UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Regarding the Petition for Recusal from
Involvement in Intuit Inc.
Commission File No. 9408

Respondent Intuit Inc. ("Intuit") has filed a petition under Rule 4.17(b)(1) in this matter to seek to have me recused. Intuit cites three instances of what it believes to be statements by me that show prejudgment. After having reviewed closely its arguments and the relevant facts and law, I have determined that the petition lacks merit.

Recusal from an adjudicatory proceeding is required where "a disinterested observer" would conclude that the adjudicator "has in some measure adjudged the facts as well as the law of a particular case in advance."[1] Moreover, agency officials "are presumed objective and 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"[2] As the D.C. Circuit most recently has explained, "[a] party asserting prejudgment must show that the agency official has 'demonstrably made up [her] mind about important and specific factual questions and [is] impervious to contrary evidence.'"[3]

The first two instances that Intuit raises in its petition are statements that I made at or around the time the Commission's complaint was first filed in March 2022. These two statements were: (1) my March 2022 retweet of the FTC press release announcing the filing of this action; and (2) an April 2022 Q&A session in which I referred to this proceeding in the context of discussing the importance of timely action by the agency.[4] Although Rule 4.17(b)(2) directs those who believe they have grounds to disqualify a Commissioner to make a motion for disqualification "at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification," Respondent did not file a petition

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[1] *Cinderella Career & Finishing Schools, Inc. v. FTC,* 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959), cert. denied, 361 U.S. 896 (1959)).
[2] *Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm'n*, 509 F.3d 562 (D.C. Cir. 2007) (quoting *U.S. v. Morgan*, 313 U.S. 409, 421 (1941)).
[3] *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (internal quotation marks omitted). *See also Fast Food Workers Comm. v. NLRB*, 31 F.4th 807, 815 n.4 (D.C. Cir. 2022) (noting that *Metro. Council of NAACP Branches* "elaborated" on the *Cinderella* standard).
[4] Specifically, I stated:

> On . . . stopping the law-breaking—I think we need to act in a more timely manner. We need to be going into court more quickly; we need to be seeking preliminary injunctions. On the consumer protection side, the FTC, a few weeks ago, filed a lawsuit against TurboTax on the consumer protection side, alleging that TurboTax had been showing all these ads that are allegedly deceptive, and that it was really important to get that relief ahead of Tax Day. I think that type of timely intervention and timely filing of lawsuits is incredibly important.

under Rule 4.17(b)(1) until August 2023, 17 months after I made the statements that it alleges show bias.[5]

Intuit's claim that these two comments evince prejudgment has already been rejected by Chief Administrative Law Judge Chappell.[6] Issuing an order denying Intuit's request for discovery related to the alleged prejudgment, he wrote, "Factual statements that the FTC has brought a lawsuit alleging deception are akin to a factual press release describing pending adjudicatory proceedings and allegations, which . . . does not evince prejudgment."[7] Judge Chappell noted that in *FTC v. Cinderella Career & Finishing Schools, Inc*., the D.C. Circuit held that the Commission's issuance of press releases that called attention to the pending proceedings and allegations did not constitute prejudgment or violate respondent's right to due process of law.[8] I agree with Judge Chappell's determination.

The third instance Intuit cites is my answer to one question in a hearing before the House Judiciary Committee on July 13, 2023:

> REPRESENTATIVE PRAMILA JAYAPAL: I just want to go to evil actors because there's one more I really want to talk about, and that is tax preparation companies. For years, Intuit, the maker of TurboTax, flooded consumers with ads promising 'free free free' tax-filing services only to trick and trap them into paying, which is why taxpayers pay $250 on average each year just for the privilege of filing their taxes. So state attorney generals have won taxpayers money from Intuit and the FTC has also taken action. Can you just speak about that?
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> CHAIR LINA M. KHAN: Yeah, absolutely. So, last year the FTC brought a lawsuit against Intuit for those very types of deceptive practices that are laid out in our complaint. That is still pending. But I couldn't agree more that claims of something being free but then ultimately it not being so really hurts people.[9]

My response to Congresswoman Jayapal's question accurately noted that "deceptive practices … are laid out in our complaint." Intuit asserts that my use of "our" shows that I placed myself "on the same team as Complaint Counsel."[10] I used that possessive to acknowledge a basic fact: the Commissioners—including me—voted to issue the complaint as required by Section 5 of the FTC Act, which instructs that the Commission file a complaint whenever it "shall have reason to believe" there is a violation of the Act. I then explicitly referenced the pending nature of this matter, signaling that the Commission has not issued a final decision and that I had not prejudged any issue in any way with respect to this matter.

