

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

In the Matter of:

Intuit Inc., a corporation.

Docket No. 9408

**RESPONDENT'S REQUEST FOR LEAVE TO FILE REPLY
IN SUPPORT OF MOTION FOR DISCOVERY PURSUANT TO RULE 3.36**

Pursuant to Rule 3.22(d) of the Commission's Rules of Practice, 16 C.F.R. § 3.22(d), Respondent Intuit Inc. respectfully seeks leave to file a short reply brief in support of its Rule 3.36 motion. Intuit's proposed reply brief, conditionally filed with this motion, complies with Rule 3.22's timing and word-count requirements.

Rule 3.22(d) permits reply briefs "in circumstances where the parties wish to draw the Administrative Law Judge's ... attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief." 16 C.F.R. § 3.22(d). Here, Intuit seeks to respond to three discrete points raised in Complaint Counsel's opposition brief

where there is none. Intuit wishes to rebut Complaint Counsel's argument that the requests are not relevant

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a 3C AND X Inc (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p) (q) (r) (s) (t) (u) (v) (w) (x) (y) (z) (1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12) (13) (14) (15) (16) (17) (18) (19) (20) (21) (22) (23) (24) (25) (26) (27) (28) (29) (30) (31) (32) (33) (34) (35) (36) (37) (38) (39) (40) (41) (42) (43) (44) (45) (46) (47) (48) (49) (50) (51) (52) (53) (54) (55) (56) (57) (58) (59) (60) (61) (62) (63) (64) (65) (66) (67) (68) (69) (70) (71) (72) (73) (74) (75) (76) (77) (78) (79) (80) (81) (82) (83) (84) (85) (86) (87) (88) (89) (90) (91) (92) (93) (94) (95) (96) (97) (98) (99) (100)

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Second, **C** are also wrong that the documents sought are not reasonably expected to yield relevant information. To start, **CC** do not seriously dispute that many of Intuit's requests are relevant. See Opp. 2 (Intuit's requests concerning FTC's guidance and ability to seek monetary relief are "arguably related to the Complaint's claims").

CC's relevance objection essentially boils down to **CC**'s claim that Intuit's defenses are not valid. Opp. 4. But in evaluating whether discovery material is relevant to a claim or defense, the Court does not assess the ultimate merits of the claim or defense, but only whether the material tends to make the existence of any fact that is of consequence to the determination of the claim more or less probable. *Manzo v. County of Santa Clara*, 2019 WL 2866047, at *2 (N.D. Cal. July 3, 2019). Also, Intuit filed its answer six months ago. A motion to strike would be "disfavored" *Dura Lube Corp.*, 1999 WL 33577395, at *1 (F.T.C. Aug. 31, 1999), and the time to file a motion to strike has long since passed, see *MSPA Claims 1, LLC v. Covington Specialty Ins. Co.*, 2021 WL 1390371, at *2 (S.D. Fla. Apr. 13, 2021). **CC** also filed a motion for summary decision, but did not move on affirmative defenses. Needless to say, **CC**'s opposition to a discovery motion is not an appropriate forum for adjudicating the merits of Intuit's defenses.

CC are also wrong that Intuit has failed to articulate how the requests are relevant to its defenses. As stated in the motion, the discovery sought directly bears on Intuit's affirmative defense regarding prejudgment. Mot. 5. **CC**'s own discussion of the evidence related to Intuit's prejudgment defense refutes any notion that Intuit relies on a "just conclusory statement." Opp.

¹ "Without a Rule of Practice governing motions to strike," the Commission and this Court "have sought guidance from Federal Rule of Civil Procedure 12(f) and cases which have construed Rule 12(f)." *Matter of Dura Lube Corp.*, 1999 WL 33577395, at *1 (F.T.C. Aug. 31, 1999); also, e.g., *Matter of 1-800 Contacts, Inc.*, 2017 WL 511541, at *2 (F.T.C. Feb. 1, 2017) (Aor (o)23 Tc C p(.)TJxy]TJ 0 atL,.. A tui

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6. Intuit should be provided an opportunity to develop those defenses, and Rule 3.36 provides the only avenue to do so.

