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

RESPONSE TO INTUIT INC.'S NOTICE OF SUPPLEMENTAL AUTHORITY

Intuit Inc.'s (the "Respondent" or "Intuit") Notice of Supplemental Authority ("Intuit's Notice") is improper and should not be considered because the case it cites could have been raised in Intuit's principal briefing. Even if considered, the supplemental authority submitted by Intuit is inapposite and has no bearing on this proceeding.

I. Intuit's Supplemental Authority Should Not Be Considered As It Could Have Been Raised In Intuit's Reply

Intuit's Notice is essentially an impermissible surreply and should be stricken as such. The parties had an opportunity to file reply briefs. The deadline for filing post-trial concurrent reply briefs was June 20, 2023. Order On Post-Trial Filings at 1. Surreply briefs were neither contemplated by the Order On Post-Trial Filings, *id.*, nor the rules, 16 C.F.R. §3.46(a). Generally, surreply briefs are "permitted only in circumstances where the parties wish to draw the Administrative Law Judge's or the Commission's attention to recent important developments or controlling authority that *could not* have been raised earlier in the party's principal brief." *See generally*, 16 C.F.R. §3.22(d) (emphasis added). Intuit's Notice of Supplemental Authority does not meet this standard. First, the supplemental authority submitted by Intuit, *McGinity v. Procter & Gamble Co.*, 69 F.4th 1093 (9th Cir. 2023), was filed on June 9, 2023—eleven days before Intuit's post-trial reply brief was due. The opinion would have been immediately available online; it was also designated for publication and was expeditiously reported in the Federal Reporter. Not only *could* Intuit have included this case in its post-trial reply brief, but it had

ample opportunity to do so.[1] Second, Intuit's supplemental authority is not controlling authority in that it does not address claims brought under the FTC Act. Instead, it addresses the "reasonable consumer" standard applicable under California's Unfair Competition Law, California's False Advertising Law, and California's Consumers Legal Remedies Act. 69 F.4th at 1096–97. As explained more fully below, this standard, as applied in *McGinity*, is materially different from the standard that applies in consumer protection cases, like this one, brought under Section 5(a) of the FTC Act. As further explained below, Intuit's supplemental authority is inapposite and in no way detracts from Professor Novemsky's survey and his expert report and testimony in this case.

II. Intuit's Supplemental Authority is Inapposite and Does Not Detract from Professor Novemsky's Survey and Expert Testimony in this Case

Assuming, arguendo, that Intuit's Notice is permissible, it does not support Intuit. *McGinity* is inapposite. In applying the "reasonable consumer" standard under the applicable California statutes, the court in *McGinity* deviates materially from the standard that applies in FTC consumer protection cases, like this one, brought under Section 5(a) of the FTC Act. The table below identifies key differences between the California "reasonable consumer" standard as applied in *McGinity* and the standard that applies in this case brought under Section 5(a) of the FTC Act:

FTC Act	***McGinity***
"Liability may be imposed if at least a significant minority of reasonable consumers would be likely to take away the misleading claim." *Fanning v. FTC*, 821 F.3d 164, 170-71 (1st Cir. 2016) (quoting *In re Telebrands Corp.*, 140 F.T.C. 278, 291 (2005), *aff'd*, *sub*	"[T]he reasonable consumer standard requires a probability 'that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.'" 69 F.4th at 1097 (emphasis added).

[1] Intuit claims that its "counsel did not become aware" of the supplemental authority "until after filing its post-trial reply brief." Intuit's Notice at 1 n. 1. Beyond that, it offers no authority that permits its filing, and no explanation why it failed to cite an opinion that was published online eleven days before its post-trial reply brief was due. Moreover, *McGinity* affirmed a United States District Court order granting a motion to dismiss that relied on the same reasoning and was available on Westlaw in 2021—more than a year before Intuit's post-trial reply brief was due. *See McGinity v. Procter & Gamble Co.*, No. 4:20-cv-08164-YGR, 2021 WL 3886048 (N.D. Cal. Aug. 31 2021). Yet neither Intuit's pre-trial nor post-trial briefing mentions it.

nom Telebrands Corp. v. FTC, 457 F.3d 354 (4th Cir.2006)) (cleaned up) (emphasis added).	
"If a claim conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if nonmisleading interpretations are possible." *Fanning*, 821 F.3d at 170-71 (quoting *Telebrands*, 140 F.T.C. at 291) (cleaned up); *see also Resort Car Rental Sys., Inc. v. FTC,* 518 F.2d 962, 964 (9th Cir. 1975) ("Advertising capable of being interpreted in a misleading way should be construed against the advertiser."); Deception Policy Statement, at 178 ("To be considered reasonable, the interpretation or reaction does not have to be the only one. When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.").	Resolving "ambiguity" in meaning of messaging on package labeling in favor of the advertiser. 69 F.4th at 1097–98.

Moreover, nothing in the *McGinity* opinion diminishes Professor Novemsky's work in this case, including the results of the perception survey. The Ninth Circuit's critique of the survey in *McGinity* is cabined to flaws in "the particular survey" at issue in that case. 69 F.4th at 1100. In fact, the court makes clear that "consumer surveys may well be relevant and helpful in other cases," such as this one. *See id.*

Unlike the Intuit case which involves a pervasive multi-modal, multi-year advertising and marketing campaign with an unambiguous "free" claim, *McGinity* involved an allegedly misleading product label for shampoo and conditioner in which there was "some ambiguity as to what 'Nature Fusion' means." 69 F.4th at 1095–96, 1098. Thus, the survey in *McGinity* was attempting to measure a more ambiguous and discrete claim allegedly occurring on product packaging at the point of sale—grocery stores. *Id.* at 1096. For this reason, comparing the survey in *McGinity* to the survey in this case is not informative.

Additionally, if anything, *McGinity* confirms the reliability of Professor Novemsky's survey, which does not suffer from any of the flaws identified regarding the *McGinity* survey. The primary flaw in the *McGinity* survey was the failure to show survey respondents disclosures that appeared on the back label of the product, which the Court determined meant that the survey

did "not adequately address the primary question in this case." *Id.* at 1099–100. By contrast, Professor Novemsky's perception survey measures both the primary messaging in Intuit's free TurboTax campaign and Intuit's disclosures, including the "simple tax returns only" language Intuit often used. (*See, e.g.*, FF-538, RFF-323).[2] Unlike the *McGinity* survey which didn't "address the primary question" in the case, Professor Novemsky's perception survey goes to the crux of the issue: whether consumers ineligible for the TurboTax free offer had the misimpression they could file for free using TurboTax based on Intuit's advertising. (*See* FF-480, FF-504—FF-505). Intuit's untimely attempt to submit inapposite supplemental authority cannot change that.

Respectfully submitted,

Dated: July 5, 2023

/s/ Rebecca Plett

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[2] References to the existing post-trial filings are abbreviated as follows:
FF – Complaint Counsel's Proposed Findings of Fact
RFF – Complaint Counsel's Reply to Intuit's Proposed Findings of Fact

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2023, I electronically filed the foregoing Response to Intuit Inc.'s Notice of Supplemental Authority electronically using the FTC's E-Filing system, and I caused the foregoing document to be sent via email to:

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Administrative Law Judge

I further certify that on July 5, 2023, I caused the foregoing document to be served via email on:

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