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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

In the matter of:

Intuit Inc.,
a corporation,

Respondent.

Docket No. 9408

**COMPLAINT COUNSEL’S OPPOSITION TO INTUIT’S EXPEDITED
MOTION TO EXTEND DEADLINES FOR FILING APPEALS BRIEFS**

The primary issues and evidence in this matter are straightforward: Intuit’s deceptive “free” ads. After summary decision briefing, nine days of trial, and post-trial briefing and findings of fact, both the record and the issues in this matter are clear and familiar to both parties. Intuit’s requested delay is not in the public interest, nor has Intuit shown good cause for a request for more than double the briefing period established by Commission rules. In fact, the requested delay could result in millions of consumers being duped by Intuit’s deceptive advertising for yet another tax season. Complaint Counsel therefore respectfully requests that Intuit’s Motion be denied in large part and granted only to a limited extent.

I. Background

On March 28, 2022, the Commission issued the Complaint in this matter, which alleged that Respondent, Intuit Inc. (“Intuit”), deceptively marketed TurboTax, its online tax preparation service, in violation of Section 5 of the FTC Act. At the same time the Commission voted to issue this Complaint, it also authorized Bureau of Consumer Protection staff to seek a Temporary Restraining Order and Preliminary Injunction in the United States District Court for the Northern District of California, which was denied after briefing and a hearing before Judge Charles R. Breyer. Order Denying

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Motion for Emergency Relief, *FTC v. Intuit Inc.*, No. 22-cv-01973-CRB (Apr. 22, 2022), ECF No. 66.

On August 22, 2022, Complaint Counsel filed a motion for summary decision with the Commission, pursuant to Commission Rule 3.22(a). 16 C.F.R. § 3.22(a). Respondent filed an opposition on August 30, 2022. The Commission heard oral arguments on October 31, 2022, and issued an Opinion and Order Denying Summary Decision on January 31, 2023. *In re Intuit Inc.*, No. 9408, 2023 FTC LEXIS 18 (Jan. 31, 2023).

After pretrial briefing, the evidentiary hearing in this matter began on March 27, 2023, and was conducted over three weeks, on nine trial days. Thereafter, the parties submitted post-trial briefs, proposed findings of fact and conclusions of law, and replies to each other's briefs and proposed findings of fact and conclusions of law.

As the year draws to a close, it is important to keep in mind that Intuit's advertising for tax filing is seasonal, with a concentration of its revenue occurring between November and April. GX288 (Intuit) at CC-00006018. Without resolution of this matter, Intuit may run another advertising campaign in the next tax season, deceptively advertising "free" tax filing.

II. Argument

For matters pending before the Commission, the Commission "for good cause shown, may extend any time limit prescribed by the rules." 16 C.F.R. § 4.3(b). The time prescribed by the rules "ordinarily should provide parties enough time to file briefs of sufficient quality and detail to present their case and to inform the Commission's decision making." *In re Otto Bock Healthcare North Am., Inc.*, 2019 FTC LEXIS 35, *2 (F.T.C. May 22, 2019). The Commission has been reluctant to grant even joint requests for extensions of time for appellate briefing. *See In re Rambus, Inc.*, Order Granting Extensions of Time to File Appellate Briefs and Increases in Word Count Limits, Docket No. 9302, at 1 (Mar. 18, 2004) ("reluctant[ly]" granting a joint motion for an extension

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and stating that “[t]he time periods . . . prescribed by the Commission Rules of Practice should afford parties to FTC proceedings sufficient time . . . to file pleadings and briefs of sufficient quality and detail to aid in the preparation of Commission opinions and orders”).