Third, contrary to CC's bald assertion (at 8), Intuit cannot obtain the documents sought through other means.² Even CC recognize that Intuit is not otherwise able to obtain the records sought—instead arguing that the few public documents available are sufficient to satisfy Intuit's requests and that all remaining documents might be privileged. See *id.* But as explained above, those privilege concerns are overstated. Even if that were not the case, the potential that responsive documents would be privileged does not establish that the documents can be obtained through other means. Indeed, as to many of the requests, CC informed Intuit that it is unable to provide documents and affirmatively suggested Intuit file the present motion. See Woodman Decl. ¶¶ 89.

I. CONCLUSION

An order should issue authorizing the subpoenas attached to the motion as Exhibits A and

B.

Dated: October 26, 2022

Respectfully submitted,

WILMER CUTLER PICKERING HALE
AND DORR LLP

/s/ David Z. Gringer

David Z. Gringer

Charles Bridge

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² CC emphasize that they have produced “over 7,000 documents to Intuit.” But thousands of those documents are screenshots from Intuit's website or of its advertising produced in response to just 3 of Intuit's 36 requests. CC have not produced any documents responsive to 30 of Intuit's requests, including requests that relate to the documents requested in these proposed subpoenas.

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DECLARATION OF DAVID GRINGER IN SUPPORT OF RESPONDENT'S
REPLY IN SUPPORT OF MOTION FOR DISCOVERY PURSUANT TO RULE 3.36

I, David Z. Gringer, declare as follows:

1. I am a partner at Wilmer Cutler Pickering Hale and Dorr LLP. I represent the respondent, Intuit Inc., in the above-captioned proceeding.

2. I submit this declaration in support of Intuit's Reply in Support of Motion for Discovery Pursuant to Rule 3.36, filed herewith on October 26, 2022.

3. Attached hereto as Exhibit A is Complaint Counsel's First Requests for Production of Documents to Intuit Inc., dated September 12, 2022.

4. If the Commission or the Secretary were to identify and explain unreasonable burdens imposed by the document requests in the subpoenas Intuit seeks to issue to them, Intuit is willing to meet and confer in good faith to minimize those burdens. To date, no one (including Complaint Counsel) has expressed to me or any of my colleagues any concerns about any burden associated with Intuit's requests.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 26th day of October, 2022, in New York, NY.

By: /s/ David Z. Gringer
David Z. Gringer

so used, and vice versa; the use of the masculine form of a pronoun shall be considered to include also within its meaning the feminine form of the pronoun so used, and vice versa; the use of any tense of any verb shall be considered to include within its meaning all other tenses

5. All documents, without regard to the applicable time period, relating to the TurboTax “Power of Free” advertising campaign.

6. All documents, without regard to the applicable time period, relating to TurboTax Super Bowl advertisements that used any of the following words: “free,” “zero,” “\$0,” “no cost,” or “gratis.”

7. All documents relating to the creation, content, placement, use, approval, modification, or rejection of any disclaimers or disclosures used in any advertisement responsive to Requests for Production 1.

8. For any advertisement responsive Request for Production 1, documents sufficient to show the beginning and ending dates of dissemination, audience size, and the times and locations the ads were disseminated.

9. For print ads responsive Request for Production 1, produce documents sufficient to show every publication in which the ads were disseminated.

10. For video, television and radio ads responsive Request for Production 1, documents sufficient to show every network, system, streaming service, or station in which the ads were disseminated.

11. For internet ads responsive Request for Production 1, documents sufficient to show the platform used (e.g., mobile, desktop); its successfulness in driving traffic to

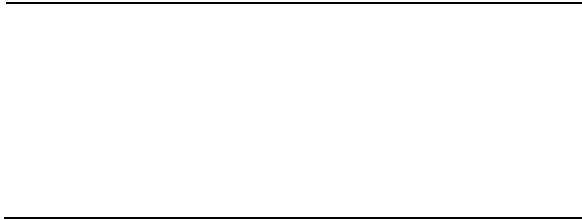
25. All documents related to any arbitration filed against Intuit related to free offers pertaining to TurboTax.

Dated: September 12, 2022

Respectfully submitted,

s/Rebecca Plett
Roberto Anguizola
Rebecca Plett
James Evans

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2022, I caused the foregoing document to be filed electronically using the FTC's E-Filing system, which will send notification of such filing to:

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Federal Trade Commission
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Suite CC-5610
Washington, DC 20580
ElectronicFilings@ftc.gov*

*The Honorable D. Michael Chappell
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580*

I further certify that on October 26, 2022, I caused the foregoing document to be served via email to:

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