

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya

**DECISION AND ORDER DENYING RESPONDENT’S APPLICATION FOR
STAY OF ORDER PENDING REVIEW BY U.S. COURT OF APPEALS**

On January 30, 2024, Respondent Intuit Inc. (“Respondent”) applied for a stay of the Commission’s Final Order in this matter, pending review by the United States Court of Appeals for the Fifth Circuit. Respondent Intuit Inc.’s Appl. for a Stay Pending Review by the U.S. Ct. of Appeals for the Fifth Circuit (“App.”). Absent a stay, the Commission’s Final Order will become final on the sixtieth day after its service, resulting in a March 25, 2024 effective date. 15 U.S.C. § 45(g)(2).¹ Complaint Counsel oppose the stay. For the reasons explained below, we find that Respondent has failed to demonstrate that a stay is warranted. Specifically, Respondent has failed to demonstrate a likelihood of success on appeal or that Respondent will suffer irreparable harm absent a stay of the Final Order. Further, we find that the balance of harms favors denial of a stay and that Respondent has failed to show that a stay would be in the public interest. Accordingly, we deny Respondent’s Application.

The Commission issued its Opinion (“Op.”) and Final Order on January 19, 2024, finding that Respondent had deceptively advertised its “free” online tax preparation products and services in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. As the Commission found, Respondent promoted its TurboTax products through aggressive, yearslong, nationwide ad campaigns that stated or implied that the products allowed the viewers to file their taxes for free, though Respondent knew that approximately two-thirds of U.S. taxpayers did not qualify for the free offers. *E.g.*, Op. 37–38, 46, 47, 80–81. The Commission further found that Respondent’s disclaimers or other limitations on the free offer were not clearly communicated or understood by consumers. *Id.* at 39–52.

¹ Because the sixtieth day after se

I. THE FINAL ORDER

The Commission issued a Final Order designed to prevent Respondent from making misleading “free” claims about its products and services. When Respondent makes “free” claims and fewer than all consumers are eligible for the free product or service, the Final Order requires Respondent to alert consumers in specified ways that some or most are not eligible. Final Order I.B.1. The Final Order requires that, when Respondent’s ads assert that a product is free, they must clearly and conspicuously disclose the percentage of U.S. taxpayers (or other consumers) who qualify for the product (or, alternatively, that a majority of U.S. taxpayers do not qualify, if that is the case). *Id.* The ads must also disclose all terms, conditions, and obligations on which receipt and retention of the free good or service are contingent. *Id.* at I.B.2. If the ad is space-constrained, however, it may direct consumers to view eligibility requirements on a landing page or webpage on a TurboTax website instead of disclosing all terms, conditions, and obligations on which the “free” offer is contingent; if the space-constrained ad is online, the consumer must be able to reach the landing page or webpage by clicking on a hyperlink or on the ad itself. *Id.* at I.C. The Final Order also prohibits Respondent from misrepresenting the cost of any of Respondent’s goods or services or any other material fact concerning a good or service such as its total cost or material restrictions, limitations, or conditions. *Id.* at II.

II. ANALYSIS

Pursuant to Commission Rule 3.56(c), an application for a stay must address the likelihood of the applicant’s success on appeal, whether the applicant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and whether the stay is in the public interest. 16 C.F.R. § 3.56(c); Order Granting in Part and Den. in Part Respondent’s Appl. for Stay Pending Judicial Review, *1-800 Contacts, Inc.*, 167 F.T.C. 922, 92

disappointment that it did not end up on the winning side of the adjudication, which is not a basis to stay the Final Order.

Finally, Respondent argues that the enforcement action here involves “private rights” and should therefore have been adjudicated in an Article III court rather than an administrative forum. App. 5. As we explained in our Opinion, this case involves public rights and Respondent’s Article III argument does not apply. Op. 79–80.