Here, the requested extension of more than 20 days is striking. And it is not warranted, as it is not in the public interest. Intuit advertises its tax filing services seasonally, with advertising poised to commence at the end of this year, and at the latest at the beginning of next year. *See, e.g.,* GX288 (Intuit) at CC-00006018. It is in the public interest to resolve this matter expeditiously to prevent Intuit from engaging in yet another season of deceptive advertising. Under Intuit’s proposed schedule, appellate briefing in this matter would conclude on December 18, 2023. Giving the Commission 45 days to issue its decision, through February 1, 2024, would mean that the matter wouldn’t be resolved until the tax filing season, and Intuit’s advertising, are well underway. The Commission should be “mindful of the potential harm to consumers from unnecessary delay in resolving this appeal.” *In re Otto Bock Healthcare North Am., Inc.*, 2019 FTC LEXIS 35, *3 (F.T.C. May 22, 2019).

Intuit has also failed to show good cause as to why the extension it has requested is appropriate:

Size of the Record. Intuit points to the volume of the record in this matter, for example the roughly 2,400 exhibits submitted. However, of those exhibits, nearly 800 are Intuit’s own advertising or captures of its website and should not require a lengthy review. Intuit also points to the twelve trial witnesses and nearly 2,000 pages of trial transcript to support its request for additional time. But the Commission has denied requests for *shorter* extensions where the hearing transcripts approached 7,000 pages, from 69 witnesses. *Id.*; *see In re Otto Bock Healthcare North Am., Inc.*, Respondent’s Motion For Extension of Time and Increase in Word Limits, Docket No. 9378, at 2 (May 8, 2019).

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Length of the Initial Decision. Intuit also claims that the length of Judge Chappell's Initial Decision necessitates additional time for briefing. However, 114 pages, or nearly half, of Judge Chappell's order consist of findings of fact related to Intuit's own ads, which are neither complex, nor novel, and with which it is intimately familiar.

Complexity of the Issues. Intuit further claims that the complexity of the issues in this matter require additional time, though Intuit does not explain in what way the issues are complex. Contrary to Intuit's claim, the issues in this one-count case are simple, reflect well-established advertising law, and focus on evidence Intuit knows well: its ads. In any event, counsel for Intuit has served as counsel throughout the investigation, discovery, summary judgment briefing, the federal court action, and administrative hearing. Intuit's counsel further engaged in both pre- and post-trial briefing, which addressed every issue in this case in great detail. There is no good cause for an extension where counsel is so intimately familiar with the matter.

Prior Examples. Intuit points to two other matters in which the Commission granted extensions for the appellate briefing schedule. Those matters are inapposite, and in both matters the parties consented to an extension. In the *Rambus* matter, the Commission found that briefing involved novel legal, technological, and patent issues, none of which are present in the current matter. *See In re Rambus, Inc., Order Granting Extensions of Time to File Appellate Briefs and Increase Word Count Limits*, Docket No. 9302, at 2 (Mar. 18, 2004). Additionally, the *Rambus* matter involved 54 trial days, forty-four witnesses, and over 11,800 pages of trial transcript. *Id.* As the Commission found, there, the "record [was] replete with highly technical evidence relating to computer design, memory architectures, and various memory technologies." *Id.* Those facts are entirely distinct from the current matter, which involves straightforward ads and well-established advertising law.

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Intuit also points to the Altria matter, where the parties agreed to request an extension of deadlines for appellate filing, and where the complexity of the case required two extensions for Judge Chappell to issue the initial decision. *In re Altria Group*, Request for Extension of Time for Filing Initial Decision Pursuant to Commission Rule 3.51, Docket No. 9393, at 1-2 (Jan. 11, 2022). Remarkably, the Altria matter was only the second time that Judge Chappell made such a second extension request since Rule 3.51(a) was amended in 2009 to regulate the timing of the filing of initial decisions, illustrating the complexity of the record in that matter. *Id.* Here, Judge Chappell was able to issue his initial decision without any extension of time, which shows that this matter is very different, and significantly less complex, than the Altria matter.