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[5] Rule 4.17(b)(2). *See In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 649 (2011).
[5] Rule 4.17(b)(2).
[6] Order Denying Respondent's Motion for Discovery Pursuant to Rule 3.36 at 5-6, *In re Intuit Inc.*, FTC Docket No. 9408 (Nov. 7, 2022).
[7] *Id.* at 5.
[8] *Id.* at 6 (citing FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1314-15 (D.C. Cir. 1968)).
[9] *Oversight of the Fed. Trade Comm'n: Hearing on 15 U.S.C. §§ 41-58 Before the H. Comm. on the Judiciary*, 117th Cong. (July 13, 2023).
[10] Pet. at 5.

I then went on to make a generalized statement that "claims of something being free but then ultimately it not being so really hurt people." Contrary to Intuit's assertion, that statement was not tethered to the merits of the Intuit case, but rather was a generalized assertion that false free claims can cause consumer injury. That statement reflected a policy belief, not an adjudication of this case. As the Supreme Court noted in *FTC v. Cement Inst.*, "[No authority] would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after [the judge] had expressed an opinion as to whether certain types of conduct were prohibited by law."[11]

Intuit takes issue with Representative Jayapal's statement that she wanted to discuss "evil actors" and that Intuit "trick[ed] and trap[ped]" consumers—and claims that my response conveyed agreement with Representative Jayapal's characterization of Intuit.[12] This is belied by the text of the full exchange, where I said "Yeah, absolutely," in response to Representative Jayapal's question, "Can you speak about that?"

Rather than evincing prejudgment or bias, my response to Representative Jayapal's question, just like my two previous comments, were "[f]actual statements that the FTC has brought a lawsuit."[13] *Kennecott Copper Corp. v. FTC* involved similar prejudgment allegations based on an FTC Commissioner having mentioned a pending complaint during an interview.[14] There, the Tenth Circuit noted:

> We have examined the cases and in each instance in which the courts considering the facts have ruled that the Commissioner had to be disqualified, action was entirely justified based on comments showing what appeared to be a prejudice or a viewpoint. No such commenting or editorializing is present here. From a reading of the statement in its entirety, it is clear that Commissioner Jones was discussing the *complaint* and was doing so in an effort to illustrate a point. Thus, it does not appear that she stepped over the line, whereby she showed even a slight commitment.[15]

The cases that Intuit cites in support of its petition are factually distinguishable from this matter. As Judge Chappell noted, those cases involved instances where the adjudicator "made affirmative comments on the merits of the case."[16]

For example, in *Cinderella Career and Finishing Schools, Inc. v. FTC*, the FTC's complaint alleged that respondent's advertising falsely represented that completion of its courses would qualify students to become airline stewardesses.[17] The D.C. Circuit held that a speech by

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[11] 333 U.S. 683, 702-03 (1948).
[12] Pet. at 8.
[13] Order Denying Respondent's Motion for Discovery Pursuant to Rule 3.36 at 6, *In re Intuit Inc.*, FTC Docket No. 9408 (Nov. 7, 2022).
[14] 467 F.2d 67 (10th Cir. 1972).
[15] *Id.* at 80.
[16] Order Denying Respondent's Motion for Discovery Pursuant to Rule 3.36 at 5-6, *In re Intuit Inc.*, FTC Docket No. 9408 (Nov. 7, 2022). The other cases Intuit cites, *Am. Cynamid v. FTC*, 363 F.2d 757, 763, 767 (6th Cir. 1966), and *Berkshire Emp. Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941), did not concern public statements made after the filing of an administrative complaint, and, hence, are inapposite.
[17] 425 F.2d 583 (D.C. Cir. 1970).

the then-Chair, condemning false advertising in general and specifically citing as an example a representation that one can "becom[e] an airline's hostess by attending a charm school," showed prejudgment.[18] In *In re Boston's Children First*, the judge hearing a class certification motion gave an interview to a reporter in which she said that the instant case involved class member claims "more complex" than a previous case, where "it was absolutely clear every [class member] was injured."[19] Given that issues concerning the predominance of a common injury is often key in class certifications issues, the First Circuit found that the judge's comments could be construed to relate to the merits of the case at hand and thus warranted recusal.[20] Here, by contrast, the three statements I made refer to the allegations of the complaint and do not comment on the merits of those allegations.

Finally, absent from Intuit's petition is any reference to Complaint Counsel's motion for summary decision in this matter, which was decided by the Commission in January 2023. In that opinion, I joined the Commission in ruling *in favor* of Intuit on that motion, denying Complaint Counsel's motion in its entirety.[21] It is unclear how Intuit squares my purported bias against Intuit with my vote in favor of Intuit's motion.

In sum, none of the comments cited by Intuit are such that a "disinterested observer may conclude that [I] ha[ve] in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[22] For all these reasons, I decline to recuse myself from this matter.

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[18] *Id.* at 590-92.
[19] 244 F.3d 164, 167 (1st Cir. 2001).
[20] *Id.* at 167-68.
[21] Opinion and Order Denying Summary Decision, *In re Intuit Inc.*, FTC Docket No. 9408 (Jan. 31, 2023).
[22] *Cinderella Career & Finishing Schools, Inc. v. FTC,* 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959), cert. denied, 361 U.S. 896 (1959)).