

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 RESPONDENT'S EXPEDITED
MOTION TO CONTINUE ORAL ARGUMENT TO ACCOMMODATE THE
IMPENDING SENATE CONFIRMATION HEARING OF TWO
COMMISSIONERS

Intuit's Expedited Motion to Continue Oral Argument to Accommodate the Impending Senate Confirmation of Two Commissioners (the "Motion") should be denied because Intuit has not demonstrated good cause for its requested extension. *See* Rule 4.3(b), 16 C.F.R. § 4.3(b).

First, *Humphrey's Executor* does not, as Intuit argues, demand waiting for the current appointees to the FTC to be confirmed. *See* Mot. at 2-3. Since 1914, including in 1935 when *Humphrey's Executor* upheld the constitutionality of the FTC's structure, the FTC Act has provided: "A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission." 38 Stat. 717, 718 (1914); 15 U.S.C. § 41. Thus, the Supreme Court was aware, in issuing *Humphrey's Executor*, that there may be times when the Commission did not have a full bipartisan complement of Commissioners. Intuit has not identified any law, regulation, or precedent that requires the Commission to cease its work pending the confirmation of appointees.

Second, the question before the Commission is not a semantic or academic one – it has real world consequences to the public interest as the next tax season approaches without a final order from the Commission. The Commission should be “mindful of the potential harm to consumers from unnecessary delay” in resolving issues before it. *See In re Otto Bock Healthcare North Am., Inc.*, 2019 FTC LEXIS 35, *3 (F.T.C. May 22, 2019). Here, Intuit advertises its tax filing services seasonally, with advertising poised to commence at the end of this year or 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. Complaint Counsel have consistently maintained that Intuit should be prevented from engaging in further deceptive advertising. Under Intuit’s proposed schedule, oral argument could be delayed through January 2024, pushing a decision in the matter even later into (or after the end of) this upcoming tax season. Such a delay is not justified.

Moreover, the basis for Intuit’s expedited¹ request is speculative because no one knows whether the Senate will vote on the nominations to the Commission tomorrow, next week, next month, or well after Intuit’s final December 31, 2023 deadline after which it would agree to proceed with oral argument. Nor is the result of that vote predetermined. Intuit’s only evidence that such votes are imminent, and will lead to a confirmation of the appointees, is: (1) a Reuters article documenting the October 18, 2023 vote of the Senate Commerce Committee sending the nominations out of committee for a final vote by the full Senate at some future date, and (2) the fact that those nominees are listed on the Senate’s Executive Calendar. These facts alone,

¹ Although Intuit calls its motion an “expedited” one, (Mot. at 1), there is no support in the Rules for such motions. While Intuit points to Rules 3.22(d) and (f), these Rules are silent on the issue of expedited filings and instead set out a standard deadline by which to respond to a motion or, if allowed, to reply (3.22(d)) and a mechanism for extending those deadlines (3.22(f)). *Compare* Mot. at 1 *with* 16 C.F.R. §3.22(d), (f). Even if there were a basis in equity for filing an expedited motion, the underlying facts Intuit relies on were knowable on October 18, 2023 (Mot. at 1-2) – almost a month before it filed this motion. Intuit’s delay in waiting until 6 business days before oral argument does not justify any special treatment.

however, do not, as Intuit opines, provide a “strong likelihood that [the Appointees] will be confirmed in the *coming days or weeks*.” See Mot. at 2 (emphasis added). As much as we all like to read the tea leaves, Intuit’s opinions as to when the Senate might act don’t carry water, and surely do not establish good cause to delay holding oral argument.

Because Intuit has not shown good cause to continue for an indeterminate time oral argument in this matter, its Motion should be denied.

Respectfully submitted,

Dated: November 13, 2023

/s/ Sara Tonnesen

Sara Tonnesen, MD Bar No. 1312190241

Roberto Anguizola, IL Bar No. 6270874

Rebecca Plett, VA Bar No. 90988

James Evans, VA Bar No. 83866

Federal Trade Commission

600 Pennsylvania Ave., NW, CC-6316

Washington, DC 20580

(202) 326-3284 / ranguizola@ftc.gov

(202) 326-3664 / rplett@ftc.gov

(202) 326-2026 / james.evans@ftc.gov

(202) 326-2879 / stonnesen@ftc.gov

Counsel Supporting the Complaint
Federal Trade Commission

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2023, I electronically filed the foregoing Complaint Counsel's Opposition to Respondent's Expedited Motion to Continue Oral Argument to Accommodate the Impending Senate Confirmation of Two Commissioners electronically using the FTC's E-Filing system, and I caused the foregoing document to be sent via email to:

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610
Washington, DC 20580
ElectronicFilings@ftc.gov

*Secretary of the Commission
Clerk of the Court*

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite H-110
Washington, DC 20580

Administrative Law Judge

I further certify that on November 13, 2023, I caused the foregoing document to be served via email on:

David Z. Gringer
Phoebe Silos
Charles Bridge
Wilmer Cutler Pickering Hale & Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
David.Gringer@wilmerhale.com
Phoebe.Silos@wilmerhale.com
Charles.Bridge@wilmerhale.com
(212) 230-8800

Shelby Martin
Wilmer Cutler Pickering Hale & Dorr LLP
1225 Seventeenth Street, Suite 2600
Denver, CO 80202
Shelby.Martin@wilmerhale.com
(720) 274-3135

Katherine Mackey
Wilmer Cutler Pickering Hale & Dorr LLP
60 State Street
Boston, MA 02109
Katherine.Mackey@wilmerhale.com
(617) 526-6000

Howard M. Shapiro
Jonathan E. Paikin
Jennifer Milici
Daniel S. Volchok
Derek A. Woodman
Vinecia Perkins
Andres Salinas
Jocelyn Berteaud
Benjamin Chapin
Margaret (Molly) Dillaway
Reade Jacob
Wilmer Cutler Pickering Hale & Dorr LLP
2100 Pennsylvania Avenue NW
Washington, DC 20037
Howard.Shapiro@wilmerhale.com
Jonathan.Paikin@wilmerhale.com
Jennifer.Milici@wilmerhale.com
Daniel.Volchok@wilmerhale.com
Derek.Woodman@wilmerhale.com
Vinecia.Perkins@wilmerhale.com
Andres.Salinas@wilmerhale.com
Joss.Berteaud@wilmerhale.com
Benjamin.Chapin@wilmerhale.com
Molly.Dillaway@wilmerhale.com
Reade.Jacob@wilmerhale.com
(202) 663-6000

Jonathan D. Leibowitz
6313 Kenhowe Drive
Bethesda, MD 20817
jondleibowitz@gmail.com
(202) 577-5342

Attorneys for Respondent, Intuit Inc.

/s/ Sara Tonnesen
SARA TONNESEN

Public

**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

**[Proposed] ORDER DENYING EXPEDITED MOTION TO CONTINUE ORAL
ARGUMENT TO ACCOMMODATE THE IMPENDING SENATE
CONFIRMATION HEARING OF TWO COMMISSIONERS**

Pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), Respondent Intuit Inc.’s
Expedited Motion to Continue Oral Argument to Accommodate the Impending Senate
Confirmation Hearing of Two Commissioners is DENIED.

By the Commission.

April J. Tabor
Secretary

Seal:

Issued: