

By Commissioner Alvaro M. Bedoya, for the Commission.

The Complaint in this proceeding

through various advertising channels that consumers could file their taxes for free using TurboTax. Compl. ¶ 5. In fact, however, Complaint Counsel allege, TurboTax is free for only some consumers, based on the tax forms they need. *Id.* ¶ 6. For many others, the Complaint states, Intuit tells them after they have inputted sensitive personal and financial information into TurboTax that they cannot continue for free and will need to upgrade to a paid TurboTax service to complete and file their taxes. *Id.* ¶¶ 6, 58. Thus, Complaint Counsel contend that Intuit’s “door-opener” ads are deceptive. *Id.* ¶¶ 57, 122.

On August 22, 2022, Complaint Counsel moved for summary decision pursuant to Commission Rule 3.24, 16 C.F.R. § 3.24. Respondent timely opposed the motion. On October 31, 2022, on Respondent’s request, the Commission heard oral argument on the motion. As explained below, we have determined that summary decision should be denied timely ed

Compl. ¶ 9; Answer ¶ 9.

RCCSF ¶¶ 4-5.

Compl. ¶ 10; Answer ¶ 10; *cf.* RCCSF ¶4.

The free version of TurboTax was called “Federal Free Edition” for tax year (“TY”) 2016 and “TurboTax Free Edition” thereafter. CCSF ¶ 6; RCCSF at 9 (Intuit does not dispute CCSF ¶ 6); Answer ¶ 13.<sup>3</sup> Free Edition is available to taxpayers with “simple tax returns.” Answer ¶ 14; RSF ¶¶ 2-3; CCRSF ¶¶ 2-3. According to Complaint Counsel, Intuit has changed the definition of “simple tax returns” over time, such that which consumers could file for free with TurboTax has varied depending on the tax year. CCSF ¶¶ 8-12.<sup>4</sup>

eligible for Free Edition may begin preparing their taxes in that product. Upon entering disqualifying information, they are presented with a screen that informs them that they will need to upgrade to a paid product capable of supporting their tax needs in order to continue using TurboTax. RSF ¶ 64; CCRSF ¶ 64; Golder Decl. ¶¶ 128, 130, 133; Compl. ¶ 45; Answer ¶ 45.

Intuit has promoted its free offering through multiple advertising channels, including television, the TurboTax website, social media, and paid search advertising. Ryan Decl. ¶¶ 18, 20, 23-26; RSF ¶ 36; Answer ¶ 21; *see also* CCSF ¶¶ 18-24; RCCSF at 9 (Intuit does not dispute CCSF ¶¶ 18-24). According to Complaint Counsel, much of this advertising has been misleading because it conveyed i25- (gi)29, 31-30, 32. A



a decision based on the whole record. *Id.* at 32. Contrary to Respondent's contention, however, the rights of Section 556(d) are not absolute. The requirement of a full hearing applies where there are material questions of fact for trial.<sup>7</sup> But the Commission grants summary decision only where it has determined that there are no genuine issues of material fact. Therefore, Section 556(d) does not bar summary decision.

Claims may be express or implied: express claims are those that directly state the representation at issue, while implied claims are any that are not express. *Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff'd sub nom. Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992). Both express and implied claims may be deceptive. *Fedders Corp. v. FTC*, 529 F.2d 1398, 1402-03 (2d Cir. 1976). “Deception may be accomplished by innuendo rather than by outright false statements.” *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995) (quoting *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963)); *FTC v. Cap. Choice Consumer Credit, Inc.*, No. 02-21050 CIV, 2003 WL 25429612, at \*4 (S.D. Fla. Jun. 2, 2003) (same), *aff'd*, 157 F. App'x 248 (11th Cir. 2005). Absent an explicit representation, the question of whether the advertisement at issue makes a particular representation is determined by considering the “net impression” of such an advertisement for the reasonable consumer-viewer. *Traffic Jam Events*, 2021 WL 5124183, at \*12; *Jerk LLC*, 159 F.T.C. 885, 891 (2015); *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 298 (D. Mass. 2008); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) (looking to “common-sense net impression” of an advertisement). In ceTh aeo “ mh. 1954 /o C ( )]TnI [“ncon5k

decision. Because an assessment of the entire course of conduct presented here could affect determination of the appropriate remedy, summary decision on only some of the ads would not resolve the case. At the same time, denying summary decision and remanding for trial will provide a fuller factual record and facilitate a more complete and cohesive opinion that addresses all of the relevant legal and factual issues, and advertising claims at once. Therefore, summary decision is denied. Below, we provide a further explanation of our reasoning with respect to the claims and ads in question, which may guide their assessment at trial. We note that although the briefing and oral argument focused heavily on Respondent’s video ads, a focus also reflected in the discussion that follows, the allegations of Complaint Counsel concern many different ads across different media; the analysis of those other, equally important ads, will be further developed during the course of trial.

