

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHELE ARENA, et al.,

Plaintiffs,

v.

INTUIT INC., et al.,

Defendants.

Case No. [19-cv-02546-CRB](#)

**ORDER AND OPINION DENYING
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

A group of Plaintiffs brought a putative class action against Intuit, Inc., alleging that Intuit induced them into paying for its tax preparation services when they were entitled to use Intuit's free-filing option. The Court previously denied Intuit's Motion to Compel Arbitration, but the Ninth Circuit reversed. Plaintiffs, with support from Intuit, eventually moved for preliminary approval of a proposed settlement. The settlement would award claimants who expected to file for free, but ended up paying roughly \$100 per year they filed, an estimated \$28 assuming a 5% participation rate. It would also require Intuit to take various steps to inform consumers of the free file option.

In the meantime, many Intuit customers had filed individual arbitration demands against Intuit, exposing Intuit to multiple fees for each arbitration, leaving aside potential liability on the merits. The proposed settlement included a procedure by which these and other class members could opt out, and was contingent on the Court immediately enjoining individual arbitrations and any other parallel proceedings until the class member involved in those proceedings opted out. Some of the arbitration claimants moved to intervene in opposition to the proposed settlement, and the Court granted their motion on December 14,

United States District Court
Northern District of California

1 motion for preliminary approval. The Court delayed issuing an opinion at the parties’
 2 request. Because the parties have been unable to reach a settlement to date, the Court now
 3 provides its reasoning for denying the motion. The facts and reasoning set forth below
 4 were applicable when the Court issued its December 17, 2020 order:¹

5 The Court denies the motion for preliminary approval because the proposed
 6 settlement is not fair, reasonable, and adequate under Rule 23(e)(2) of the Federal Rules of
 7 Civil Procedure. In particular, the proposed settlement provides class members with
 8 inadequate compensation and sets forth opt out procedures that unduly burden all class
 9 members, but especially those who have already begun to pursue claims through
 10 arbitration.

11 **I. BACKGROUND**

12 Intuit owns TurboTax, an online tax preparation service. Complaint (dkt. 1) ¶ 1. In
 13 2002, Intuit and other tax preparation services agreed with the Internal Revenue Service to
 14 provide low-income taxpayers and active military members the option to file their taxes for
 15 free. Id. ¶¶ 15–16, 20. In exchange, the government promised to not enter the tax
 16 preparation software and e-filing services market. Id. ¶ 17. By staying out of that market,
 17 the government helps Intuit maintain its status as the dominant provider of e-filing services
 18 for all taxpayers, so long as Intuit offers free services to low-income taxpayers. Id. But
 19 Plaintiffs allege that instead of steering eligible taxpayers to its free-filing option, or
 20 simply letting customers find their way to it, Intuit misleadingly channeled free-filing
 21 eligible taxpayers to its paid services. Id. ¶ 3.

22 On May 12, 2019, Plaintiffs sued Intuit on behalf of themselves and other similarly
 23 situated individuals. Id. ¶ 47. They asserted claims for breach of contract and violations
 24 of various state consumer protection laws. Id. ¶¶ 62–110. On August 19, 2019, the Court
 25 appointed Daniel C. Girard of Girard Sharp LLP and Norman E. Siegel of Stueve Siegel
 26 Hanson LLP (collectively, “interim class counsel”) as co-lead interim class counsel under
 27

28 ¹ The Court notes that the parties have not advised the Court of any material change beyond their

Rule 23(g)(3) of the Federal Rules of Civil Procedure. See Order Appt. Interim Class Counsel (dkt. 72).²

On October 28, 2019, Intuit moved to compel arbitration. See Mot. to Compel (dkt. 97). Intuit's terms of service ("Terms") contained an arbitration clause stating:

"ANY DISPUTE OR CLAIM RELATING IN ANY WAY TO THE SERVICES OR THIS AGREEMENT WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT, except that you may assert claims in small claims court if your claims qualify . . . WE EACH AGREE THAT ANY AND ALL DISPUTES MUST BE BROUGHT IN THE PARTIES' INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING."

Sun Decl. (dkt. 97-3) ("Terms") at 4. On March 12, 2020, the Court denied Intuit's Motion to Compel Arbitration. See Order Denying Mot. to Compel (dkt. 141). But in August 2020, the Ninth Circuit reversed, holding that the arbitration clause must be enforced. See Dohrmann v. Intuit, Inc., 823 F. App'x 482 (9th Cir. 2020).

Plaintiffs had moved for class certification in January 2020, see Mot. to Certify Class (dkt. 116), but the parties have not fully briefed that motion, and the Court is yet to certify any class in relation to this case. Given the Ninth Circuit's ruling and the arbitration clause's prohibition on class arbitration, Plaintiffs' only path to obtaining class relief from this Court is via a settlement with Intuit (or, less likely, after a successful appeal to the U.S. Supreme Court).³

A. The Proposed Settlement

On November 12, 2020, Plaintiffs moved for preliminary approval of a settlement agreement with Intuit. See Mot. for Preliminary Approval (dkt. 162); Settlement

² Under Rule 23(g)(3), "[t]he court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action."

