

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

_____)	
In the Matter of)	
Intuit, Inc.,)	
a corporation,)	Docket No. 9408
Respondent.)	
_____)	

**ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT’S MOTION TO COMPEL RESPONSES
TO INTUIT’S FIRST SET OF INTERROGATORIES**

I.

On October 19, 2022, Respondent Intuit, Inc. (“Respondent” or “Intuit”) filed a Motion to Compel Responses to Intuit’s First Set of Interrogatories (“Motion”). Federal Trade Commission (“FTC”) Complaint Counsel filed an Opposition (“Opposition”) on October 26, 2022. Upon full consideration of the Motion and Opposition, and as further set forth below, the Motion is GRANTED in part and DENIED in part.

II.

Pursuant to Commission Rule 3.31(c)(1): “Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1). Discovery shall be limited if the Administrative Law Judge determines that it is “unreasonably cumulative or duplicative,” or the “burden and expense of the proposed discovery . . . outweigh its likely benefit.” 16 C.F.R. § 3.31(c)(2)(i), (iii). “Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied.” *In re Daniel Chapter One*, 2009 WL 569694, at *2 (F.T.C. Jan. 9, 2009). If a party fails to comply with any discovery obligation under the rules, Rule 3.38 authorizes the opposing party to seek an order compelling such compliance. “Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that . . . [responses] be made.” 16 C.F.R. § 3.38(a).

“The purpose of interrogatories is to narrow the issues and thus help determine what evidence will be needed at trial and to reduce the possibility of surprise at the trial.” *In re Union Oil Co. of California*, 2003 WL 21672867, at *2 (F.T.C. July 8, 2003) (*quoting In re TK-7 Corp.*, 1990 FTC LEXIS 20, *1-2 (March 9, 1990)). The Commission’s Rule on interrogatories requires that each interrogatory be answered “fully.” 16 C.F.R. §3.35(a)(2).

To answer some of Intuit’s interrogatories fully requires Complaint Counsel to provide Intuit with facts supporting its contentions.¹ *In re N. Texas Specialty Physicians*, 2003 WL 22936410, at *1-2 (F.T.C. Dec. 4, 2003); *In re MSC.Software Corp.*, 2002 WL 31433929, at *1 (F.T.C. Feb. 21, 2002). However, though contention interrogatories are authorized under Commission Rule 3.35(b)(2), they “need not be answered until after designated discovery has been completed, but in no case later than 3 days before the final prehearing conference.” 16 C.F.R. § 3.35(b)(2); *In re Impax Labs., Inc.*, 2017 WL 2570856, at *2-3 (F.T.C. June 12, 2017).² In addition, a party is under a duty to supplement a discovery response with subsequently acquired information, where such information renders the prior response incomplete or incorrect, or if otherwise ordered by the Administrative Law Judge. 16 C.F.R. § 3.31(e)(1)-(2).

III.

Intuit seeks an order requiring Complaint Counsel to provide further responses to Interrogatories 1-8, 10, 11, and 13-15. The above legal standards are applied to the challenged responses to the Interrogatories.

A. Interrogatory 1

Interrogatory 1 requests that Complaint Counsel “identify every advertisement or communication by Intuit regarding TurboTax Free Edition that you claim in this lawsuit to be deceptive.” Motion, Ex. A at 5. Intuit asserts that it is entitled to know the specific advertisements that Complaint Counsel believes are deceptive, instead of leaving it to Intuit to guess what “substantially similar” means.

Complaint Counsel objects to Interrogatory No. 1 as overly broad and unduly burdensome to the extent Intuit requests that it identify “every advertisement or communication” Complaint Counsel considers to be deceptive. Motion, Ex. B at 6. Complaint Counsel provided a detailed response specifically identifying dozens of deceptive advertisements known to Complaint Counsel and further directed Intuit to “all substantially similar advertisements and communications.” *Id.* at 7. Complaint Counsel asserts that the incorporation of “substantially similar” advertisements provides Intuit with sufficient information to understand which advertisements are allegedly deceptive. Opposition at 3.

