in front of me on a preliminary approval which will be heard on December 17th.

I was not aware of what you just said because I had Mr. Postman's letter, which I assume was written yesterday or -- is that correct?

MR. POSTMAN: It was written this morning.

THE COURT: Maybe 2:00 a.m. I don't know, but I just got it and I just read it. So I thought -- and that may be -- and maybe we need an update on that. I thought that that meant that there were a number of demands for arbitration in -- of this matter presently pending a legal determination as to whether or not arbitration can proceed or in lieu of arbitration it goes by way of Small Claims Court and very attendant relief which would be generated by whichever direction things went, all before a judge of the L.A. County Superior Court. So that's what I thought.

MR. POSTMAN: Your Honor, if I may --

MR. COLE: Your Honor, if I may --

THE COURT: So wait, wait, wait. Everyone is going to -- we have got plenty of time. No one is going anywhere. We are all Zooming, okay, so everybody gets their -- everybody gets their say.

What I want to do is -- and you -- Mr. Postman and Mr. Cole and anybody else can address it. We are going to start first with Mr. Postman. But what I need to know is as of 10:00 a.m. this morning, what is the procedural posture of Mr. Postman's clients? That's what I need to know.

Okay. And then I will go to you, Mr. Cole, after Mr. Postman speaks. Go ahead, Mr. Postman.

MR. POSTMAN: Thank you, Your Honor.

At this moment there are slightly over 100,000 of our clients who have filed demands for arbitration with AAA.

Those demands are in various states of progress. Some have been initiated under AAA's process. Some have not been.

About 40,000 of those clients filed a motion to compel arbitration in your court in the *Jolly v. Intuit* action, and they did that in response to a lawsuit Intuit filed against them in L.A. Superior Court.

That L.A. Superior Court action seeked (sic) to enjoin -- sought to enjoin their arbitrations on the argument that they should go instead to Small Claims Court.

We filed in your court arguing that that was a breach of

the arbitration agreement, to file that very State court lawsuit.

Your Honor, abstained from deciding that case under Colorado River abstention at Intuit's suggestion; and we, therefore, we responded to and litigated Intuit's motion for preliminary injunction to enjoin the arbitrations.

The L.A. Superior Court, Judge Green, denied that preliminary injunction in the opinion that we attached as Exhibit A in this morning's letter. That was written early this morning, which was when we first found out --

THE COURT: Don't you guys ever sleep?

MR. POSTMAN: Not much, Your Honor.

(Laughter)

MR. POSTMAN: But we like it.

At the same time we read the tea leaves and understood that Class Counsel and Intuit would be working on a settlement which would include our clients within the scope of the settlement agreement.

And we, in front of Judge Green in L.A. Superior Court where our clients were already parties, filed a motion on an expedited basis seeking a preliminary injunction and declaration stating that our clients under the rights pursuant to the arbitration agreement should not be included in a class settlement because class proceedings had been waived by Intuit.

That briefing is pending. Intuit has filed its response

and our reply is due tonight and a hearing is next week. And we will be asking Judge Green to issue a declaration.

We understand with the settlement having been reached and submitted to Your Honor that Judge Green cannot enjoin your proceedings, but we will be asking Judge Green to issue a declaration about our client's rights, the parties who are before him -- and not this Court at this moment -- and we will be asking, Your Honor, potentially -- this is all fast moving -- but to likewise defer, as it did in the first action under Colorado River, to that legal action.

The last moving piece here is that after Judge Green denied Intuit's request for a preliminary injunction enjoining our client's arbitrations, Intuit sought an appeal in the Appellate Division, the Court of Appeal, and sought a writ of supersedeas to enjoin not Judge Green's denial but actually enjoin the arbitrations outright.

So there is a second court considering on a writ of supersedeas, the Appellate Court, whether our client's arbitration should be enjoined. And we filed our opposition to that last night, and Intuit has sought leave to file a reply.

So that, as I see it, is just the nuts and bolts state of play.

And, if I may, the last piece addressed in our letter, the settlement -- without going into any of the merits -- among other things, as I understand it, seeks to enjoin our clients

from proceeding until the settlement administration process has completed.

And because our clients are facing a potential injunction, we respectfully request time to respond before they are enjoined, an opportunity to be heard. And we have suggested in the letter that we think 28 days from the last brief submitted by the party would be a reasonable time period.

So we are, from our perspective, here to discuss if and how we could be heard on that.

THE COURT: Okay. Mr. Cole, if you want to speak please.

MR. COLE: Yes, appreciate the opportunity.

Your Honor, so the procedural posture Mr. Postman outlined is correct. A couple of clarifications. What we sought in L.A. Superior Court, because we had no federal jurisdiction in the case, was to enforce the AAA rules that require the AAA to close a case if either party elects Small Claims Court. That is the procedural request we made, and Mr. Postman is correct that that is currently on appeal.

Mr. Postman is incorrect about what the motion for preliminary -- what the settlement agreement calls for in the preliminary approval request to Your Honor about his clients.

What it calls for is a stay of the case, an orderly class process. And if his clients validly opt out of the class, the arbitrations proceed. If they do not validly opt out, they

will be part of the class settlement.

THE COURT: Okay. So got that. So why wouldn't I do the following: Prior to the hearing on the preliminary approval, provide the parties with the opportunity of -- well, I have in hand Mr. Postman's objection to the -- to approval of the settlement or maybe I don't.

MR. POSTMAN: Your Honor --

THE COURT: Maybe I just sort of basically have a "This is where we are today."

Why wouldn't I -- hear me out -- why wouldn't I simply say: All right. What I want to do is give the parties -- the parties, you know, Intuit and I think Class Counsel -- the opportunity of addressing what impact, what effect, if any, do the -- I don't know, numerous arbitration proceedings or proceedings that are presently pending in the L.A. Superior Court or elsewhere have on the -- on the -- on whether I would issue preliminary approval.

And I don't -- obviously, I don't want to get into the merits because I really don't know the merits; okay. You know, this has been a bit of a confusing litigation. It has been -- started out by Intuit coming in and telling me: Yes, we must -- this is arbitration. This is arbitration. What are you doing, Judge? It is arbitration.

And now, of course, it looks like maybe Intuit is taking a different position or at least a modification of that position.

That's fine. Be that as it may, I'm not trying to pigeonhole a position that isn't subject to change. I mean, after all, we have had a -- we have had a Ninth Circuit opinion on it and subsequent motions in front of me.

So I think that landscapes always do change, but I don't think I'm in any position to grant or deny preliminary approval until the dust settles a bit, until I have a fairly clear idea, if I can have one -- and I may not be able to get one -- what is going to happen in the Los Angeles Superior Court. Is the Court of Appeals -- the State Court of Appeal going to -- going to grant or are they going to deny or reverse?

I don't know -- I don't know their procedural posture. I don't know what they call it exactly. We just call it win or lose in our -- in Federal court. I mean, you are either affirmed or you are reversed.

But they have all these Latin remedies that, of course, I didn't do -- well, I never took remedies in law school. Probably should have. Well, maybe I should have taken many other courses as well.

But, be that as it may, it seems to me, I don't want to be in the position where I rule on the preliminary approval until I have a much better idea of what is happening in connection with these matters. And I think everybody would be -- would think that's a good idea. You know, well, anyway, whether they do or not, that's my idea.

When I do a preliminary approval, it can mean any number of things. It can mean: Well, okay. I will hear all the objections at the final approval, but it also -- it also can mean that given the objections I have heard so far, it may or may not have some merit; but let's go ahead with the notice.

A lot of things actually happen once I grant preliminary approval. Intuit and the parties spend money. They spend time. They send out notices. They do all sorts of things, which, are in the ordinary course of an approval of a class action.

