

**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.

**Docket No. 9408**

**RESPONDENT INTUIT’S MOTION FOR LEAVE TO FILE REPLY  
IN SUPPORT OF MOTION TO DISQUALIFY CHAIR LINA M. KHAN**

Pursuant to Rule 3.22(d) of the Commission’s Rules of Practice, 16 C.F.R. § 3.22(d), Respondent Intuit Inc. respectfully seeks leave to file a short reply brief in support of its Motion to Disqualify Chair Lina M. Khan. Intuit submits its Reply to correct Complaint Counsel’s misstatement of the standard governing disqualification. Leave to file has been granted in similar circumstances. *See* Order Denying CC’s Mot. to Bar Testimony and Argument at 1 (F.T.C. No. 9372 Feb. 21, 2017); Order Denying CC’s Mot. to Disregard and Strike, *1-800 Contacts, Inc.*, 2017 WL 2459061, at \*1 (F.T.C. May 31, 2017). Intuit’s proposed reply brief, conditionally filed with this motion, complies with Rule 3.22’s timing and word-count requirements.

Dated: August 10, 2023

Respectfully submitted,

By: /s/ David Z. Gringer

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**ORAL ARGUMENT REQUESTED**

**Docket No. 9408**

**RESPONDENT INTUIT INC.’S REPLY IN SUPPORT OF  
MOTION TO DISQUALIFY CHAIR LINA M. KHAN**

Pursuant to 16 C.F.R. § 3.22(d), Respondent Intuit Inc. respectfully submits this short reply brief to correct Complaint Counsel’s misstatement of the applicable legal standard governing disqualification in their response to Intuit’s motion.

As set forth in the motion, Chair Khan’s public testimony before the House Judiciary Committee and other comments would lead a disinterested observer to conclude that she has at least in some measure decided how she will rule. *See* Mot. at 5-8.<sup>1</sup> Under the D.C. Circuit’s standard, Chair Khan must be disqualified. *See Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 589-590 (D.C. Cir. 1970); ABA Model Code of Judicial Conduct R. 2.11 (2020). Complaint Counsel do not even attempt to argue that Chair Khan’s statements survive scrutiny under this standard.

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<sup>1</sup> Complaint Counsel’s assertion that Chair Khan did no more than make a “factual statement that the FTC had brought a lawsuit,” *see* Response at 3, is disconnected from the actual facts. In response to comments that Intuit was “evil” and had “trick[ed] and trap[ped]” consumers, Chair Khan told Rep. Jayapal that the acts set forth in “our” complaint were “deceptive practices,” the ultimate issue in this case. And she then went on to say that the conduct at issue “really hurts people.”

In their response, Complaint Counsel mischaracterize dicta from a footnote that appeared in *Fast Food Workers Committee v. NLRB*, 31 F.4th 807 (D.C. Cir. 2022), to invent a different disqualification standard. According to Complaint Counsel, derisive comments about a litigant in a pending matter are permissible so long as there is no proof that a Commissioner has “demonstrably made up [his/her] mind about important and specific factual questions and is impervious to contrary evidence.” Response at 1, 4-5 (quoting *Fast Food Workers Committee*, 31 F.4th at 815 n.4 (quoting *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164-1165 (D.C. Cir. 1995))).

Chair Khan’s comments here are sufficiently serious and concrete that they meet even this standard, but requiring definitive proof that a Commissioner had made up their mind would be an extraordinary test in light of the Supreme Court’s admonition that due process “requires both the *appearance* and reality of impartial justice.” *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016) (emphasis added). Contrary to Complaint Counsel’s suggestion, neither *Fast Food Workers* nor *Metropolitan Council* purported to override the disqualification standard articulated by the D.C. Circuit in *Cinderella* over 50 years ago. Both decisions reaffirm that due process requires disqualification where there is an *appearance* of prejudgment by an agency adjudicator. *Fast Food Workers* explained that disqualification is required when “a disinterested observer may conclude that the agency has in some measure” prejudged the case. 31 F.4th at 815. And *Metropolitan Council* similarly made clear that “[i]n an adjudicatory proceeding, recusal is required ... where ‘a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.’” 46 F.3d at 1164-1165 (quoting *Cinderella*, 425 F.2d at 591).

Complaint Counsel similarly miscite *N.C. Board of Dental Examiners*, 151 F.T.C. 644 (2011), to suggest that the Commission adopted their seemingly heightened standard for disqualification. While disqualification was not required in that matter under circumstances very different from the comments Chair Khan made here, that determination was expressly made under the familiar standard that disqualification is required where “a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *N.C. Bd. of Dental Examiners*, 151 F.T.C. at 648 (quoting *Cinderella*, 425 F.2d at 591).

The applicable disqualification standard is met here.

Dated: August 10, 2023

Respectfully submitted,

By: /s/ David Z. Gringer

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**PROPOSED ORDER**

Upon consideration of Intuit’s Request for Leave to File Reply in Support of Motion to Disqualify Chair Lina M. Khan:

IT IS HEREBY ORDERED, that the Motion is GRANTED.

ORDERED:

\_\_\_\_\_  
Lina M. Khan  
Chair of the Federal Trade  
Commission

Date: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on August 10, 2023, I caused the foregoing document to be filed 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 August 10, 2023, I caused the foregoing document to be served via email to:

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Dated: August 10, 2023

Respectfully submitted,

/s/ Derek Woodman  
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