

**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.

ORAL ARGUMENT REQUESTED

Docket No. 9408

RESPONDENT INTUIT INC.'S MOTION TO DISQUALIFY CHAIR LINA M. KHAN

If a federal judge testified under oath that, in a case pending before her, she agreed with the plaintiffs' theory of liability, referred to the operative complaint as "our" complaint, and adopted an interlocutor's assertion that the defendant was an "evil actor," that judge would unquestionably need to recuse herself, or else be disqualified. Recusal or disqualification would be even more warranted if the judge in question had, on two previous occasions, made statements that reasonably called her neutrality into question. That is exactly what Chair Khan has done in this case, and because the same rules applicable to federal judges apply to FTC Commissioners when they sit as adjudicators, Chair Khan must be disqualified.

Intuit's post-trial brief identified (at 122-123) statements by Chair Khan that, at minimum, created the appearance that she had prejudged the merits of this case. To the extent any doubt as to whether disqualification is required remained, Chair Khan erased that doubt during a July 13, 2023 hearing before the House Judiciary Committee, during which she both made and adopted inappropriate and inaccurate remarks about this case—including by referring to Intuit's conduct as "deceptive," the ultimate issue in this case—and adopted Rep. Pramila

Jayapal's false statements that Intuit was an "evil actor," and that it cost over \$250 to use TurboTax.

Put simply, there is now no doubt that "'a disinterested observer [would] conclude that [Chair Khan] has in some measure'" prejudged this case against Intuit, *Fast Food Workers Committee v. NLRB*, 31 F.4th 807, 815 (D.C. Cir. 2022). As such, Chair Khan's disqualification is required. See ABA Model Code of Judicial Conduct R. 2.11 (2020) (requiring disqualification where a judge "made ... public statement[s], other than in a court proceeding, judicial decision, or opinion, that ... appear[] to commit [her] to reach a particular result ... in the proceeding").

BACKGROUND

Intuit offers a free tax preparation product called TurboTax Free Edition. Intuit's Proposed Findings of Fact ("PFF") ¶67. TurboTax Free Edition is free, and millions of taxpayers annually use it to file their taxes for free. PFF ¶113. An extensive evidentiary hearing established that Intuit's advertisements for Free Edition were not deceptive. Complaint Counsel came forward with no fact witnesses or other evidence of deception or even likely deception. And of particular import in light of the misrepresentation that Intuit is somehow "evil," the Court was able to hear from Intuit's own employees, who credibly explained why the challenged advertisements were not deceptive, why it would be counterproductive and unprofitable for Intuit to deceive consumers, and how internal surveys and other consumer testing demonstrated the complete absence of deception. *E.g.*, PFF ¶¶95, 134.

After Chief ALJ Chappell decides the case, it will go to the full Commission for review. The Commissioners will not have heard live testimony or otherwise had the opportunity to assess the credibility of the various witnesses. And the case will go to the Commission even though a federal judge has already held that injunctive relief on the same ads was unwarranted. Based on

Chair Khan’s public statements, there is substantial and sufficient reason for Intuit to be concerned about whether it can get a fair hearing at that stage of the case.¹

First, on March 29, 2022, with the Part 3 wall in place, Chair Khan retweeted, from her @linakhanFTC twitter account, a press release from the Commission regarding Intuit’s “deceptive TurboTax ‘free’ filing campaign” and the need for an “immediate halt to Intuit’s deceptive ads.” PFF ¶932. Then, not one month later (and with the Part 3 wall still in place), Chair Khan said in a widely watched public interview that Intuit had “alleged[ly]” engaged in “law-breaking” and that it was “incredibly important” for the FTC to stop Intuit’s unlawful “deceptive” conduct. PFF ¶933.

Before trial, Intuit raised to both the ALJ and the Commission the impropriety of these remarks. *See Intuit, Inc.*, 2023 WL 1861211, at *17 (F.T.C. Jan 31, 2023). Intuit further renewed the argument that these two remarks warranted dismissal in its pre-trial (at 84-87) and post-trial (at 122-125) briefing.

On July 13, 2023, Chair Khan again commented publicly on this matter. While testifying before the House Judiciary Committee, Chair Khan and Rep. Jayapal engaged in the following exchange (emphases added):

REP 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?

CHAIR KHAN: 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

¹ There are other reasons for concern too, including public reporting that suggests the use of so-called zombie votes in this matter.

pending, but *I couldn't agree more* that claims of something being free but then ultimately it not being so really hurts people.²

TurboTax Free Edition *is free*, and the key issue in this case is whether Intuit nonetheless deceptively advertised that free product as free.