And it may be that that all will take place. I just don't feel that today or even by the 17th I'm really -- and maybe by the 17th, but as of today, my present thinking is I want -- I want to have -- to the extent it is possible, I want to know what the ground is and how firm the ground is as to all of these things because I think -- and no one would deny -- I think that how it ultimately plays out in the arbitration proceedings or in the State court proceedings may very well impact whether I would grant preliminary approval or send the parties back to the drawing board.

So that's my sense of it and it seems to me -- and I will call on you, Mr. Cole, it seems to me that I would -- I would invite your comments as to timing as distinct from the merits of the case.

I really don't want to get into the merits of the case or

the merits of the procedural -- the procedural merits. Too complicated. Too complicated for me right now.

And you are not asking me to do it actually. You are just asking me, you know, grant -- go ahead with the preliminary approval on the 17th.

So question, number one is: Do you think by December 17th we are going to be in a position to have a pretty firm idea of what the state -- what is the state of affairs with respect to the claims that are -- that are -- or the demands for arbitration, vis-a-vis Small Claims Court and so forth? Do you think we will be in that position? Yes? No? Maybe? Who knows? I don't know.

And if the answer is: Yes, we will be. And I can get sort of a general agreement, then I will just tell the parties to brief this issue once the -- once the Court of -- the State Court of Appeals rules. Just brief it.

MR. GIRARD: I want to be heard --

THE COURT: And tell me how it impacts. So maybe, Mr. Girard --

MR. GIRARD: Yes.

THE COURT: -- I haven't heard from you, or, Mr. Siegel, why don't you chime in here.

MR. GIRARD: Sure.

THE COURT: You tell me what you want to do. You are Class Counsel.

MR. GIRARD: Yeah, a couple things, Your Honor.

First of all, when we were in front of you back in October of last year, one of the really main points we talked about was the ongoing problem of people being unaware of the availability of this free filing option.

And we have been in discussions with Intuit's Counsel, beginning as early as the Rule 26(f) conference last year and in formal mediations with Judge Infante starting in April of this year. We had earlier settlement discussions. This is the culmination of an ongoing process.

And the settlement that we have reached provides that Intuit will mail notice at its expense. And on the very first page of that notice in bold is an explanation of how to go file for free under the IRS Free File program and a link to the website.

So we are going to be sending this to every member of this class. And we are coming up on tax season. So from our point of view, that is important relief; and it is timely and a lot of the value is in getting that out now.

As far as the monetary aspects of the settlement go, we have briefed those in the submission to Your Honor. We have complied with the Northern District guidelines laying out what we anticipate the claims rates will be; what we think the likely recovery to individuals will be and so forth. We think it is a favorable resolution.

We understand the need for briefing here. I think Mr. Postman has demonstrated that he is nothing if not quick on the draw. And we have certainly thought about these issues quite a bit.

From our point of view, we think this can happen on an expedited timetable and that this settlement will stand on its own merits.

And our concern is a little bit that our -- from our point of view, what Mr. Postman has done -- and he has every right to do this, and he is a fine lawyer -- but he has effectively solicited a class within the class and he is trying to operate -- he is here today, not on behalf of any individual but on behalf of an unidentified group of people.

And that's fine. He has ever right to and the settlement contemplates his clients can opt out, and they can be on their way to go resume their arbitrations. We understand that and think both of these can work in tandem here.

But we don't want that to move off the process of getting the settlement before the class.

THE COURT: Okay. So in sum, you are saying: Look, this all can be done --

MR. GIRARD: Exactly.

THE COURT: -- and keep the date of the 17th.

MR. GIRARD: That's right. And we are prepared to respond quickly. And I know he can do it as well.

THE COURT: Okay. So, let me turn to Mr. Cole as promised. Question: Putting all the merits aside, is this -- you know, is this something that you think I should take the December 17th date off calendar or do you think that we can move ahead and have the, quote, firmer ground in front of me before the 17th? What do you think?

MR. COLE: Your Honor, we would suggest moving forward on the 17th for two reasons.

THE COURT: Okay. Let me turn to you --

MR. COLE: One --

THE COURT: -- Mr. Postman. Give me a little bit better idea how you see the timetable.

MR. POSTMAN: Thank you, Your Honor.

I can be very concrete. I think the first question that we should answer or nail down is whether Intuit -- separately from Plaintiffs who filed the motion for preliminary approval -- also plans to file a brief in support of the motion.

I could imagine they might want to. I could imagine in some other similar factual context Defendants have submitted an expert report. So, I think that is important for us to know what --

THE COURT: Well, okay. As to that -- as to that, I'm allowing -- I would allow the Plaintiffs, the Defendants and you, Mr. Postman, all to file briefs.

MR. POSTMAN: Great.

THE COURT: So, I mean, I'm not directing -- I wouldn't direct Mr. Cole to file a brief. It is up to him. And I have never actually found any litigant particularly shy if given the opportunity to file something. So there it is.

MR. POSTMAN: I understand, Your Honor. If I operate on my guess about what will happen -- and Mr. Cole can correct me if I'm wrong -- I think a very logical way to deal with this would be: The State court is going to issue a tentative in a matter of days on our motion. The hearing is the 20th. And it is a PI, so I think the Judge will have a decision by next Thursday.

I think Intuit should submit any brief in support of the -- of the settlement here as soon as it would like to. My guess -- and I could be wrong -- is that it will be a lengthy submission with an expert declaration speaking to our role in all of this.

Our letter this morning was absolutely not anything substantive about the settlement. We have a lot to say, and I won't go into it unless, Your Honor, needs to know the --

THE COURT: Not now.

MR. POSTMAN: No, no. But if you would like me to elaborate on why it is complex, I can.

THE COURT: No, no. I assume it is complex.

MR. POSTMAN: I would just say, putting aside the

holidays, we absolutely would think we need four weeks to respond to the expert report, all the other moving pieces here. Responding with a two-page letter asking to be heard overnight is different from this important brief. This is an important case.

We are not asking for more time because of the holidays. We will make it work. But, you know, this case has been pending for over a year.

THE COURT: Okay. Well, let me ask Mr. Cole this.

MR. POSTMAN: We think four weeks --

THE COURT: Are you -- is there -- I'm a bit confused about the expert, why we need this expert and what the expert is going to say and so forth.

Are you contemplating a declaration from an expert or expert report or something in response to all of this that is happening?

MR. COLE: We are not contemplating filing anything regarding the preliminary approval motion, Your Honor. That is unopposed.

If I may say one thing about the State court action, so there are two State court actions. One is the Small Claims issue that Your Honor has heard. That has now moved up to the Court of Appeals. We are very unlikely to have any resolution of that before December 17 or before January 15th, which is when tax season opens and a lot of people start filing who need

a refund on their taxes. That is January 15th. We are not likely to have it.

There is a second L.A. Superior Court action that Mr. Postman filed. Once we filed the status conference statement -- request for a status conference, Your Honor, he filed an action seeking to opt out all of his clients before there was even a settlement. That, to me, puts the cart before the horse.

These issues should be before Your Honor as to whether or not he can opt out his clients, and that should not be decided by Judge Green in L.A.

This settlement is governed by Rule 23, and we should not be having a hearing in L.A. on whether or not there are opt-outs. That should be decided by Your Honor on December 17th.

MR. GIRARD: And, Your Honor, if I may, I guess I have the same sense that Mr. Cole does; that we are kind of jumping ahead procedurally to a position that I think is going to end up more confusing. If Mr. Postman wants to be heard -- and it seems like he should be heard -- isn't the first step for him to file a motion to intervene so we know who he is seeking to intervene on behalf of and for what purpose?

And then the proponents of the settlement, who are the parties to this action, can then respond to that.

And to the --

THE COURT: Well, okay. I don't disagree with that, Mr. Girard. I mean, I think there has to be a motion to intervene.

But I don't want to start cutting it in pieces in terms of timing because I think that one of the things that I'm concerned with -- and I said it on day -- at the beginning of this litigation -- is that we have to take a look at the clients; that is, the consumers.

