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

In the matter of:

**Intuit Inc.,**  
a corporation,  
  
Respondent.

Docket No. 9408

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT INTUIT’S  
MOTION FOR DISCOVERY PURSUANT TO RULE 3.36**

This case is about Intuit’s deceptive advertising for TurboTax. Respondents, like Intuit, can assert legally valid defenses;<sup>1</sup> but Intuit cannot use its defenses as a license to embark on a fishing expedition into the Commission’s internal deliberations and other irrelevant, privileged records held by the FTC Commissioners and Secretary. Complaint Counsel thus opposes Intuit’s Motion for Discovery Pursuant to Rule 3.36 (the “Motion”).

The Rules generally cabin discovery to relevant, non-privileged materials collected or reviewed by “the Bureaus or Offices . . . that investigated the matter.” 16 C.F.R. § 3.31(c)(2). These materials have been collected and, to the extent they are responsive to Intuit’s Requests and not privileged, are being produced on a rolling basis consistent with the Scheduling Order.<sup>2</sup> Intuit’s Motion now seeks an order authorizing the issuance of subpoenas duces tecum to (1) the Commissioners of the Federal Trade Commission and their staff, and (2) the Secretary of the Federal Trade Commission and her staff. Intuit’s Motion seeking discovery from additional sources looks to exploit a narrow exception to Rule 3.31(c)(2) to expand the scope of discovery in a way that is not

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<sup>1</sup> As explained in the Reply in Support of Complaint Counsel’s Motion for Summary Decision and in a forthcoming motion to strike affirmative defenses, Intuit’s affirmative defenses are not legally valid.

<sup>2</sup> Complaint counsel has already produced over 7,000 documents to Intuit. *See* Complaint Counsel’s Opposition to Intuit’s Motion to Compel Production of Documents.

supported by the plain text of the Rules or precedent. The Motion should therefore be denied.

## I. Introduction

Rule 3.31(c)(2) provides that the Respondent is entitled to discovery of “materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of *the Bureaus or Offices of the Commission that investigated the matter.*” 16 C.F.R. § 3.31(c)(2) (emphasis added). Rules 3.31 and 3.36 provide a limited exception: the Administrative Law Judge may authorize discovery from additional sources where the requesting party demonstrates that the material sought: (i) is reasonable in scope; (ii) is reasonably expected to yield relevant information; (iii) cannot reasonably be obtained by other means; and (iv) is specified “with reasonable particularity.” 16 C.F.R. § 3.36 (incorporating by reference §§ 3.31(c)(1), 3.37(a)). In adopting Rule 3.36, the Commission recognized documents from additional sources outside the investigating office, such as the Commission, uninvolved Bureaus or Offices, or the Secretary, are “almost always protected by the deliberative process or attorney-client privileges or as work product,” 74 Fed. Reg. 1804, 1812 (Jan. 13, 2009), *see* Ex. A to Complaint Counsel’s Opposition to Intuit’s Motion to Compel Production of Documents, and therefore “the burden (and delay) of searches for responsive records and the creation of privilege logs should not be imposed without strong justification,” given “the lack of useful additional information likely to be available.” *Id.* at 1815.

Intuit’s Motion seeks, generally, two categories of documents. First, Intuit requests materials related to the FTC’s Free Guides, .com Disclosures guide, and ability to seek monetary relief – items arguably related to the Complaint’s claims. Second, Intuit seeks materials related to its affirmative defenses, including its protestations that its right to adjudication before a neutral arbiter has been violated and that the Commission’s procedures somehow violate Intuit’s right to procedural due process.

In both categories of requests, Intuit impermissibly seeks to peek into the Commission's internal deliberations and legal analyses to obtain materials that are not reasonably expected to yield information relevant to the matters at issue. *See infra* Part II. And even if such materials existed and were relevant, they would be highly protected. The subpoenas seek, for example, categories of documents that on their face would be covered by the deliberative process and attorney-client privileges, or are exempt from production as work product. *See infra* Part III. This includes documents related to the Commission's "consideration of whether to update its [.com Disclosure] guidance document," "votes or *potential* votes" taken by the Commission, and "internal memoranda or other legal analyses" "related to the FTC's ability to obtain monetary relief following the Supreme Court's April 22, 2021 decision in *AMG Capital Management, LLC v. Federal Trade Commission*, No. 19-508." *See, e.g.*, Commission Requests 5 and 7.<sup>3</sup> Respondent's subpoenas, which request privileged documents such as legal analyses created for a client by an attorney and pre-decisional deliberative materials, strike at the core of the Commission's concerns that such discovery will impose undue burdens without yielding discoverable information because the documents are privileged. 74 Fed. Reg. at 1812. Moreover, Intuit asks for swaths of documents from the Commission and the Secretary that are overbroad in scope, in some cases can be obtained by other means, and are requested in vague terms. *See infra* Part III. This Court should exercise its gate keeping function to prevent Intuit from going on a fishing expedition into waters that are unlikely to yield any relevant, non-privileged documents.

