

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: Joseph J. Simons, Chairman
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of

Axon Enterprise, Inc.
a corporation.

DOCKET NO. 9389

**COMPLAINT COUNSEL’S RESPONSE TO RESPONDENT’S MOTION TO
DISQUALIFY THE ADMINISTRATIVE LAW JUDGE**

On July 8, 2020, Respondent Axon Enterprise, Inc. (“Axon”) filed a Motion to Disqualify the Administrative Law Judge (“Motion”) pursuant to Federal Trade Commission Rule 3.42(g)(2). The Motion was certified to the Commission on July 9, 2020. Complaint Counsel respectfully submits this brief opposition to respond to several issues raised by Respondent’s Motion.

First, Axon’s Motion is improper under Rule 3.42(g). That rule permits a party to move for the disqualification of a *particular* judge in a *particular* proceeding and Axon’s arguments are not specific to this particular proceeding, or this particular judge. In fact, Axon admits that its motion, which argues that no FTC ALJ can ever hear any case, is not properly brought under Rule 3.42(g). Mot. at 2 (“Rule 3.42(g) addresses situations in which an ALJ is disqualified to preside ‘in a particular proceeding,’ not a situation in which the Constitution disables all ALJs in all proceedings.”). The Commission has explained, when addressing a similarly quixotic motion asserting it lacked constitutional authority that “lack of jurisdiction is not an argument for

disqualification. Rather, jurisdiction regards the power of the Commission to entertain this dispute in the first instance.” *In re N.C. Bd. of Dental Examiners*, 151 FTC 644 at 645 n. 3 (Feb. 16, 2011). Such jurisdictional arguments are not properly raised in a Rule 3.42(g) disqualification motion.

Second, Axon failed to comply with Rule 3.42(g)(3), which requires that motions to disqualify “shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.” 16 C.F.R. § 3.42(g)(3). As Axon’s recitation of filings confirms, Axon has been fully aware of the arguments raised in this Motion since at least January 3, 2020. *See* Mot. at 2 n. 3. Axon offers no explanation as to why it waited more than ten weeks after the start of this litigation to file the Motion, and the Motion may be denied as untimely on that basis.

Third, Axon states that its purpose in bringing this Motion is not to get a ruling under Rule 3.42(g), but to “further preserve the constitutional defense asserted in its Amended Answer and Defenses.” Mot. at 1. That defense is already preserved by its inclusion in Axon’s amended answer as its Fifteenth Affirmative Defense. Axon Amended Answer, Dkt. No.9389 (March 2, 2020). This alleged purpose to “further preserve” something that is already preserved shows the Motion for what it really is: a public relations stunt and an effort to distract Complaint Counsel from the merits of the litigation. Notably, Axon has not felt it necessary to file procedurally improper motions to “preserve” its myriad other constitutional defenses. The Commission should not condone the filing of pointless motions, such as this one, that seek no relief and waste the time of Complaint Counsel, the Court, and the Commission.

Axon’s motion should be denied because it is procedurally improper and untimely. While the Commission need not address Axon’s arguments on the merits, it has considered Axon’s claims and rejected them before. *See In re Otto Bock HealthCare N. Am., Inc.*, 2019 FTC LEXIS 79,

*146-155 (Nov. 1 2019); *In re 1-800 Contacts, Inc.*, 2018 FTC LEXIS 184, *167 (Nov. 7, 2018). Axon makes no effort to engage with the Commission’s thorough analysis in those opinions, and Complaint Counsel will not endeavor to summarize them here.

Axon’s re-boot adds little worth considering. Axon claims that the Supreme Court in *Free Enterprise* “did not address” administrative law judges. Mot. at 5. But, in fact, the Court indicated that its holding was not directed at ALJs and expressly distinguished ALJs’ authority from that of the Board. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 507 n. 10 (2010) (“[U]nlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, ... or possess purely recommendatory powers.”). Indeed, the Commission has also recognized that “the FTC’s ALJ occupies a different role than the Public Company Accounting Oversight Board (PCAOB) found to be improperly insulated from presidential control in *Free Enterprise*.” *In re 1-800 Contacts, Inc.*, 2018 FTC LEXIS 184, *167 (Nov. 7, 2018). The Supreme Court’s recent decision in *Seila Law LLC v. Consumer Financial Protection Bureau*, 2020 U.S. LEXIS 3515 at *37 (2020), does not overrule *Free Enterprise* or change the analyses regarding the constitutionality of ALJ removal provisions.

CONCLUSION

For the foregoing reasons, the Commission should deny Axon's Motion to Disqualify the Administrative Law Judge.

Dated: July 20, 2020

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

July 20, 2020

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