Complaint Counsel is required to disclose all advertisements upon which it will rely to try to prove its case at trial. *In re POM Wonderful LLC*, 2011 FTC LEXIS 42, at *7-8 (Mar. 16, 2011). At this stage of the proceedings, Complaint Counsel’s response to Interrogatory 1 is

¹ Contention interrogatories ask a party “to state what it contends; to state whether it makes a specified contention; to state all facts upon which it bases a contention; to take a position, and explain or defend that position, with respect to how the law applies to facts; or to state the legal or theoretical basis for a contention.” *B. Braun Med. Inc. v. Abbott Labs.*, 155 F.R.D. 525, 527 (E.D. Pa. 1994) (quotation omitted) (interpreting Fed. R. Civ. Pro. 33(a)(2)).

² The Commission, when it amended its Rules of Practice, stated that the Rule is intended to “conform Commission practice with federal court practice and consistently allow a party to delay answering a contention interrogatory until fact discovery is almost complete.” Rules of Practice; Final Rule, 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009) (amending 16 C.F.R. pts. 3 and 4).

adequate with respect to advertisements currently known to Complaint Counsel. However, any newly discovered advertisements will need to be identified by way of supplementation, and failure to timely supplement can result in evidence being excluded from trial. *Id.*; *see also* Fed. R. Civ. P. 37(c)(1) (providing that a party that fails to timely supplement as required is not allowed to use that information, “unless the failure was substantially justified or is harmless”). The incorporation of the “substantially similar ad” language provides Intuit with sufficient information to understand which advertisements Complaint Counsel challenges as deceptive. However, if Complaint Counsel learns that its response is in some material respect incomplete, Complaint Counsel is under an obligation to supplement its response to identify any additional specific advertisements it intends to introduce at trial; otherwise, Complaint Counsel may be precluded from introducing any advertisement not identified. *See* 16 C.F.R. § 3.31(e)(2) (providing for duty to amend prior responses to incomplete interrogatories).

B. Interrogatories 2, 3

Interrogatory 2 and 3 each have two parts.

(1) The first part of Interrogatories 2 and 3 relate to “each advertisement or communication identified in response to Interrogatory No. 1,” and requests that Complaint Counsel state what it “believe[s] to be the ‘net impression’ left on a reasonable consumer;” and to identify any representations alleged to be deceptive and material. Motion Ex. A at 6.

To the first part of Interrogatory 2, Complaint Counsel responds that the net impression for all the advertisements identified, and substantially similar advertisements, is the same – it “believes that the net impression of a reasonable consumer viewing the advertisements . . . is that the consumer can file their taxes for free using TurboTax.” Motion, Ex. B at 9. To the first part of Interrogatory 3, Complaint Counsel responds that it alleges that all the advertisements identified in response to Interrogatory 1, and any substantially similar advertisements, make the same false and misleading claim that consumers can file their taxes for free with TurboTax and that those deceptive claims are material. Motion, Ex. B at 12.

Complaint Counsel explains its position is that “[t]he net impression and the materiality for the ads identified, and substantially similar ads, is the same.” Opposition at 4. Because Complaint Counsel has narrowly tailored its position to assert that the net impression and materiality for all advertisements identified “is the same,” Respondent’s request that Complaint Counsel provide the net impression of each specific advertisement or the materiality of alleged representations in each specific advertisement is not necessary for Intuit to prepare its defense and is therefore rejected.

(2) The second part of Interrogatories 2 and 3 request Complaint Counsel to provide “all facts and the evidentiary basis that supports the conclusion that consumers were left with that net impression” and “the evidentiary basis for the allegation that the representation is ‘material,’” respectively. Motion, Ex. A at 6. Complaint Counsel cited to specific evidence in Intuit’s possession in support of its response to Interrogatories 2 and 3. Motion, Ex. B at 9-10, 12-13.

By asking Complaint Counsel to identify the factual or evidentiary bases, Interrogatories 2 and 3 seek “an opinion or contention that relates to fact or the application of law to fact” 16 C.F.R. § 3.35(b)(2). Complaint Counsel is required to supplement its responses to the second part of Interrogatories 2 and 3 at the end of discovery.

C. Interrogatories 4-8:

In response to Interrogatories 4-8, Complaint Counsel referred Intuit to the consumer complaints in Intuit’s possession and asserts that since Intuit is likely the recipient of the most complaints about its products, Intuit likely possesses the most accurate information about consumers who used TurboTax. Respondent argues that Complaint Counsel’s responses are deficient where, for example, in response to a specific proposition, such as that consumers complained about the amount of time they spent completing their taxes, Complaint Counsel referred to the entire group of consumer complaints, most of which do not pertain to that issue. The specific interrogatories and responses are as follows.