³ Plaintiffs have indicated that they may file a petition for writ of certiorari. See Hearing Tr. (dkt. 206) at 30–31. Plaintiffs have also asserted that their arguments against the enforceability of the arbitration clause resemble those implicated by Henry Schein, Inc. v. Archer and White Sales, Inc., 141 S. Ct. 107 (2020) (granting a petition for writ of certiorari). See Hearing Tr. at 30. After this Court's hearing on the motion for preliminary approval, the Supreme Court dismissed the writ

1 Agreement (dkt. 162-1). The proposed settlement class “consists of all persons within the
2 United States who, from January 1, 2015 to November 20, 2020, paid to use TurboTax
3 online in a year in which they were eligible to file for free with the TurboTax Free File
4 Program.” Mot. for Preliminary Approval at 6. But the proposed settlement class is
5 narrower with respect to any monetary award, because in filing a claim for such an award,
6 class members must sign an attestation that they paid a fee to Intuit when they “expected”
7 to file for free. Id. at 7. The parties nonetheless estimate that the proposed class includes
8 19 million people. Id. at 6.

9 Under the proposed settlement, Intuit would pay a fixed sum of \$40 million in
10 exchange for the release of all claims that were or could have been asserted in this case.
11 Id. “Notice and administrative expenses, as well as attorneys’ fees, expense
12 reimbursements and service awards approved by the Court, [would] be deducted from the
13 settlement amount.” Id. at 6–7. Class Counsel would seek “25% of the fund in attorneys’
14 fees and reimbursement of litigation expenses,” and each class representative would
15 receive a \$10,000 “service award.” Id. at 7. The balance of approximately \$28 million
16 would be paid to settlement class members who, as discussed above, must sign an
17 attestation that they paid a fee to Intuit when they “expected” to file for free. Id. at 7, 16.
18 Class members who timely submit a valid claim would receive a “pro rata” cash award
19 from the remaining pool, and class counsel expect that between 1% and 10% of settlement
20 class members would submit claims. Id. at 8. Any unclaimed distributions would be paid
21 to the settlement class members “who accepted or elected to receive a pro rata payment”
22 until the settlement administrator determines that further distributions are not economically
23 feasible. Id. at 8–9. Intuit asserts that “participating class members are expected to
24 recover 20% to 50% of the average fees a taxpayer paid to use TurboTax online in a year
25 they were eligible to file for free.” Intuit Opp. to Mot. to Intervene (dkt. 189) at 3. On
26 average, class members paid approximately \$100 in filing fees in a given tax year. Mot.
27 for Preliminary Approval at 16. At the “midpoint” of the estimated participation rate, each
28 class member who files a claim “would receive about \$28.” Mot. for Preliminary

Approval at 17.

Under the proposed settlement, Intuit would also modify certain business practices. Mot. for Preliminary Approval at 7. As long as Intuit participates in the IRS Free File Program, “for up to three years,” Intuit would:

1. “[A]dhere, to the fullest extent practicable, to the Federal Trade Commission’s guidelines for online marketing”;
2. “[D]isclose the existence of the IRS Free File Program and qualifications to file for free . . . on one or more webpages maintained as part of, and accessible from the homepage of, the intuit.turbotax.com domain, and provide information on how to participate in the [program], and . . . maintain a publicly available webpage on the same domain setting forth the forms and schedules not covered in the TurboTax free edition”;
3. “[C]reate a minimum of three blog posts each tax filing season . . . on its commercial website informing consumers about the IRS Free File Program and linking to it”;
4. “[S]end a minimum of six email reminders to returning IRS Free File Program . . . customers,” until a customer “files their taxes” or “unsubscribes” from such emails; and
5. Not engage “in any practice that would cause the landing page” for the Free File Program “to be ‘de-indexed’ from organic internet search results.”

Id. at 7–8.⁴ In this sense, the proposed settlement would provide non-monetary relief to class members who, though eligible to file for free, did not expect to file for free and thus could not submit a claim.

The proposed Notice to the Settlement Class would also advise class members regarding the free file program. Id. at 8. Notice would be delivered to the email addresses that Intuit has on file, though a settlement class member who requests a mailed copy “or whose email address is no longer valid or otherwise results in a bounce-back message” would receive a mailed copy at the address that Intuit has on file. Id. at 9. Notice would also be available on a settlement website. Id.

The proposed settlement provides an opt out procedure for class members who wish neither to file a claim nor to be bound by the settlement. Such class members must

⁴ The fifth promise to not de-index would have little, if any, practical effect because Intuit has

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