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<sup>3</sup> "Commission Request[s]" refers to Exhibit A to the Declaration of Derek Woodman in Support of Intuit's Motion; "Secretary Request[s]" refer to Exhibit B to that Declaration.

## II. The Discovery Sought is Not Reasonably Expected to Yield Relevant Information

Intuit's conclusory statements in support of its Motion fall short of showing that the additional discovery it seeks is reasonably expected to yield relevant information. *See In re LabMD, Inc.*, 2014 FTC LEXIS 22, \*12 (F.T.C. Jan. 30, 2014) ("conclusory, unsupported assertions do not demonstrate relevance"). The first category of documents Intuit seeks, for example, is *all* documents and communications related to the FTC's Free Guides and .com Disclosures guide, which, it claims, "would show that Intuit did not violate the FTC Act." Mot. at 4. Of course, Intuit is already in possession of the best evidence as to whether the guidelines absolve its conduct—the guidelines themselves and its own ads (indeed, even in the Motion, Intuit cherry-picks from the .com Disclosures guide to argue that its ads were not deceptive). Intuit argues additional materials are relevant because "the Commission has effectively acknowledged that its .com Guidance supports Intuit's theories and has sought to retract that guidance" in light of its determination. Mot. at 2, 4. This argument, seemingly supported by a coincidence of timing of public announcements and a confounding statement (given that the confidential nature of the Bureau's investigations and negotiations) that Intuit is the only company *it* knows of that has raised this defense, cannot render relevant *any and all* documents and communications—regardless of when it was created, who created it, or why it was created—that relates to the Free Guides or the .com Disclosures guide.

Intuit additionally seeks documents that it asserts are relevant to its affirmative defense that "one or more Commissioners prejudged the merits of the dispute." Complaint Counsel does not believe that Intuit raises a valid defense. As a matter of law, adjudicators are presumed to be unbiased. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). To rebut this presumption, a party must show "a conflict of interest or some other reason for disqualification." *Id.* at 195-96. The evidence Intuit cites to, which amounts to little more than the Chair restating a press release, fails to rebut the

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presumption. Intuit has no basis for seeking disqualification of Chair Khan or any other Commissioner. And Intuit should not be permitted to insert delay into these proceedings because it failed to seek disqualification of Chair Khan or any other Commissioner “at the earliest practicable time” after “reasonably hav[ing] learned, of the alleged grounds for disqualification. 16 C.F.R. 4.17.

Even assuming, *arguendo*, this affirmative defense is appropriately before this Court, Intuit has not shown that the materials sought are relevant. Intuit instead makes vague, conclusory assertions that Chair Khan’s public statements “reasonably call into question her impartiality.” Mot. at 5. Intuit also alleges, without citing any source or record, that it “understands that inaccurate information was shared with the Commissioners” that “may have impacted one or more Commissioner’s decision to bring this case and may have led to prejudgment of the matter.” Mot. at 3. Intuit argues that it seeks the requested documents to “ensure a level playing field and process.” *Id.*

Conjecture about the motivations of the Commission, however, does not give Intuit license to probe “the internal decision-making process of an administrative agency.” *In re School Services, Inc.*, 1967 FTC LEXIS 125, \*7 (F.T.C. June 16, 1967) (cleaned up); *see also In re Metagenics, Inc.*, 1995 FTC LEXIS 23, \* 1 (F.T.C. Feb. 2, 1995) (denying as irrelevant discovery on respondent’s unfair prosecution claim). Other than the public statements of Chair Khan to which Intuit has access, Intuit has not identified with specificity *any* relevant, discoverable documents that may exist other than by unsupported inuendo. Instead, Intuit’s proposed subpoena seeks *all* documents relating to issues of only tangential relationship to the merits of this case, such as documents sufficient to show the identity of the person who operated the Chair’s Twitter account (Commission Request 3), the narrative summary of the case provided on the FTC’s online docket (Secretary Request 2), and Intuit’s supposed “Rule 2.31 motion” (Commission Request 9; Secretary Request 4), even though Rule 2.31 does not authorize the filing of a “motion.” Although Intuit argues that it “should be afforded discovery to

confirm” its “concern[] about bias and prejudgment,” Mot. at 6, that conclusory statement does not render relevant a countless number of documents otherwise outside of its and Complaint Counsel’s reach.

**III. The Discovery Sought is Not Reasonable in Scope or Stated with Particularity, and Can Be Otherwise Obtained**

In a single paragraph of four sentences, which do not cite to any specific document request, nor to the record, nor to any issues in this case, Intuit sets forth the requirement that discovery be reasonable in scope and stated with particularity and then, in a conclusory fashion, relies on this lip service to conclude that such a standard has been met. Mot. at 6. This approach falls far short of demonstrating the necessary components of Rule 3.36 and ignores patent defects in its subpoenas.