And that has been everybody's concern. And I'm not saying you are not thinking about them. I'm just saying I want to get this thing, if it can be, fairly resolved before tax season starts.

MR. GIRARD: Exactly.

THE COURT: That may require expedited schedules. And I'm not going anywhere. And no one is going anywhere, by the way, unless you get a vaccine. Mr. Postman?

MR. POSTMAN: Thank you, Your Honor.

I vigorously dispute the characterization of Mr. Cole about what we are doing in the State court, but I will resist. I do not want to get into arguing the merits of that case.

I will put it very simply. If Intuit is also going to file a brief in support of the settlement, they should do so as soon as they are ready. We are not trying to slow them down.

And it seems like the only thing we are talking about -- you know, we can mechanically file the motion to --

THE COURT: Well, I don't quite understand that, Mr. Postman. I mean, the motion itself is a joint motion, as I understand it, for approval of a class action -- a settlement of a class action.

I mean, I have to assume that the views that are communicated in the motion for preliminary approval reflect -- not necessarily on the merits -- but reflect an agreement by the parties to resolve the action in a particular way.

So that sits there. You are challenging it. I mean, I think that's what you want to do. You want to challenge it. Or perhaps not. Or perhaps challenge a part of it or perhaps get a clarification of what it all means.

That's fair. I understand that. But to do it, you have to intervene -- I think you have to intervene. Not quite sure you do. Maybe if you represent one class member, maybe you have standing then to come in. I don't know.

But I do think that the way to proceed is to give you the first shot at it which would mean that I would ask you to file a motion to intervene, if you think appropriate, and any opposition or view or statement of views you have with respect to whether I should grant preliminary approval. And I think you should do so within a reasonably short period of time.

I don't think it is an evidentiary question at this point. You know, I don't think it is going to be a battle of the experts and so forth. It may become -- it may become a

question of whether the settlement itself is fair, just and reasonable. But I'm -- I'm a little loath to have a hearing before the hearing, if you understand what I'm saying. I mean, you know --

MR. POSTMAN: I appreciate that, Your Honor, and I'm certainly not suggesting a hearing before the hearing.

I respectfully think the approach I was headed toward would in the end be faster because I think what will happen -- if we file our motion to intervene and response, we will identify -- we are not trying to stop the settlement with regard to folks other than our clients.

And, frankly, we are not -- we are not, as Mr. Cole -- trying to preemptively opt them out. There are things in the settlement like in order to opt out, our clients need to sign in wet ink.

A client can submit a claim to be in the settlement online very easily; but to get out, you have got to sign in wet ink. You have got to do your settlement ID number. The injunction --

THE COURT: All of this --

MR. POSTMAN: My only point, Your Honor, is once we raise all of that, I fully expect that Intuit -- the motion, as I understand it, for preliminary approval was filed just by Plaintiff.

Once we -- in any event, once we file our motion to

intervene and response, I fully expect Intuit to want a separate, lengthy brief where --

THE COURT: We will see. We will see.

MR. POSTMAN: And then I would request a reply.

THE COURT: Well, everybody is going to get --

MR. POSTMAN: I just think --

THE COURT: Everybody is going to get the opportunity to say what they want to say about what is being said. Okay. That's not a problem. That's not a problem.

I would like to keep a tight timetable on it for the very reason that Mr. Girard has pointed out and that started two years ago or whatever it was. I think actually Intuit has changed its website. Is that correct, Mr. Cole?

MR. COLE: Yes, Your Honor.

And I know Your Honor has skepticism about Intuit. But having worked with the company for 20 years, I can ensure you that they are so focused on their customers. And that is part of candidly --

THE COURT: Well, I mean, that's fine. I really just want to get some dates here. So this is what -- my question to you, Mr. Postman, today is something. What is it?

MR. POSTMAN: November 13th.

THE COURT: I count the days since the election. How many -- what is it?

MR. SIEGEL: It is the 13th, Your Honor.

THE COURT: The 13th, all right. So can you file -- I don't really want to -- it is up to you. I mean, apparently you get up at 1:00 a.m. and write this letter, which was quite coherent. I mean, I'm not that coherent at 1:00 a.m. I'm not even that coherent at 10:00 a.m.

Be that as it may, how much time do you need? Because I want to keep the date of the 17th; okay. Now, I may have to change that in light of what you say or in light of what somebody else says.

I don't want to back into it. That is, I don't want to set up a schedule that will then put them at a disadvantage.

My question to you is: Whatever you want to say about the settlement, are you able to say that if you file your motion to intervene and attach to it your -- basically your reasons for being affected by it -- which is a merits brief in part -- are you able to do that if I say file on or before -- let me look at my calendar -- if I say that you should file on or before November 30th, that gives you -- I mean, it is up to you whether you want to have a pleasant Thanksgiving. But it does give you a substantial amount of time from the date that you believe you will have an opinion out on some of the issues by the Superior Court.

MR. POSTMAN: Your Honor --

THE COURT: Don't the Court of Appeals act pretty quickly on a writ of supersedeas or whatever it is? Don't

they -- it is emergency tactical relief, isn't it?

MR. POSTMAN: Your Honor, I think they will act quickly on the writ. Mr. Coleman had been referring to the full appeal but I think --

THE COURT: Well, that is a different issue.

MR. POSTMAN: I think you are right on the writ.

Respectfully, Your Honor -- and I'm happy to go into what we would need to brief here, but I think four weeks was not a bid in the hopes of trying to meet in the middle.

THE COURT: Anything anybody tells me is a bid.

MR. POSTMAN: I understand. And we were trying not to pack in extra times for the holidays either. But, I mean, three weeks -- putting aside one of these weeks is Thanksgiving week, I really respectfully think is more than reasonable given the trajectory of this case. December 17th is the date they put on their notice of hearing, but that is somewhat arbitrary. We have --

THE COURT: Well --

MR. POSTMAN: We have a lot of FAA issues.

You alluded to the Ninth Circuit's decision and the complete contradiction that Intuit has gone through, but that has complex legal implications that we will need to brief.

THE COURT: Well, I don't know how complicated it is. Let's do this -- as they like to say -- do your best. Get it in by November 30th, okay, with Intuit -- with anybody else,

which would be the Plaintiffs and Intuit -- responding in a week.

And then I will decide. I'm not deciding the preliminary approval. I will decide whether we can go ahead with the hearing on the preliminary approval on the 17th. Maybe we can't.

Now, here, I will give you an opportunity to reply; okay. Let me look at my calendar here.

So you do the 30th.

Intuit and any -- and the Class Counsel by the 7th with any response by Noon on the 11th.

MR. GIRARD: I appreciate that. I think, you know, from our point of view, I think it is important and I appreciate that you are holding the 17th. Because while I'm sympathetic to Mr. Postman, I think he could probably get this brief on file by the 20th.

THE COURT: I think so. Mr. Postman will do a fine job. I'm confident of that. Right, Mr. Postman? You will do a fine job. You are competent?

MR. POSTMAN: We will do a fine -- as fine a job as possible within the time --

THE COURT: You are a good lawyer. You are a very good lawyer. I'm sure you will do well. But you are surrounded by good lawyers. So there we are.

Okay. Anything further?

MR. COLE: Yes, Your Honor. We still have the issue of what is -- of the State court action next Friday.

And if Judge Green gets a head of Your Honor on a Federal settlement, then effectively it may end the settlement before there is a possibility for you to even consider it.

THE COURT: Well, you know what, if Judge Green gets ahead of me, he gets ahead of me. I'm not interfering at this point with any State court proceedings.

You know, Judge -- I'm not -- you know, I let -- let the State court deal with it as they see it. What will be presented to Judge Green, I suppose, is: Well, this is what -- this is what the Federal court is planning on doing.