ARGUMENT

“Both the appearance and reality of impartial justice,” the Supreme Court has explained, are foundational to due process and the rule of law. *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016). And courts have repeatedly held that due process prohibits an agency from “adjudg[ing] the facts as well as the law of a particular case in advance of hearing it.” *Fast Food Workers Committee v. NLRB*, 31 F.4th 807, 815 (D.C. Cir. 2022). Consistent with this fundamental principle, 16 C.F.R. §4.17(c) provides for the disqualification of Commissioners “in accordance with legal standards applicable to the proceeding in which such motion is filed.” The standards governing judicial disqualification apply where, as here, “Commissioners act[] as judges.” *Intel Corp.*, 149 F.T.C. 1548, at *3 (2010).³

To determine whether due process requires disqualification, courts ask “whether a disinterested observer may conclude that the agency has in some measure” prejudged this case against Intuit. *Fast Food Workers*, 31 F.4th at 815; *see also* 28 U.S.C. §455(a) (federal judges shall recuse themselves from “any proceeding in which [their] impartiality might reasonably be questioned”). This standard is met when a disinterested observer would conclude that the “ultimate determination of the merits” improperly “move[d] in predestined grooves.” *Cinderella*

² The full hearing can be found at <https://www.youtube.com/watch?v=nLGku6ueO-8>. The relevant exchange takes place from 2:07:10-2:07:56.

³ 16 C.F.R. §4.17(b)(2) requires that a motion to disqualify “be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.” Given how soon after Chair Khan’s testimony Intuit is filing this motion, there is no credible argument Intuit is not acting in a timely manner.

Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 589-590 (D.C. Cir. 1970). Whenever the question of “disqualification is a close one, the balance tips in favor of recusal.” *In re Boston’s Children First*, 244 F.3d 164, 167 (1st Cir. 2001).

Here, it is not close. Chair Khan clearly expressed her (erroneous) view on multiple occasions—all before the case was fully before her on a complete record—that Intuit’s ads were deceptive in precisely the manner alleged by Complaint Counsel.

Chair Khan’s recent colloquy with Rep. Jayapal—both the words Chair Khan said herself, and the remarks of Rep. Jayapal that she effectively adopted—confirm that, at minimum, a reasonable observer would believe that Chair Khan already deems Intuit guilty of the allegations raised in the complaint, notwithstanding that the ALJ has yet to even issue his initial decision. When Rep. Jayapal asked if Chair Khan could “speak about” the FTC’s pending case against Intuit, the appropriate response needed to be “no.” *See In re Boston’s Children First*, 244 F.3d at 166 (disqualifying a judge based on a statement she made when “asked about” a pending case). Instead, Chair Khan said “[a]bsolutely,” and proceeded to note that the matter concerns “deceptive practices that are laid out in our complaint.” Two points stand out from that answer. First, Chair Khan did not include even a perfunctory “alleged” qualifier before characterizing Intuit’s practices as deceptive. And second, by using the phrase “our complaint,” Chair Khan acknowledged ownership of the complaint and her place on the same team as Complaint Counsel. Any disinterested observer who watched that exchange would form the impression that Chair Khan agreed with both Rep. Jayapal and Complaint Counsel on the merits.

Courts have invalidated FTC actions tainted by statements far less problematic. For example, in *American Cyanamid Co. v. FTC*, 363 F.2d 757, 763, 767 (6th Cir. 1966), an action was invalidated because the Commission’s Chair at the time had merely investigated similar

“facts and issues” to those in the proceeding in question. Recusal was necessary, the court explained, because FTC proceedings ““must be attended, not only with every element of fairness but with the very appearance of complete fairness,”” and that “[w]herever there may be reasonable suspicion of unfairness, it is best to disqualify.” *Id.* at 767. The D.C. Circuit subsequently embraced *American Cyanamid*’s reasoning when it invalidated a commission order holding a company liable for deceptive practices because the Commission’s then-Chair made public statements appearing to condemn particular industries—including the industry of the company in question—as engaging in deceptive practices. *Cinderella*, 425 F.2d at 584-585.