Complaint Counsel allege that various television and/or video ads contain misleading representations. We summarize those ads below.

The “Boston Tea Party” ad, a 60-second commercial that, per Complaint Counsel, aired during the 2015 Super Bowl,<sup>8</sup> shows a fictionalized re-creation of the Boston Tea Party where, in the midst of the American revolt, the following exchange takes place:

FIRST REVOLUTIONARY: No (Y)2 (:)-2 ((((((((((e(((((((()-4 (e f)-1 (o)-4 (l)-6 (l)-6 (o)-4 (s)-5 (e )-10





the voiceover stated, “That’s right. TurboTax Free Edition is free. See details at TurboTax.com.” GX 200; RX 202; GX 206. The disclaimer for those ads read, “TurboTax Free Edition is for simple U.S. returns only. See if you qualify at turbotax.com. Offer subject to change.”

Complaint Counsel also submit “Steven/Spit Take” ads, which they allege Intuit ran for TY 2021. CCSF ¶ 118. The ads promoted TurboTax Live and free tax filing with the help of an expert. The “simple tax returns” limitation was included in the small print disclaimer at the bottom of the screen at the end and also mentioned by the voiceover narrator. *See, e.g.*, GX 307 (“For a limited time TurboTax is free for simple returns even when an expert files for you.”) Tf( )Tj/TT0 1 Tf 8F

908, 958 (N.D. Ill. 2006). However, if relevant extrinsic evidence regarding the meaning of the ad has been introduced, the Commission will consider it. *POM Wonderful*, 155 F.T.C. at 14; *Bristol-Myers Co.*, 102 F.T.C. 21, 319 (1983).

Many of Intuit's television ads, on their face,

21, 1970) lays out the

advertising, Respondent will have an opportunity to present any relevant, admissible extrinsic evidence at the hearing and the Commission will consider any such evidence in any later review of this matter.

Respondent argues that, even if the ads did not adequately disclose the limitations on its free offerings, consumers would have been sufficiently apprised of those limitations through the TurboTax website or app, which consumers must visit in order to use the product. Opp. at 16. Although Respondent will have an opportunity at trial to make its arguments about the adequacy of its website/app disclosures, as a general rule, “

But even if we accept Respondent's position that the two-thirds figure is not properly calculated, Respondent does not and cannot seriously dispute that a significant percentage of taxpayers who file online do not have "simple tax returns." This category includes taxpayers with common financial scenarios, such as those who have mortgage or property deductions, education expenses, itemized deductions, investment or rental property income, and taxpayers who are small business owners. *See* RSF ¶ 4. For all those people, the promise that "you can file on TurboTax for absolutely nothing" is false.

Respondent asserts that the ads are not false because they convey only that Free Edition is free, which is a true statement. *Opp.* at 10. But Respondent has not pointed to evidence that the reasonable consumer would know that Free Edition is a different product from TurboTax.<sup>12</sup> and, as discussed above, most of the ads at issue do not mention Free Edition. In any case, even ads that are technically true may be deceptive. The key question is not the literal truth of the advertisement but the net impression it creates. *See Thompson Med.*, 791 F.2d at 197 ("[L]iterally true statements may . . . be found deceptive[.]"); *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp.2d 1167, 1189 (N.D. Ga. 2008), *aff'd*, 456 F. App'x 358 (11th Cir. 2009) ("When assessing the meaning and representations conveyed by an advertisement, the court must look to the advertisement's overall, net impression rather than the literal truth or falsity of the words in the advertisement."); *Cap. Choice Consumer Credit*, 2004 WL 5149998, at \*32 ("[A] claim may be deceptive even though it is literally true."). If an ad that literally states that TurboTax Free Edition is free is written in a way that falsely conveys to at least a significant minority of reasonable consumers that they can file their taxes for free with TurboTax, the ad is deceptive. Moreover, a true statement may be deceptive by omission. "The failure to disclose material information may cause an advertisement to be deceptive, even if it does not state false facts." *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir. 1984); *see also Cap. Choice Consumer Credit*, 2004 WL 5149998, at \*33.

Respondent argues that its industry-leading customer satisfaction scores indicate that customers were not deceived by its ads. *Opp.* at 20. However, the fact that most customers who chose to use a TurboTax product were generally happy with that product does not render non-deceptive a particular ad that drove people to the TurboTax website. *See In re Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 86, at \*7 (F.T.C. April 20, 2009) ("EvJ-gFeug, InTd[(C)-3 ( (t)-2 (om)-2 (e)4



the presumption of materiality that is applicable to television ads that expressly or by implication conveyed that consumers viewing the ads could file their taxes for free using TurboTax.