3. The Cease-and-Desist Order

Respondent claims that the Final Order is “unjustified” and that this establishes a likelihood that the Fifth Circuit will, at a minimum, vacate it. App. 7. The Commission considered and rejected each of Respondent’s arguments on appeal, Op. 81–84, 86, 89–90, and we find that they do not establish a likelihood of success for Respondent.⁶

We note that our Final Order offers certain flexibilities to Respondent that the ALJ’s original order did not. For example, the Final Order allows space-constrained advertisements to use a landing page or webpage to substitute for disclosing all terms, conditions, and obligations, so long as the ad clearly and conspicuously directs consumers there and, if online, permits consumers to reach the landing page or webpage by clicking on a hyperlink or on the ad itself. Final Order I.C. Respondent asserts that, by requiring it to disclose the percentage of U.S. taxpayers that qualify for the free product (or, if Intuit prefers, that a majority of U.S. taxpayers do not qualify, if such is the case), the Final Order “requires Intuit to say something it would not say but for the Order, because Intuit does not believe the compelled language to be helpful or relevant for consumers to understand the qualifications for its free products.” Soukas Decl. ¶ 6. But, Respondent contends in its Reply that its current website and its current ads already display upfront that “~37% of filers qualify.” Reply 3. While Respondent’s last-minute adoption of partial, voluntary compliance, following years of deliberate, deceptive conduct, Opp. VI.B, does not obviate the need for our Order, it does undermine Respondent’s claims that the information is

reversed. Indeed, if that were the law, every commercial entity would automatically meet the standard for irreparable harm in every case based on its belief that its reputation is valuable. This is not the law. Respondent’s argument for reputational harm amounts to a claim that (1) it would like consumers to view it as acting with integrity across its entire business, including its advertising, and (2) it believes the Final Order’s disclosures will be less clear than “simple tax returns” and will give consumers an unfavorable view of Intuit and cause some taxpayers to believe erroneously that they are not eligible for the free product. Soukas Decl. ¶¶ 15–18, 20–22. As our Opinion made clear, Intuit’s conduct was deliberate, Op. VII, undermining its professed reputational concerns, and its contentions regarding disclosures are unpersuasive. Op. VI & VII.

Respondent’s claim that it will suffer competitive harm due to the Final Order’s terms similarly lacks merit. As we explain in the Opinion, the Final Order is designed to prevent Respondent from making misleading “free” claims. Op. 86. It thereby removes Intuit’s unlawful advantage over rivals who do not advertise deceptively.

In any case, the Final Order’s disclosure requirements have been tailored in the context of space-constrained ads to allow suitable hyperlinks and landing pages and should cause Respondent no hardship.⁷ As noted above, post.

157 F.T.C. 1845, 1850 (Apr. 11, 2014).

We find that the public interest favors allowing the Final Order to go into effect as scheduled. For several years Respondent has flooded every major communication platform with its deceptive messages. *See, e.g.*, Op. II.C, VII.A, VII.B. A “free” message that turns out to be false can deprive a consumer of time, privacy, and money. Inadequate disclosures leave consumers exposed to Intuit’s misleading messages. Indeed, our Opinion provides several examples of Respondent’s TY 2022 ads, the most recent in the record, that remained deceptive despite the pendency of this and other enforcement actions and a nationwide settlement with the attorneys general of the fifty states. Op. 82–84. Furthermore, as we mentioned in our Opinion, allowing dishonest practices to persist can result in a “race to the bottom” that harms honest businesses and consumers alike. Op. 91 & n.81.

A stay pending judicial review could extend consumers’ exposure to harm through the current tax season and well into or through the next tax year. The Final Order will protect potentially tens of millions of individual U.S. taxpayers from the consequences of further deception.

In balancing “the hardships of the public interest against private interest, the public interest should receive greater weight.” *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999) (citation and quotation omitted). Here the balance plainly favors consumers. This circumstance, and the breadth and scope of the violations at issue, calls for the protection of the public who will view Intuit’s advertisements and counsels against any stay of the Final Order’s effective date.

III. CONCLUSION

For the reasons stated, we conclude that Respondent has failed to meet the required