Interrogatory 4 requests that Complaint Counsel “identify every consumer who, in 2022, visited the TurboTax website, and based on any advertisement or communications on that website, believed that *all taxpayers* could use TurboTax Free Edition to file their taxes for free.” Motion, Ex. A at 6 (emphasis added).

Interrogatory 8 requests that Complaint Counsel “identify any consumer who, in 2022, believed that TurboTax Free Edition was free *for all taxpayers*, chose to use TurboTax based on that belief, and paid to file their taxes using TurboTax.” Motion, Ex. A at 7 (emphasis added).

The Complaint alleges that Respondent represents “that consumers can file their taxes for free using TurboTax.” Complaint ¶ 119. Complaint Counsel asserts that it has not alleged that “consumers viewing Intuit’s deceptive advertising believe that TurboTax is free for *all taxpayers*.” Opposition at 4 n.5 (quoting Motion at 5 (emphasis added)). Intuit is not entitled to discovery related to allegations Complaint Counsel did not make. *See In re HomeAdvisor, Inc.*, 2022 FTC LEXIS 65, at *3 (Aug. 29, 2022).

Interrogatories 4 and 8 will be narrowed to identification of consumers who believed that they could use TurboTax Free Edition to file their taxes for free and who chose to use TurboTax based on that belief, and paid to file their taxes using TurboTax.

Complaint Counsel has additional objections to Interrogatories 4 and 8 which are nearly the same as those it asserted in response to Interrogatories 5, 6, and 7.

Interrogatory 5 requests that Complaint Counsel “identify any consumer complaints relevant to the allegations in the Complaint, and for each, identify the year(s) in which the consumer used TurboTax products, any TurboTax advertisements or marketing that the consumer complained of, and the facts and evidentiary basis within the FTC’s possession that substantiate the consumer complaints.” Motion, Ex. A at 6.

Interrogatory 6 requests that Complaint Counsel “identify the evidentiary basis” for allegations that “consumers who were not eligible for the ‘freemium’ version of TurboTax would not learn they were ineligible until they had already invested significant time and effort creating an account and inputting their sensitive personal and financial information into TurboTax.” Motion, Ex. A at 7.

Interrogatory 7 requests that Complaint Counsel “identify the evidentiary basis” for the allegation that “the term ‘simple tax returns’ is not understood by many consumers.” Motion, Ex. A at 7.

In response to each of Interrogatories 4-8, Complaint Counsel lodges numerous objections. Complaint Counsel then responds: “So construed, and subject to and without waiving the foregoing general and specific objections, Complaint Counsel refers Intuit [to]”: Category L of Complaint Counsel’s Initial Disclosures³ (Interrogatory 4); Categories L, I, and K of Complaint Counsel’s Initial Disclosures and documents it intends to produce in response to Intuit’s Requests for Production (Interrogatory 5); two specific exhibits and Category L of Complaint Counsel’s Initial Disclosures (Interrogatory 6); portions of expert reports, one document, and Category L of Complaint Counsel’s Initial Disclosures (Interrogatory 7); and Category L of Complaint Counsel’s Initial Disclosures (Interrogatory 8). Motion, Ex. B at 13-23. For purposes of this Motion, Complaint Counsel’s construction of Interrogatories 4-8 is appropriate and accepted. Complaint Counsel’s general referral to documents is not.

Commission Rule 3.35(c) allows a party to “specify the records from which the answer [to interrogatories] may be derived or ascertained” if the “burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.” 16 C.F.R. § 3.35(c); *see In re Tronox Ltd.*, 2018 FTC LEXIS 99, at *3 (May 31, 2018) (denying a motion to compel where response referenced expert reports and documents and data cited therein with sufficient detail to identify the evidence upon which Complaint Counsel relied in support of its answer to interrogatory). When the option to produce records is utilized in lieu of answering interrogatories, the specification shall include sufficient detail to permit the interrogating party to identify the individual documents from which the answer may be ascertained. *In re MSC Software Corp.*, 2002 WL 31433929, at *1; 16 C.F.R. § 3.35(c). A general referral to all consumer complaints does not provide sufficient detail. Therefore, Complaint Counsel will be required to provide specific, responsive answers.