Scheduling Issues. Intuit next points out a scheduling conflict for its lead attorney in this matter because he is taking expert depositions. However, a scheduling conflict does not show good cause for an extension. First, the schedule in this matter is predictable, with the rules prescribing the amount of time for the Administrative Law Judge to issue a decision and setting the subsequent briefing schedule. 16 C.F.R. 3.51(a), 3.52(a). Intuit could have readily anticipated any scheduling challenges, and its failure to do so does not constitute good cause. Indeed, Intuit has referred to Judge Chappell's Initial Decision as "anticipated" – though Complaint Counsel strongly disagrees with Intuit's aspersions against the Commission's administrative process.¹ Second, sixteen attorneys have noticed an appearance on behalf of Intuit in this matter, including a

¹ See Press Release, Intuit Inc., Intuit Responds to U.S. Federal Trade Commission's Anticipated Decision And Reaffirms its Commitment to Free Tax Preparation (Sept. 1, 2023), *available at* [intuit.com/blog/news-social/intuit-responds-to-u-s-federal-trade-commissions-anticipated-decision-and-reaffirms-its-commitment-to-free-tax-preparation/](https://www.intuit.com/blog/news-social/intuit-responds-to-u-s-federal-trade-commissions-anticipated-decision-and-reaffirms-its-commitment-to-free-tax-preparation/) (last visited Sept. 5, 2023). In its release, Intuit goes on to refer to the Initial Decision as "groundless and seemingly predetermined." Expressing contempt for the Commission's well-established administrative adjudicative processes, Intuit "is confident that when the matter ultimately returns to a neutral body Intuit will prevail, as it has previously in this matter." *Id.* Further: "The FTC's ruling was expected given the Commission's flawed and highly questionable process, Chair Lina Khan's previous public and prejudicial statements against Intuit, and the fact that the FTC has ruled in its own favor in nearly every consumer protection case for the last two decades." *Id.*

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former Chair of the Commission, the former Chief Trial Counsel for the FTC's Bureau of Competition, the former general counsel for the FBI, and the Vice Chair of WilmerHale's Government and Regulatory Litigation Practice Group. Complaint Counsel is confident that Intuit will receive adequate representation under the schedule set forth by the Rules.

Finally, Intuit points out a religious holiday that falls within the time set for its appellate briefing. As Complaint Counsel expressed to counsel for Intuit, Complaint Counsel does not oppose an extension to account for the holiday. Accordingly, Complaint Counsel can agree to extend Intuit's initial deadline by three days, with Complaint Counsel extending its own filing deadline by only one day, as shown below.

Opening Briefs	September 21, 2023
Answering Briefs	October 12, 2023
Reply Briefs	October 20, 2023 (includes additional day permitted in the event of electronic service)

* * *

For the foregoing reasons, Intuit's Motion should be denied in part and granted in part.

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Respectfully submitted,

Dated: September 6, 2023

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**UNITED STATES OF AMERICA
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COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
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**[Proposed] ORDER DENYING EXPEDITED MOTION TO EXTEND
DEADLINES FOR FILING APPEAL BRIEFS**

Pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), Respondent Intuit Inc.’s Expedited Motion to Extend Deadlines for Filing Appeal Briefs is DENIED in part and GRANTED in part, and it is hereby:

ORDERED that the briefs in this proceeding shall be due as follows:

Opening Briefs	September 21, 2023
Answering Briefs	October 12, 2023
Reply Briefs	October 20, 2023

By the Commission.

April J. Tabor
Secretary

Seal:

Issued:

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2023, I electronically filed the foregoing Complaint Counsel's Opposition to Intuit's Expedited Motion to Extend Deadlines for Filing Appeals Briefs and Proposed Order electronically using the FTC's E-Filing system, and I caused the foregoing document to be sent via email to:

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*Secretary of the Commission
Clerk of the Court*

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
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Administrative Law Judge

I further certify that on September 6, 2023, I caused the foregoing document to be served via email on:

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