Chair Khan’s characterization of Intuit’s “practices” as “deceptive” went beyond merely investigating issues relevant to this proceeding or commenting on practices of a particular industry; rather, she expressly commented on the most important issue at the heart of the trial. There is no doubt a judge who said what Chair Khan did would have to recuse. Because “comments ... sufficiently open to misinterpretation so as to create the appearance of partiality, even when no actual prejudice or bias existed” necessitate recusal, *In re Boston’s Children First*, 244 F.3d at 170, judicial recusals have been required merely for characterizing one case as “more complex” than another, *id.* at 166, or for telling the press that people who voiced an intention to disregard the judge’s injunction were “breaking the law,” *United States v. Cooley*, 1 F.3d 985, 990, 995 (10th Cir. 1993). Chair Khan is held to the same standard as judges. *Supra* p.4. And her remarks, particularly when made under oath in the very public setting of a Congressional hearing, at the very least pose an unconstitutional risk of “entrenching [her] in [the] position which [s]he had publicly stated.” *Cinderella*, 425 F.2d at 590.

Equally troubling were the many premises embedded in Rep. Jayapal’s remarks, with which Chair Khan did not voice any disagreement. Rep. Jayapal’s remarks are relevant because

they provide the context in which Chair Khan’s subsequent statements were made and color how a reasonable observer would interpret Chair Khan’s statements in response. Indeed, at least one court has held that an FTC Chair’s recusal was warranted based on words that were not entirely his own. *See, e.g., American Cyanamid*, 363 F.2d at 763.

To start, Rep. Jayapal referred to Intuit as “evil.” A statement that a party before a court is “evil” goes far beyond the relatively banal remarks and conduct cited above as warranting disqualification. Rep. Jayapal’s unfounded attack against Intuit—inappropriate on any record—was particularly improper here because the record in this case firmly belies the notion that Intuit is, to use Rep. Jayapal’s word, “evil.” *See* PFF ¶¶33-38, 171, 852, 860, 870. In particular, the record showed unequivocally that if Intuit ever believed it was running a deceptive or misleading ad, the company would have taken steps to ensure that ad would stop running immediately, PFF ¶174.

Rep. Jayapal’s assertion that Intuit “trick[ed] and trap[ped]” consumers “into paying” an average of \$250 annually to file their taxes is also as problematic as it is untrue. That statement, which suggests that Intuit’s ads were inaccurate and that consumers had no choice but to use a paid TurboTax service after being lured under false pretenses by Intuit, comments on core issues that have been disputed throughout the proceeding and were unsupported at trial. None of the challenged ads falsely promoted a free product, Intuit Post-Trial Br. 37-49, there is no evidence reasonable consumers were deceived into thinking TurboTax was free for them when it was not, *e.g., id.* at 82-92, and there is no evidence consumers felt trapped into using paid SKUs, *e.g., id.*

at 53-54, 95. But regardless of the underlying truth, staking out an “entrench[ed] ... position” on these fundamental issues violates Intuit’s due process rights. *Cinderella*, 425 F.2d at 590.⁴

In sum, Chair Khan’s recent statements before the House Judiciary Committee, especially given her two earlier exhibitions of prejudice against Intuit, show that Chair Khan “has demonstrably made up [her] mind about important and specific factual questions and is impervious to contrary evidence.” *Fast Food Workers Committee*, 31 F.4th at 815. Because she has repeatedly expressed her apparent view on the ultimate issue in this case—including by stating without qualification that Intuit has engaged in “deceptive practices” and that she “couldn’t agree more” that Intuit’s purportedly deceptive conduct “really hurts people”—Chair Khan must be disqualified.⁵ Moreover, given her status as Chair of the Commission, Chair Khan’s disqualification is particularly necessary because failure to do so would necessarily taint the remaining commissioners through any deliberations that may later occur. *See Berkshire Employees Ass’n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941) (“Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.”).⁶

⁴ Intuit’s discussion of Complaint Counsel’s failure of proof in this case should not be read to suggest that disqualification depends on whether or not Chair Khan *correctly* prejudged the case. Rather, Chair Khan must be disqualified because her statements, at the least, suggest to a reasonable observer that she has prejudged the merits. That she has prejudged the case *incorrectly* matters because it shows that she prejudged the case improperly to begin with.

⁵ Complaint Counsel’s post-trial reply brief centers (at 111-112) its defense of Chair Khan’s pre-trial statements on (1) the prior rejection of Intuit’s bias argument, and (2) the fact that Intuit had not sought to disqualify Chair Khan. Those arguments were flawed when made, *see* Intuit Post-Trial Reply Br. 87, and they are untenable now given Chair Khan’s colloquy with Rep. Jayapal and Intuit’s prompt filing of this motion in response.

⁶ Intuit reserves the right to argue that such a taint has already occurred.

CONCLUSION

Chair Khan should be disqualified.

Dated: August 7, 2023

Respectfully submitted,

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PROPOSED ORDER

Upon consideration of Intuit’s 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 7, 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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