It is up to you. You can represent as far as the Federal court is concerned, the State court should do whatever they think is appropriate under the circumstances.

MR. GIRARD: We have read that transcript, Your Honor; and my impression is that Judge Green was very sensitive to the limits of his authority when this Court is considering a class action settlement under Rule --

THE COURT: I must tell you, though, I'm not -- I'm even -- this will come as a surprise to you, Mr. Girard. I'm even more humbled in terms of the Federal court's power.

Having lived through *Volkswagen*, I am -- you know, I am mindful of the All Writs Act. I'm mindful of all sorts of things.

I generally like to see what State courts do. You know, they are the courts of general jurisdiction, you know. So I'm not about at this point going to tell the State court "don't decide this" or "do decide that."

It is entirely up to them. Entirely up to them. You know --

MR. GIRARD: Yes.

THE COURT: -- they run for election. I don't.

MR. GIRARD: Understood.

THE COURT: That's called the practical answer to any State Court Judge. Okay.

MR. COLE: Your Honor --

MR. GIRARD: Thank you.

MR. COLE: -- the practical impact of that is that if the State court decides to opt out Mr. Postman's clients, then we are unlikely to have a settlement; and --

THE COURT: Well, I don't know. I'm not going to stop a State court at this point.

MR. COLE: Okay.

THE COURT: I don't actually have that before me, by the way.

Now, if you think -- well, I'm not going to invite more motions. I don't know. Let's see what happens. And whatever State court does, it does. And you can respond to it either in State court or advising this Court. Okay.

MR. COLE: Thank you, Your Honor.

MR. GIRARD: Thank you, Your Honor.

THE COURT: Anything further?

MR. POSTMAN: No. Thank you, Your Honor.

MR. GIRARD: Thank you, Your Honor.

MR. COLE: Thank you, Your Honor.

THE COURT: All right.

(Proceedings adjourned at 10:41 a.m.)

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CERTIFICATE OF REPORTER

We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Friday, November 13, 2020

Marla Knox

Marla F. Knox, RPR, CRR
U.S. Court Reporter

Attachment E

Order Denying Preliminary Approval of Class Settlement

FTC Docket No. 9408

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHELE ARENA, et al.,

Plaintiffs,

v.

INTUIT INC., et al.,

Defendants.

Case No. 19-cv-02546-CRB

ORDER AND OPINION DENYING MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

A group of Plaintiffs brought a putative class action against Intuit, Inc., alleging that Intuit induced them into paying for its tax preparation services when they were entitled to use Intuit's free-filing option. The Court previously denied Intuit's Motion to Compel Arbitration, but the Ninth Circuit reversed. Plaintiffs, with support from Intuit, eventually moved for preliminary approval of a proposed settlement. The settlement would award claimants who expected to file for free, but ended up paying roughly $100 per year they filed, an estimated $28 assuming a 5% participation rate. It would also require Intuit to take various steps to inform consumers of the free file option.

In the meantime, many Intuit customers had filed individual arbitration demands against Intuit, exposing Intuit to multiple fees for each arbitration, leaving aside potential liability on the merits. The proposed settlement included a procedure by which these and other class members could opt out, and was contingent on the Court immediately enjoining individual arbitrations and any other parallel proceedings until the class member involved in those proceedings opted out. Some of the arbitration claimants moved to intervene in opposition to the proposed settlement, and the Court granted their motion on December 14, 2020. On December 17, 2020, the Court held a hearing and issued an order denying the

motion for preliminary approval. The Court delayed issuing an opinion at the parties' request. Because the parties have been unable to reach a settlement to date, the Court now provides its reasoning for denying the motion. The facts and reasoning set forth below were applicable when the Court issued its December 17, 2020 order:[1]

The Court denies the motion for preliminary approval because the proposed settlement is not fair, reasonable, and adequate under Rule 23(e)(2) of the Federal Rules of Civil Procedure. In particular, the proposed settlement provides class members with inadequate compensation and sets forth opt out procedures that unduly burden all class members, but especially those who have already begun to pursue claims through arbitration.

I. BACKGROUND

Intuit owns TurboTax, an online tax preparation service. Complaint (dkt. 1) ¶ 1. In 2002, Intuit and other tax preparation services agreed with the Internal Revenue Service to provide low-income taxpayers and active military members the option to file their taxes for free. Id. ¶¶ 15–16, 20. In exchange, the government promised to not enter the tax preparation software and e-filing services market. Id. ¶ 17. By staying out of that market, the government helps Intuit maintain its status as the dominant provider of e-filing services for all taxpayers, so long as Intuit offers free services to low-income taxpayers. Id. But Plaintiffs allege that instead of steering eligible taxpayers to its free-filing option, or simply letting customers find their way to it, Intuit misleadingly channeled free-filing eligible taxpayers to its paid services. Id. ¶ 3.

On May 12, 2019, Plaintiffs sued Intuit on behalf of themselves and other similarly situated individuals. Id. ¶ 47. They asserted claims for breach of contract and violations of various state consumer protection laws. Id. ¶¶ 62–110. On August 19, 2019, the Court appointed Daniel C. Girard of Girard Sharp LLP and Norman E. Siegel of Stueve Siegel Hanson LLP (collectively, "interim class counsel") as co-lead interim class counsel under

[1] The Court notes that the parties have not advised the Court of any material change beyond their failure to reach a settlement.

Rule 23(g)(3) of the Federal Rules of Civil Procedure. See Order Appt. Interim Class Counsel (dkt. 72).[2]

On October 28, 2019, Intuit moved to compel arbitration. See Mot. to Compel (dkt. 97). Intuit's terms of service ("Terms") contained an arbitration clause stating:

> "ANY DISPUTE OR CLAIM RELATING IN ANY WAY TO THE SERVICES OR THIS AGREEMENT WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT, except that you may assert claims in small claims court if your claims qualify . . . WE EACH AGREE THAT ANY AND ALL DISPUTES MUST BE BROUGHT IN THE PARTIES' INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING."

Sun Decl. (dkt. 97-3) ("Terms") at 4. On March 12, 2020, the Court denied Intuit's Motion to Compel Arbitration. See Order Denying Mot. to Compel (dkt. 141). But in August 2020, the Ninth Circuit reversed, holding that the arbitration clause must be enforced. See Dohrmann v. Intuit, Inc., 823 F. App'x 482 (9th Cir. 2020).

Plaintiffs had moved for class certification in January 2020, see Mot. to Certify Class (dkt. 116), but the parties have not fully briefed that motion, and the Court is yet to certify any class in relation to this case. Given the Ninth Circuit's ruling and the arbitration clause's prohibition on class arbitration, Plaintiffs' only path to obtaining class relief from this Court is via a settlement with Intuit (or, less likely, after a successful appeal to the U.S. Supreme Court).[3]

A. The Proposed Settlement

On November 12, 2020, Plaintiffs moved for preliminary approval of a settlement agreement with Intuit. See Mot. for Preliminary Approval (dkt. 162); Settlement

[2] Under Rule 23(g)(3), "[t]he court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action."

[3] Plaintiffs have indicated that they may file a petition for writ of certiorari. See Hearing Tr. (dkt. 206) at 30–31. Plaintiffs have also asserted that their arguments against the enforceability of the arbitration clause resemble those implicated by Henry Schein, Inc. v. Archer and White Sales, Inc., 141 S. Ct. 107 (2020) (granting a petition for writ of certiorari). See Hearing Tr. at 30. After this Court's hearing on the motion for preliminary approval, the Supreme Court dismissed the writ of certiorari in Henry Schein as improvidently granted. See 141 S. Ct. 656 (2021).