Interrogatories 6 and 7 and the second part of Interrogatory 5⁴ seek “an opinion or contention that relates to fact or the application of law to fact” 16 C.F.R. § 3.35(b)(2).

³ Complaint Counsel’s Initial Disclosures include documents in the following categories: L (consumer complaints obtained from Consumer Sentinel); I (consumer declarations); and K (consumer complaints obtained from the Better Business Bureau of Los Angeles and Silicon Valley).

⁴ The first part of Interrogatory 5 is a request that Complaint Counsel “identify any consumer complaints relevant to the allegations in the Complaint, and for each, identify the year(s) in which the consumer used TurboTax products, any TurboTax advertisements or marketing that the consumer complained of[.]” Motion, Ex. A at 6. The second part of Interrogatory 5 is a request that Complaint Counsel identify “the facts and evidentiary basis within the FTC’s possession that substantiate the consumer complaints.” *Id.*

Complaint Counsel is required to provide responses to these Interrogatories, as narrowed herein, by the close of discovery.

Complaint Counsel is required to provide responses to Interrogatories 4 and 8, and the first part of Interrogatory 5, as narrowed herein, within 10 days.

D. Interrogatories 10, 11, 13-15:

These interrogatories pertain to a nationwide settlement agreement Intuit entered into in May 2022, with the Attorneys General of fifty states. That settlement agreement requires monetary compensation and contains a number of injunctive terms governing Intuit's advertising practices. Complaint Counsel objects to these interrogatories principally on the basis that they require Complaint Counsel to conduct a review of Intuit's current and future advertisements, in conjunction with the terms of Intuit's settlement with the states, and to provide a legal analysis of both.

Interrogatory 10 requests that Complaint Counsel "identify the relief sought in the Complaint that is not already addressed and resolved by the AG Settlement."

Interrogatory 11 requests that Complaint Counsel "identify any additional disclosures required, beyond those already mandated by the AG Settlement, to prevent Intuit's advertisements from giving the net impression that TurboTax Free Edition is free for all consumers or from otherwise deceiving consumers."

Interrogatories 13 and 14 ask Complaint Counsel to "identify any circumstances in which any advertisement that complies with the AG Settlement": "*would be* false, misleading, or deceptive"; and "*would violate* Section 5(a) of the Federal Trade Commission Act" (emphasis added).

Interrogatory 15 asks Complaint Counsel to "identify any differences between the relief provided in the AG Settlement and the terms proposed by the FTC, and provided to Intuit, in November 2021."

Interrogatories 11, 13, and 14 seek to have Complaint Counsel provide legal analysis of Intuit's current and any potential future advertising. Requiring Complaint Counsel to assess whether an advertisement or a hypothetical future advertisement is or would be compliant with a multistate settlement would impermissibly require Complaint Counsel to disclose legal analysis and mental impressions that are clearly work product. *See In re Lab. Corp. of Am.*, 2011 FTC LEXIS 30, at *9 (Feb. 24, 2011) (quoting Fed. R. Civ. P. 26(b)(3)) ("[T]he court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."). Further, Complaint Counsel is not required to provide answers to speculative questions. *See In re Basic Research, LLC*, 2004 FTC LEXIS 210, at *6 (Nov. 4, 2004). Interrogatory 15 also calls for legal analysis and conclusions of Complaint Counsel by asking Complaint Counsel to "identify any differences between the relief provided in the AG Settlement and the terms proposed to the FTC." Therefore, Complaint Counsel is not required to respond to Interrogatories 11 or 13-15.

Interrogatory 10 seeks to have Complaint Counsel “identify the relief sought in the Complaint” that Complaint Counsel contends “is not already addressed and resolved by the AG Settlement.” The specific terms of relief sought by Complaint Counsel are identified in Complaint Counsel’s proposed order attached to its pending Motion for Summary Decision and both parties have access to the terms of relief provided in the AG Settlement. Respondent is therefore equally capable of ascertaining the information requested by Interrogatory 10 without requiring any probing of Complaint Counsel’s legal theories as to the relative scopes of relief. For these reasons, Complaint Counsel will not be required to respond to Interrogatory 10.

IV.

After full consideration of the Motion and Opposition, and the Motion is GRANTED in part and DENIED in part in accordance with the provisions set forth above.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 31, 2022