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To summarize, although we find that Complaint Counsel have presented a strong case for summary decision with respect to at least some of the video ads, we are denying summary decision at this time. Deferring the ruling until after trial will allow the Commission to have the benefit of a full factual record, including any relevant and admissible extrinsic evidence, and will facilitate a cohesive decision that addresses all of the relevant ads at once. Our denial of summary decision, however, should not be taken as an indication that the evidence presented is necessarily insufficient and that liability cannot attach unless Complaint Counsel produce additional evidence of deception at trial. Evidence that may not be sufficient for liability when the Commission must resolve all ambiguities and draw all justifiable inferences in Respondent's favor may nevertheless be sufficient to support a liability finding when Respondent is not entitled to such deference.

Complaint Counsel allege that, like the video ads, the TurboTax homepage misled consumers into believing they could file for free using TurboTax. Compl. at 7 & ¶¶ 36-44. The website echoed the "Free" message of the video ads, proclaiming in large lettering, "That's right. TurboTax Free is free. Free, free free free. \$0 Fed. \$0 State. \$0 to File." or "FREE Guaranteed. \$0 Fed. \$0 State. \$0 To File." or other similar language. Mot





did not specifically mention a “simple tax returns” limitation, Respondent claims that the statement in the small descriptive text that “Over 50 Million Americans Can File With TurboTax Free Edition” would inform consumers that the claim pertains to Free Edition only and that most Americans do not qualify for Free Edition. Opp. at 15. Respondent also raises evidentiary objections to the search ads. RCCSF ¶¶ 83-84, 93-95, 126-30; RCCSF, General Objections 5 & 6.

Because on summary decision the Commission must resolve all factual ambiguities and draw all justifiable inferences in favor of the non-moving party, factual disputes regarding many of the search ads render summary decision unwarranted. Some of the ads included a reference to Free Edition in the headline, which at least theoretically could support Respondent’s position. Further, most (but not all) of the submitted ads had disclaimers in the smaller descriptive text referring to “simple tax returns” or similar language. Factual development at trial will help determine whether the ads conveyed to reasonable consumers that they could file taxes for free with TurboTax and, if so, whether the “simple tax returns” disclaimer was sufficiently prominent and unambiguous to change the net impression. With respect to falsity and materiality, the analysis in Sections III.C.1.c and d provides further guidance.

Complaint Counsel identify various email, social media, and other online ads that they allege conveyed that consumers can file their taxes for free with TurboTax. The evidence includes, for example, ads from Facebook’s Ad Library, videos from TikTok, and ads from news sites and Reddit. *See, e.g.*, GX 342 ¶¶ 114, 117, 161-62, 169-71. The ads vary in content; some are in video form and others are static images. Many of the ads mirror the TurboTax website, with references to “FREE” and “\$0 Fed. \$0 State. \$0 To File” and a “simple tax returns” disclaimer, although the “simple tax returns” references in these ads are not color-contrasted hyperlinks. *See, e.g.*, GX 342 ¶¶ 102-03, 114, 122, 159-60, 172. The “simple tax returns” language, where included, is much less prominent than the “FREE” language. However, given the requirement that we draw all justifiable inferences in the light most favorable to Respondent, we find that the net impression conveyed by these ads would be best addressed after full factual development at trial. With respect to falsity and materiality, again, the discussion in Sections III.C.1.c and d should guide the analysis.

Respondent argues that its various affirmative defenses, including those alleging constitutional violations, excuse its conduct and preclude summary decision. Opp. at 28-31. Because we are denying summary decision, we do not need to address Respondent’s affirmative defenses. *See Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445-46 (1988) (“A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.” (citation omitted)). We also do not need to, and indeed cannot at this point, resolve Respondent’s arguments regarding the appropriate relief. *See* Opp. at 25-28. We do, however, wish to address Respondent’s arguments that its due process rights are violated based on Chair Khan’s alleged prejudgment of

the case and the lack of opportunity to conduct discovery; in both cases, Respondent has asserted constitutional violations while ignoring Commission procedures to address these issues.

On the first point, Respondent argues that (1) Chair Khan's retweet of the FTC press release announcing the filing of this action and (2) a Q&A session in which she referred to this proceeding in the context of discussing the importance of timely intervention.<sup>16</sup> indicate that she has prejudged the case and that, therefore, this proceeding violates due process. *Perkins v. FTC*, 717 F.2d 1033 (D.C. Cir. 2013).

For the reasons discussed above, we have determined that a decision on the merits of the case would be best made after fuller factual development at trial. Accordingly,

that Complaint Counsel's Motion for Summary Decision is

By the Commission.

April J. Tabor  
Secretary