Agreement (dkt. 162-1). The proposed settlement class "consists of all persons within the United States who, from January 1, 2015 to November 20, 2020, paid to use TurboTax online in a year in which they were eligible to file for free with the TurboTax Free File Program." Mot. for Preliminary Approval at 6. But the proposed settlement class is narrower with respect to any monetary award, because in filing a claim for such an award, class members must sign an attestation that they paid a fee to Intuit when they "expected" to file for free. Id. at 7. The parties nonetheless estimate that the proposed class includes 19 million people. Id. at 6.

Under the proposed settlement, Intuit would pay a fixed sum of $40 million in exchange for the release of all claims that were or could have been asserted in this case. Id. "Notice and administrative expenses, as well as attorneys' fees, expense reimbursements and service awards approved by the Court, [would] be deducted from the settlement amount." Id. at 6–7. Class Counsel would seek "25% of the fund in attorneys' fees and reimbursement of litigation expenses," and each class representative would receive a $10,000 "service award." Id. at 7. The balance of approximately $28 million would be paid to settlement class members who, as discussed above, must sign an attestation that they paid a fee to Intuit when they "expected" to file for free. Id. at 7, 16. Class members who timely submit a valid claim would receive a "pro rata" cash award from the remaining pool, and class counsel expect that between 1% and 10% of settlement class members would submit claims. Id. at 8. Any unclaimed distributions would be paid to the settlement class members "who accepted or elected to receive a pro rata payment" until the settlement administrator determines that further distributions are not economically feasible. Id. at 8–9. Intuit asserts that "participating class members are expected to recover 20% to 50% of the average fees a taxpayer paid to use TurboTax online in a year they were eligible to file for free." Intuit Opp. to Mot. to Intervene (dkt. 189) at 3. On average, class members paid approximately $100 in filing fees in a given tax year. Mot. for Preliminary Approval at 16. At the "midpoint" of the estimated participation rate, each class member who files a claim "would receive about $28." Mot. for Preliminary

Approval at 17.

Under the proposed settlement, Intuit would also modify certain business practices. Mot. for Preliminary Approval at 7. As long as Intuit participates in the IRS Free File Program, "for up to three years," Intuit would:

1. "[A]dhere, to the fullest extent practicable, to the Federal Trade Commission's guidelines for online marketing";
2. "[D]isclose the existence of the IRS Free File Program and qualifications to file for free . . . on one or more webpages maintained as part of, and accessible from the homepage of, the intuit.turbotax.com domain, and provide information on how to participate in the [program], and . . . maintain a publicly available webpage on the same domain setting forth the forms and schedules not covered in the TurboTax free edition";
3. "[C]reate a minimum of three blog posts each tax filing season . . . on its commercial website informing consumers about the IRS Free File Program and linking to it";
4. "[S]end a minimum of six email reminders to returning IRS Free File Program . . . customers," until a customer "files their taxes" or "unsubscribes" from such emails; and
5. Not engage "in any practice that would cause the landing page" for the Free File Program "to be 'de-indexed' from organic internet search results."

Id. at 7–8.[4] In this sense, the proposed settlement would provide non-monetary relief to class members who, though eligible to file for free, did not expect to file for free and thus could not submit a claim.

The proposed Notice to the Settlement Class would also advise class members regarding the free file program. Id. at 8. Notice would be delivered to the email addresses that Intuit has on file, though a settlement class member who requests a mailed copy "or whose email address is no longer valid or otherwise results in a bounce-back message" would receive a mailed copy at the address that Intuit has on file. Id. at 9. Notice would also be available on a settlement website. Id.

The proposed settlement provides an opt out procedure for class members who wish neither to file a claim nor to be bound by the settlement. Such class members must

[4] The fifth promise to not de-index would have little, if any, practical effect because Intuit has already agreed with the IRS to not engage in such de-indexing. See Hearing Tr. at 39.

> send a written request to the Settlement Administrator providing their name, address, telephone number, e-mail address, and [wet-ink] signature; their unique identification number assigned by the Settlement Administrator; a statement that they are a member of the Settlement Class and wish to be excluded; and, if the [class member] has already filed an arbitration or lawsuit against Intuit, the relevant case name and number.

Id. at 10.[5]

The settlement comes with two contingencies. Intuit would "have the right to terminate the Settlement" if either "[1] the number of valid and timely opt-outs exceeds an amount agreed upon [by] Class Counsel and Intuit in a confidential side letter," which the parties would share with the Court, or [2] "the Court does not enjoin the commencement [or pursuit] of any additional actions or proceedings." Id.; see also id. at 21. To that end, Plaintiffs have requested that upon preliminarily approving the proposed settlement, the Court "temporarily" enjoin class members from commencing or pursuing "related proceedings," including arbitrations, until they have opted out of the settlement. Id. at 21. That injunction would go into effect immediately if the Court granted Plaintiffs' Motion for Preliminary Approval. See Proposed Order (dkt. 162-1) Ex. A at 8.

B. Related Arbitration Proceedings

The proposed settlement comes with certain unusual circumstances. Namely, tens of thousands of Intuit customers have already begun individually arbitrating analogous claims against Intuit. A total of approximately 9,000 customers filed demands for individual arbitration against Intuit with the American Arbitration Association (AAA) either on October 1, 2019, shortly before Intuit moved to compel arbitration, or January 28, 2020, while the parties were litigating whether Plaintiffs' claims must be arbitrated. See Postman Decl. (dkt. 178) ¶ 5. On March 11, 2020, the day before the Court denied Intuit's Motion to Compel Arbitration, another 31,000 customers filed arbitration demands. Id. More individual customer arbitration demands followed the Ninth Circuit's August 2020

[5] The proposed settlement also provides for an objection procedure through which Settlement Class Members may oppose final approval of the settlement. See Mot. for Preliminary Approval at 10–11.

ruling that the arbitration clause must be enforced: on October 9, 2020, approximately 17,000 additional customers filed demands for arbitration, and on October 23, 2020, approximately 70,000 more customers did the same. Id.

These arbitration claimants have retained the same law firm, Keller Lenkner LLC. They are all pursuing (1) consumer fraud claims under either their home state or California law, and (2) federal antitrust claims. Id. ¶¶ 6–9. Their claims arise from the same allegations that Plaintiffs' assert: Intuit deceptively "steered" them away from "the free option and toward its paid products." Id. ¶ 23. They pursue public injunctive relief along with damages and attorneys' fees amounting to an average of approximately $2,700. Id. ¶¶ 7, 9.

The individual arbitrations have had significant financial consequences for Intuit, with more costs on the horizon. AAA requires consumer claimants to pay an initial filing fee (or submit a hardship-based waiver request) and respondents to pay slightly larger filing fees. Id. ¶ 11; Costs of Arbitration, Effective Nov. 1, 2020 (dkt. 178-3); Costs of Arbitration, Effective Sept. 1, 2018 (dkt. 178-4). The relevant rules in place before November 1, 2020, required claimants to pay a $200 filing fee and the relevant business (here, Intuit) to pay a $300 filing fee for each arbitration. See Costs of Arbitration, Effective Sept. 1, 2018. The relevant rules in place after November 1, 2020 require claimants to pay a $50 filing fee and Intuit to pay a $75 filing fee for each arbitration. See Costs of Arbitration, Effective Nov. 1, 2020. In addition to its own filing fees, Intuit would be liable for a large chunk of the claimants' fees: Intuit's Terms state that Intuit will pay arbitration fees for claimants who are unable to do so, and "reimburse all such fees and costs for claims totaling less than $75,000 unless the arbitrator determines the claims are frivolous." Terms ¶ 14. And, from Intuit's perspective, it gets worse. In addition to these filing fees, AAA rules provide that the business (here, Intuit) must pay additional case management and arbitrator compensation fees for each arbitration. See Costs of Arbitration, Effective Nov. 1, 2020; Costs of Arbitration, Effective Sept. 1, 2018.