First, Intuit’s subpoenas are overly broad and not reasonable in scope. There are, for example, no temporal limitations such that Intuit’s requests on their face seek documents dating back to the founding of the FTC more than a century ago. *Compare, In the Matter of 1-800 Contacts, Inc.*, at \*5 (expressing skepticism that documents over ten years old would be relevant to the matter). While some requests have implied time limitations, such as requests for materials from Chair Khan’s Twitter account, the proposed subpoenas would also require the Commission to search documents and communications, both internal and external, dating back decades relating to its policy about “free” advertising. *See* Commission Request 6. This outcome is entirely unreasonable.

More fundamentally, Intuit’s request is particularly, and unduly, onerous because the materials sought likely will require the review of an enormous quantity of privileged documents. Intuit’s requests squarely target materials protected from disclosure by several privileges, including the work product doctrine, attorney-client

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privilege, and the government deliberative process privilege.<sup>4</sup> For example, Intuit seeks materials that strike at the heart of the deliberative process privilege,<sup>5</sup> such as documents related to “potential votes” by Commissioners (Secretary Request 1) and the Commission’s consideration of whether to update its .com Disclosures guide (Commission Request 5). The subpoenas also seek all documents relating to the Commission’s internal memoranda and legal analyses of its ability to obtain monetary relief post-AMG (*see* Secretary Request 5, Commission Request 7), documents that epitomize the kind of highly protected work product and attorney client privileged documents that are not discoverable, as the Commission expected would be the case in situations like this. *See* 74 Fed. Reg. at 1812.

Intuit’s conclusory statement that “[t]he requests are also narrowly tailored to support Intuit’s defenses and rebut the FTC’s allegations,” and “will impose little burden” (Mot. at 6) contradicts the actual subpoena demands, which seek years of information regardless of its probative value to the matter at hand and without due consideration to the cost to the agency of collecting, reviewing, and cataloging the materials, myriad of which are surely exempt from disclosure by the agency’s privileges.

Second, the discovery sought is impermissibly vague. Broadly formulated and imprecise requests, like those here, are generally disfavored. *See, e.g., In re OSF Healthcare Sys.*, 2012 FTC LEXIS 31, \*4-5 (F.T.C. Feb. 14, 2012) (“[S]ubpoena requests that seek documents ‘concerning’ or ‘relating to’ have been found to lack the ‘reasonable

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<sup>4</sup> Complaint Counsel does not, and cannot, suggest any responsive documents exist nor could it formally assert any applicable privileges on behalf of the targets of the subpoena who Complaint Counsel does not represent.

<sup>5</sup> The deliberative process privilege protects documents that are “predecisional” and “deliberative in nature.” *See, e.g., Hongsermeier v. Comm’r of Internal Revenue*, 621 F.3d 890, 904 (9th Cir. 2010). The majority of Intuit’s own requests acknowledge that responsive materials will fall under this privilege by repeatedly reminding the Commissioners and Secretary to produce privilege logs. *See* Commission Requests 1, 4, 5, 6, & 7, and Secretary Requests 1, 2, 3, & 5.

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particularity' required."). The Commission Subpoena requests, for example, "ALL DOCUMENTS OR COMMUNICATIONS concerning" or "related to" an unspecified and potentially vast (because no time limitations apply) body of "studies, research, expert reports, or other analyses" – none of which are identified by Intuit. *See* (Commission Request 6). This imprecise request fails to provide reasonable particularity regarding what specific materials Intuit seeks, and whether, or how, such materials relate to Intuit's defenses, as required by Rule 3.36(b)(5). *See generally Assoc. Merchandising Corp.*, 1967 WL 94071, \*2 (F.T.C. Dec. 11, 1967) (denying the respondents' discovery request, which "can only be evaluated with difficulty, if at all, against the standards of the rule" as some Commission files "would have no relevance to the issues involved in litigation"). And such discovery requests are particularly inappropriate in the context of a Rule 3.36 motion, where Intuit needs to make an affirmative showing of a reasonable scope to seek documents outside the parameters of discovery permissible under Rule 3.31.

Finally, Intuit has not established that the subpoenas seek relevant, discoverable materials that it cannot obtain through means other than from the Commission and the Secretary. Intuit argues that it seeks documents "regarding Commissioner votes, control over Commissioners' social media accounts, and Commissioners' communications," yet in many cases the relevant, non-privileged documents are already in its possession, such as information about the votes themselves and the contents of public social media accounts. The non-public documents Intuit seeks would be covered by privilege, such as the communications that are part of the decision-making process of the Commission, which are protected by the deliberative process and attorney-client privilege. *See In re Basic Research LLC*, 2004 FTC LEXIS 210, \*4 (F.T.C. Nov. 4, 2004).

#### **IV. Conclusion**

For the foregoing reasons, Intuit's motion requesting issuance of subpoenas to the Secretary and to the Commissioners should be denied.



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Respectfully submitted,

Dated: October 24, 2022

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 24, 2022, I electronically filed the foregoing Opposition to Intuit’s Motion for Discovery Pursuant to Rule 3.36 electronically using the FTC’s E-Filing system, which will send notification of such filing to:

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I further certify that on October 24, 2022, I caused the foregoing document to be served via email on:

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