Roughly 37,000 claimants who filed arbitration demands in March 2020 and earlier

have collectively paid millions of dollars in AAA filing fees, advanced by Keller Lenkner; Intuit has paid millions in fees relating to those demands under protest, Postman Decl. ¶¶ 12–13, and appears obligated under the Terms to reimburse the fees paid by many claimants.[6] As of now, Intuit will also have to pay tens of millions in case management and arbitrator compensation fees. Id. ¶¶ 14–15. Intuit has made settlement offers to 101 of the individual arbitration claimants reflecting Intuit's calculation of their full out-of-pocket damages, and twenty-three of the claimants have accepted Intuit's offers. See id. ¶ 19.

In short, Intuit faces massive costs associated with the individual arbitrations, even before considering potential liability on the merits. Although Intuit questions whether Keller Lenkner is looking out for its clients' best interests, see Intuit Opp. to Mot. to Intervene at 6, the parties do not dispute that these individual arbitrations expose Intuit to enormous fees and costs. Intuit has acknowledged the bargaining advantage enjoyed by the arbitration claimants, who can effectively "threaten" Intuit "into paying $3,000 in arbitration fees, for a $100 claim." Hearing Tr. at 64. It is unclear whether Intuit considered this possibility when Intuit drafted the arbitration clause or litigated its enforceability.

Before AAA, Intuit has objected to the claimants' arbitration demands, the fees that Intuit must pay AAA, and AAA's neutrality. Postman Decl. ¶ 43. Intuit has also argued that its Terms of Service and AAA rules give Intuit the right to face the arbitration claimants' claims in small-claims court, rather than arbitration. Id. ¶ 44. AAA determined that Intuit's arguments raised questions of arbitrability, and that under the arbitration clause, individual arbitrators must decide such questions. Id. ¶ 45; Postman Decl. Ex. I (dkt. 178-9) at 17, 29–30, 35–36, 39–40, 48–50, 57–58. Thus, AAA determined that the individual arbitrations would go forward.

On June 12, 2020, Intuit sued "several thousand" arbitration claimants in California

[6] Intuit notes that Keller Lenkner withdrew roughly 8,300 of these initial demands. Intuit Opp. to Mot. to Intervene at 7. And the 88,786 October 2020 arbitration claimants have (to the Court's knowledge) not yet paid their filing fees. Id.

Superior Court. Postman Decl. ¶ 50; Case No. 20 STCV 22761 Order Denying Intuit Mot. for Preliminary Injunction (dkt. 178-10) at 1. Intuit sought a declaration that Intuit may choose to face their claims in small claims court, an order enjoining the arbitrations, a declaration that the claimants seek "de facto" class arbitration barred by Intuit's Terms, and a declaration that California Senate Bill 707 (which imposes sanctions on a party that drafted a consumer arbitration agreement, then fails to pay the fees necessary to proceed under such an agreement) is preempted by the Federal Arbitration Act. Postman Decl. ¶ 50. On September 2, 2020, Intuit sought a preliminary injunction staying the arbitrations. See id. ¶ 51. On October 8, 2020, the Superior Court denied Intuit's motion and held that the arbitrations must proceed. See Case No. 20 STCV 22761 Order Denying Intuit Mot. for Preliminary Injunction at 16. On October 26, 2020, Intuit appealed the Superior Court's decision, and on October 27, 2020, Intuit filed a petition for a writ of supersedeas from the California Court of Appeal. Postman Decl. ¶¶ 53, 54. The Court is unaware of any material developments regarding the petition.

On October 28, 2020, the arbitration claimants asked the Superior Court to enjoin Intuit from agreeing to a settlement with Plaintiffs that includes the arbitration claimants and that burdens their right to opt out. Id. ¶ 56. Before the Superior Court ruled on that motion, Intuit and Plaintiffs' counsel agreed to a preliminary settlement, and Plaintiffs' counsel filed the Motion for Preliminary Approval at issue here. Id. ¶ 57. On November 20, 2020, the Superior Court orally denied the arbitration claimants' motion as moot given the proposed settlement agreement, stating that the Superior Court would not interfere with this Court's proceedings. Id. ¶ 59; Superior Court Hearing Tr. (dkt. 178-11) at 5.

C. Recent Procedural History

On November 30, 2020, nine arbitration claimants ("Intervenors") moved to intervene under Rule 24 of the Federal Rules of Civil Procedure. See Mot. to Intervene (dkt. 177) at 8. On December 14, 2020, the Court granted that motion. See Order Re Mot. to Intervene & Amicus Br. (dkt. 199) at 2.

Also on November 30, 2020, the Los Angeles City Attorney's Office (LACA) and

County Counsel for the County of Santa Clara (SCCC) moved to file a joint amicus brief opposing the proposed settlement and to participate in oral argument. See Mot. to File Amicus Br. (dkt. 176). On December 14, 2020, the Court granted that motion as well. See Order Re Mot. to Intervene & Amicus Br. at 1.

On December 14, 2020, the Court received a letter from the Attorneys General of New York, Tennessee, Florida, Illinois, New Jersey, North Carolina, Pennsylvania, Texas, and Washington. See AG Letter (dkt. 198). The letter noted that, in its opposition to Intervenors' motion to intervene and Amici's motion for leave to file an amicus brief, Intuit "twice remark[ed] that State Attorneys General have not intervened in this action or objected to the settlement." Id. The letter clarified that "a lack of affirmative action taken by the Attorneys General does not indicate approval of this settlement." Id.

On December 17, 2020, the Court held a hearing and issued an order denying the motion for preliminary approval. See Order Denying Mot. for Preliminary Approval (dkt. 202). The Court explained that an opinion would follow in due course. Id. In the meantime, Plaintiffs, Intuit, and Intervenors unsuccessfully attempted to settle. See Minute Entry (dkt. 213). The Court now provides its opinion.

II. LEGAL STANDARD

"'[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.'" Allen v. Bedolla, 787 F.3d 1218, 1223 (9th Cir. 2015) (quoting In re Syncor ERISA Litig., 516 F.3d 1095, 1101 (9th Cir. 2008)). Nevertheless, Rule 23(e) of the Federal Rules of Civil Procedure requires courts to approve any class action settlement. "[S]ettlement class actions present unique due process concerns for absent class members." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). As such, "the district court has a fiduciary duty to look after the interests of those absent class members." Allen, 787 F.3d at 1223 (collecting cases).

To approve a proposed settlement before a class has been certified, the Court must determine that it "will likely be able to . . . approve the proposal under Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(1)(B); see also Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir.

2003) (explaining that to approve a settlement agreement reached prior to class certification, the court must assess "whether a class exists" and "whether a proposed settlement is fundamentally fair, adequate, and reasonable") (citation omitted). Thus, if the proposed settlement does not satisfy Rule 23(e), the Court must deny Plaintiffs' motion for preliminary approval regardless whether the proposed class could be certified.

Rule 23(e) is responsive to the peculiar nature of class actions, which may result in absent class members unwittingly releasing claims against a defendant to facilitate a settlement. Courts have "long recognized" that class action settlements "present unique due process concerns for absent class members." In re Bluetooth Headset Prods. Liability Litig., 654 F.3d 935, 946 (9th Cir. 2011) (citation omitted). For example, there is always the risk that class counsel will "collude" with defendants, "tacitly reducing the overall settlement in return for a higher attorney's fee." Id. (citation omitted). That is why Rule 23(e) of the Federal Rules of Civil Procedure permits class actions to be settled "only with the court's approval." Fed. R. Civ. P. 23(e).

Further, a court may give such approval "only after a hearing and only on finding that" the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Whether a proposed settlement is fair, reasonable, and adequate depends on factors that "will naturally vary from case to case." In re Bluetooth, 654 F.3d at 946. But courts "generally" must consider the following factors:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Id. (quoting Churchill Vill., LLC v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004)).

When a "settlement agreement is negotiated prior to formal class certification, consideration of these eight Churchill factors alone is not enough." Id. (emphasis in original). Before class certification, "there is an even greater potential for a breach of

fiduciary duty owed the class during settlement." Id. And because "[c]ollusion may not always be evident on the face of a settlement," courts must examine whether there are "more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." Id. at 947.

Courts need not assess all these fairness factors at the preliminary approval stage. See Alberto v. GMRI, Inc., 252 F.R.D. 652, 665 (E.D. Cal. 2008). Rather, "the preliminary approval stage [i]s an 'initial evaluation' of the fairness of the proposed settlement made by the court on the basis of written submissions and informal presentation from the settling parties." In re High-Tech Empl. Antitrust Litig., 2013 WL 6328811, at *1 (N.D. Cal. Oct. 30, 2013) (citing Manual for Complex Litigation (Fourth) § 21.632). At this stage, "[p]reliminary approval of a settlement is appropriate if 'the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.'" Ruch v. AM Retail Grp., Inc., 2016 WL 1161453, at *7 (N.D. Cal. Mar. 24, 2016) (quoting In re Tableware, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)).

III. DISCUSSION

The Court concludes that the proposed settlement does not satisfy Rule 23(e) because it is not fair, reasonable, and adequate. Therefore, the Court denies Plaintiff's motion for preliminary approval. The Court need not consider whether it would likely be able to certify the proposed class, or subsidiary issues like whether the proposed class satisfies Rule 23(a)'s four initial requirements, Rule 23(g)'s adequacy of counsel requirement, and Rule 23(b)(3)'s predominance requirement.

At every step of the Court's Rule 23(e) analysis, the Court bears in mind the stakes for different members of the proposed class. First, the arbitration claimants, like Intervenors, would be subject to an immediate injunction and must opt out of the settlement to continue pursuing their arbitration claims. These claimants may benefit from the settlement if the $28 they would recover by filing a claim exceeds their expected net

recovery through arbitration. Given Intuit's weak bargaining position in the arbitration proceedings, it would likely be economically irrational for arbitration claimants with legitimate claims to participate in the proposed settlement. Thus, the proposed settlement's primary effect on arbitration claimants is to stall their arbitrations until they comply with the proposed opt out procedures. And if arbitration claimants both fail to opt out of the settlement and fail to file a settlement claim, they get nothing. Second, there are class members who may recover via government enforcement actions against Intuit. Whether the proposed settlement harms these people depends on whether it could preclude or limit their recovery in government enforcement actions—a complex question that the parties and Amici dispute. See, e.g., Amicus Br. (dkt. 176-1) at 11–15; Plaintiffs' Opp. to Mot. to Intervene (dkt. 188) at 4. Third, there is the rest of the class. Because the Ninth Circuit has held that Plaintiffs' claims against Intuit must be arbitrated, there is no realistic way for these class members to recover in Court or as a class except via settlement, the remote possibility of a successful appeal to the U.S. Supreme Court notwithstanding. Under the proposed settlement, these class members could either submit a claim, opt out and pursue individual arbitrations, or get nothing.

The proposed settlement, when considered in context, does not fall "within the range of possible approval." Ruch, 2016 WL 1161453, at *7. In these unique circumstances, "the amount offered in settlement" is plainly inadequate, and many class members have justifiably had a negative "reaction" to the proposed settlement's opt out procedures, which expose a significant segment of the class to undue burdens. See In Re Bluetooth, 654 F.3d at 946. These considerations persuade the Court that the proposed settlement would be unfair to a portion of the class, inadequate as to the entire class, and thus not susceptible to approval under Rule 23(e).

A. Adequacy of the Settlement Award

As discussed above, the proposed settlement would provide $28 million in monetary compensation for claimants who attest that the paid Intuit a fee after they "expected" to file for free. Mot. for Preliminary Approval at 7, 16. Class members paid

approximately $100 in filing fees in a given tax year. Id. at 16. At the "midpoint" of the estimated settlement participation rate, claimants "would receive about $28." Id. at 17.

That monetary compensation is inadequate for several reasons.

First, the Court is unable to conclude that the compensation is adequate relative to Intuit's potential exposure. This is due in part to Plaintiffs' failure to provide a definite estimate of that exposure. Admittedly, the Northern District of California's Procedural Guidance for Class Action Settlements indicates that a motion for preliminary approval should state "the potential class recovery if plaintiffs had fully prevailed on each of their claims," N.D. Cal. Proc. Guidance for Class Action Settlements, available at https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/ (updated December 5, 2018), and this guideline does not apply here, where Plaintiffs' loss at the Ninth Circuit means there is no potential for class recovery in court. That said, given that the proposed settlement would bar arbitration and other parallel proceedings arising from the same claims, and may preclude participation in state enforcement actions, see Plaintiffs' Opp. to Mot. to Intervene at 4 (acknowledging this "possibility"), it is difficult to evaluate the proposed settlement's fairness without a concrete estimate of Intuit's potential exposure in those proceedings. The Court is left to do a back-of-the-envelope calculation: for a projected class of 19 million people, who paid an average of $100 per-year for at least one year, a conservative estimate of Intuit's potential liability is $1.9 billion. See Amicus Br. at 8. Under the proposed settlement, class members would recover just 1.5% of that, and neither Plaintiffs nor Intuit has pointed to a case involving a comparably low recovery in similar circumstances.

Second, as measured by settlement claimants' expected recovery, the damages award is plainly inadequate. Such recovery would constitute just 28% of damages for class members who paid to file for one year, and less for those who paid to file for multiple years.[7] The motion for preliminary approval rests this low recovery on Intuit's supposed

[7] As discussed below, the Court rejects the premise that class members could have suffered harm for no more than one year.

"robust set of defenses." Mot. for Preliminary Approval at 15. Needless to say, the Court is dubious given Intuit's apparent deception of eligible customers and applicable consumer protection law. In short, Intuit is a massive company that dominates the tax-filing space; it has no excuse, financial or otherwise, for undercompensating this class to avoid facing claims in arbitration.

As to both Intuit's potential exposure and the settlement claimants' expected recovery, Intuit argues that $28 is better than nothing, and without a settlement, many class members will get nothing. See Hearing Tr. 63. That is the wrong way of approaching the question. The Court need not evaluate the settlement's fairness in a judicial vacuum. Despite the Ninth Circuit's decision to enforce the arbitration clause, class members' individual claims still have value, as evidenced by (among other things) Intuit's willingness to settle in exchange for the release of those claims. The value of those claims is not negated by class members' inability to pursue them in this forum without a settlement given the availability of other forums, including arbitral forums. Thus, it remains worthwhile for the Court to compare the proposed compensation with awards in other cases, and in relation to the harm that class members suffered.

It also bears emphasizing that here, that harm is significant. Mostly low-income class members suffered at least $100 in damages. For class members who paid filing fees over multiple years, the harm was much more. And for a family or individual with limited disposable income, $100-per-year can have a material effect. It might be the difference in whether someone can pay rent for a month or buy groceries for a week. A small award, like $28, may also be meaningful to these same low-income class members. But it will not mean much. Otherwise, more than an estimated 5% of the class would participate in the settlement.[8]

Third, the proposed settlement fails to account for obvious and important

[8] This deficiency cannot be cured by a higher-than-expected participation rate, because as the number of claimants goes up, the $28 million pie will be split among more people, leading to a lower award per claimant. See Mot. for Preliminary Approval at 16–17.

differences among large groups of class members. Strangely, the proposed settlement provides for the same award regardless whether a class member paid fees for more than one year. Plaintiffs' argument that "eligible free-filers who paid a TurboTax fee in more than one year . . . arguably should have known they would be charged in the subsequent year," Mot. for Preliminary Approval at 14, hardly resolves the matter. Plaintiffs have characterized this action as "a bait-and-switch case." Hearing Tr. at 32. A person induced into paying for services that the person initially expected to get for free, and who continues to pay for those services annually, can trace the cumulative harm suffered back to the initial deception. Without that deception, the person would have known they could file for free from the start, and presumably would have done so each year. The proposed settlement also fails to account for arbitration fees already paid by class members; fees that Intuit appears obligated to reimburse. See supra Part I.B; Hearing Tr. at 64. Neither Plaintiffs nor Intuit have explained how releasing Intuit's liability for those fees would be fair to class members who brought claims in arbitration after Intuit insisted on proceeding in that forum.

The proposed settlement's non-monetary relief cannot overcome these inadequacies, and the Court may not trade-off the interests of some class members for others. Plaintiffs have pointed out that the proposed settlement would secure what Plaintiffs characterize as "very important injunctive relief" for the class. Hearing Tr. at 27. But this injunctive relief cannot make up for an apparent shortfall in monetary compensation when class members suffered financial harm. Similarly, Intuit has argued that Keller Lenkner represents the interests of roughly 125,000 class members, but that without a settlement here, "950,000 or more" class members who might otherwise participate in the proposed settlement would "get nothing." Hearing Tr. at 63. Rule 23(e) does not permit the Court to conduct this sort of utilitarian balancing. Indeed, the Court may not approve a proposed settlement when certain class members' interests have been elevated above others. See In re Bluetooth, 654 F.3d at 947. If class actions are to work—and people not before the Court are to be bound by settlements—the Court must

vigorously look out for all class members, not to mention large segments of the class. See Hanlon, 150 F.3d at 1026. Because the full scope of relief must be fair and adequate for all involved, see Fed. R. Civ. P. 23(e), the proposed settlement does not satisfy Rule 23(e).

B. Fairness and Reasonableness of the Opt Out Procedures

As discussed above, pre-class certification settlements are subject to heightened scrutiny. See In re Bluetooth, 654 F.3d at 946. And here, where there is good reason to think that the proposed settlement will seriously burden many arbitration claimants (and perhaps others who could benefit from government enforcement actions), the Court must be especially wary of unequal treatment among class segments. See id. at 946–47. To that end, any settlement here must permit class members to opt out in a manner that is straightforward and respectful of their existing claims. The proposed settlement falls short in this regard as well.

The proposed opt out procedures contain several troubling features. Intervenors argue that the opt out process is unduly burdensome because it requires (1) a "wet-ink" (not electronic) signature, (2) opt outs to be mailed in hard copy (though claims may be filed online), (3) a unique settlement ID, even though such an ID is not required to participate in the settlement, and (4) a case number for parallel proceedings, even though many arbitration claimants have not yet been assigned a case number. Mot. to Intervene at 16–19, 24. Intervenors also point out that the opt out procedure does not permit opting out through counsel. Plaintiffs argue that these procedures are common, and that permitting opt out through counsel could result in class members not making individualized decisions regarding their best interests. See Plaintiffs' Opp. to Mot. to Intervene at 9–14.

The Court concludes that the opt out requirements in the proposed settlement are unduly burdensome given the unique circumstances of this litigation. Setting aside the dispute about mass opt outs through counsel—which the Court need not resolve—requiring these class members to opt out by mailing a hard copy letter with a "wet-ink" signature serves little purpose but to burden those who wish to opt out. In a world where Intuit can not only administer settlement claims electronically, but also facilitate safe, legal

tax-filing electronically, Intuit can assuredly process opt outs electronically. If electronic signatures are enough for Intuit and the IRS during tax season, they should be enough for Intuit here.

Other class action settlements featuring wet-ink signature and mail-in requirements show why such requirements are inappropriate here. For example, this Court approved an opt out procedure requiring class members to mail "a signed, written request" during the Volkswagen clean diesel litigation. In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., No. MDL 2672 CRB (JSC), 2017 WL 672727, at *10 (N.D. Cal. Feb. 16, 2017). Those class members, however, would be opting out of a settlement that awarded claimants consistent with their full "possible recovery" if they proceeded to litigate—typically at least thousands of dollars. Id. at *19. Similarly, another Northern District of California court approved opt out procedures requiring class members to "personally sign" their opt out statements "in ink." del Toro Lopez v. Uber Techs., Inc., No. 17-CV-06255-YGR, 2018 WL 5982506, at *21 (N.D. Cal. Nov. 14, 2018). Those class members would be opting out of a settlement that awarded roughly $23,800 per class member. del Toro Lopez v. Uber Techs., Inc., No. 17-CV-06255-YGR Mot. for Preliminary Approval (dkt. 33) at 19. In both instances, opting out would be financially risky at best and economically irrational at worst. And in those circumstances, relatively burdensome procedures would promote careful deliberation before class members made a choice that could haunt them financially.

Here, the inverse is true. For tens of thousands of class members who are arbitrating claims against Intuit, opting out is the obvious financial choice. For everyone else, missing out on an expected $28 will not materially change their lives. That does not mean class members should be encouraged to opt out without deliberation, or (necessarily) that counsel should be able to opt out arbitration claimants en masse. But it does mean that class members should not face onerous burdens that, in this context, appear designed to

suppress opt outs.[9]

The opt out procedures are still more troubling given that the proposed settlement is contingent on the Court issuing an immediate injunction. "A court's preliminary approval of a proposed class settlement—in and of itself—has no effect on parallel actions." 4 Newberg on Class Actions § 13:19 (5th ed. 2011). But sometimes, proposed preliminary orders seek "so-called antisuit injunctions." Id. Usually such injunctions, if granted, halt parallel litigation in other federal and state courts. See id. Such injunctions raise serious concerns. "[P]erhaps most importantly, at the preliminary stage of a class action settlement, the court has not given notice to the class, not heard objections to the settlement, not weighed the settlement's strengths and weaknesses in an adversarial setting, and likely not finally certified a class." Id. Thus, although courts sometimes "simply sign the moving parties' proposed preliminary approval order without focusing on the fact that they are thereby enjoining parallel litigation," issuing such an injunction at the preliminary approval stage "would be an extraordinary measure best reserved for extraordinary circumstances." Id.

These same concerns apply here. Given Congress's instruction that the Court respect the enforceability of arbitration agreements, see 9 U.S.C. § 2, it makes no difference that many of the affected proceedings would be individual arbitrations, not court cases. The proposed immediate injunction would halt all parallel proceedings until class members complied with the onerous opt out procedures described above. To the extent that "extraordinary" circumstances could support enjoining parallel proceedings, that is not the case here, where the circumstances caution against interfering with proceedings brought by tens of thousands of class members before a class has been finally certified, or

[9] Plaintiffs and Intuit rely heavily on In re CenturyLink Sales Practice Litig. See 2020 WL 869980 (D. Minn. Feb. 21, 2020); 2020 WL 3512807 (D. Minn. June 29, 2020). That out-of-district case does not persuade the Court to approve this settlement. There, the opt out procedure did not require a wet-ink signature or a case number for parallel proceedings like arbitrations. See Order Preliminarily Approving Class Settlement at 5, In re CenturyLink Sales Practice Litig. No. 17-md-02795-MJD-KKM (Jan. 24, 2020), ECF No. 528. And the District of Minnesota discussed the importance of individual signatures in response to Keller Lenkner's attempt to submit a "mass opt out" list, 2020 WL 3512807, at *2, *3, an issue this Court need not reach.

a settlement finally approved. Those class members have an obvious, non-speculative incentive to opt out of the settlement and continue proceeding through arbitration.[10] Thus, although enjoining parallel proceedings may ultimately be necessary to achieve a global resolution of this controversy, the Court declines to do so at this stage, in these unique circumstances.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary approval is denied.

IT IS SO ORDERED.

Dated: March 5, 2021

CHARLES R. BREYER
United States District Judge

United States District Court
Northern District of California

[10] The Court need not decide whether it has power to enjoin the parallel arbitrations. See Mot. to Intervene at 10 (citing 9 U.S.C. § 2).