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**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 RESPONSE TO RESPONDENT INTUIT’S
MOTION TO DISQUALIFY CHAIR LINA M. KHAN¹**

Respondent Intuit’s Motion to Disqualify should be denied because Intuit has not made the requisite showing that Chair Khan “demonstrably made up [her] mind about important and specific factual questions and is impervious to contrary evidence.” *Fast Food Workers Comm. v. NLRB*, 31 F.4th 807, 815 n.4 (D.C. Cir. 2022) (cleaned up) (citing cases). “The standard for disqualification based on prejudgment is an exacting one.” *In re N.C. Bd. of Dental Exam’rs*, 151 F.T.C. 644, 648 (2011). To prevail on the Motion, Intuit must show, with “affidavits and other information,” Rule 4.17(b)(1), that Chair Khan’s mind is “‘irrevocably closed’ with regard to the legality of the conduct at issue in the adjudication,” *N.C. Bd. of Dental Exam’rs*, 151 F.T.C. at 648 (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948)). Intuit has not made such a showing.²

¹ This Response is authorized by Rule 3.22(d). See *In re LabMD, Inc.*, 159 F.T.C. 2145 n.2 (2015).

² The “Background” section of Intuit’s Motion begins with two paragraphs of misleading statements. Among others, first, Intuit summarily states: “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.” Mot. at 2. That is simply not the case. See generally Complaint Counsel’s Post-Trial Brief and Complaint Counsel’s Post-Trial Reply Brief. Second, Intuit again raises the red herring of Judge Breyer’s denial of a TRO in the federal court case ancillary to this matter. For discussion of why this is immaterial, see Complaint Counsel’s Post-Trial Reply Brief at 5–6, and RFF-14–RFF-15.

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In support of its Motion, Intuit has identified three instances in which Chair Khan referenced this matter. Read in context, all three references are understood properly to characterize this matter as one in which the Commission, including Chair Khan, found *reason to believe* that Intuit engaged in deceptive acts or practices. See Compl. pg. 1 (prefatory paragraph) & ¶ 122.

The first two references – a retweet of a press release and a mention in a speech – have already been held to be immaterial. See Complaint Counsel’s Post-Trial Reply Brief at 110–11 (citing *In re Intuit Inc.*, 2022 WL 16960890, at *5 (F.T.C. Nov. 7, 2022) (Chappell, C.A.L.J.); *In re Intuit Inc.*, 2023 FTC LEXIS 18, at *48–49 (Jan. 31, 2023)); see also RFF-932 – RFF-933. Both were simply “[f]actual statements that the FTC has brought a lawsuit alleging deception ..., which ... does not evince prejudgment.” *Intuit Inc.*, 2022 WL 16960890, at *5 (citing *FTC v. Cinderella Career & Finishing Sch., Inc.*, 404 F.2d 1308, 1314–15 (D.C. Cir. 1968)). Each of these references speaks to the issuance of the Complaint in this matter, in which the Commission, by a four-to-one vote, found reason to believe that Intuit had violated the FTC Act. Moreover, Intuit’s attempt to justify disqualification in an August 2023 motion based on statements from March and April 2022 is untimely. See *N.C. Bd. of Dental Exam’rs*, 151 F.T.C. at 649; Rule 4.17(b)(2).

The third instance Intuit cites is Chair Khan’s answer to a single question in a July 13, 2023 hearing before the House Judiciary Committee:

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?

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

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something being free but then ultimately it not being so really hurts people.³

Contrary to Intuit's overwrought reading of this exchange, it is nothing more than another "[f]actual statement[] that the FTC has brought a lawsuit alleging deception," which, again, "does not evince prejudgment." *Intuit*, 2022 WL 16960890, at *5 (citing *Cinderella*, 404 F.2d at 1314-15); *see also Intuit*, 2023 FTC LEXIS 18, at *49 ("Issuing a press release regarding a Commission action *or highlighting the existence or importance of such an action* does not amount to prejudgment." (emphasis added)); *N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 654-55. Chair Khan was asked "Can you just speak about that?" with regard to the FTC action against Intuit; she responded "Yeah, absolutely," and noted the existence and pending nature of this matter. Chair Khan was accurate in noting that "deceptive practices ... are laid out in our complaint" because the Commission, by a four-to-one vote including Chair Khan in the affirmative, found reason to believe that Intuit engaged in deception and issued the Complaint – a procedure that does not render her or the other Commissioners biased. *See* Complaint Counsel's Post-Trial Reply Brief § II.F.1; *see also N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 652-54; *In re Intel Corp.*, 149 F.T.C. 1548, 1552 n.9 (2010); *Gibson v. FTC*, 682 F.2d 554, 560 (5th Cir. 1982) ("The combination of investigative and judicial functions within an agency has been upheld against due process challenges, both in the context of the FTC and other agencies.") (citing *Cinderella*, 404 F.2d at 1315; *Pangburn v. CAB*, 311 F.2d 349, 356 (1st Cir. 1962); *Cement Inst.*, 333 U.S. at 700-03; *Withrow v. Larkin*, 421 U.S. 35, 51-56 (1975) (each of which cite additional cases)).

Chair Khan's follow-up remark on free claims was not tethered to this matter. It reflected a policy belief, not an adjudication of this case. *See Cement Inst.*, 333 U.S. at 702-03 ("[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

³ <https://www.youtube.com/watch?v=nLGku6ueO-8&t=7630s>. Complaint Counsel disagrees with Intuit's choice of punctuation and omission of the word "Yeah" in its transcription.

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opinion as to whether certain types of conduct were prohibited by law”). Intuit’s assertion that Chair Khan “stat[ed] 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,’” Mot. at 8, is simply belied by what was actually said.

Intuit also faults Chair Khan for “not voic[ing] any disagreement” with Representative Jayapal’s statements. Mot. at 6–7. But Chair Khan did not voice any *agreement* with those statements either. Again, Representative Jayapal said: “[T]he FTC has also taken action. Can you just speak about that?” to which Chair Khan responded by noting the existence of this matter, with the conduct at issue laid out in the Complaint. Representative Jayapal has no role in adjudicating the merits of the Complaint and her comments are not attributable to Chair Khan.⁴

* * *

The most recent and correct statement of the standard applicable here was reiterated by the D.C. Circuit last year.⁵ It asks whether Chair Khan has “demonstrably made up [her] mind about important and specific factual questions and is impervious to

⁴ Intuit also complains that Representative Jayapal has her facts wrong. Mot. at 7. Again, Intuit’s reading is self-serving. For example, Representative Jayapal simply did not say, as Intuit asserts, that Intuit gets consumers to pay “an average of \$250 annually to file their taxes.” *Id.* She actually said that “taxpayers pay \$250 on average each year just for the privilege of filing their taxes,” which is a statistic provided by the IRS. See <https://www.irs.gov/pub/irs-pdf/i1040gi.pdf>, at 106 (“[T]he estimated average time burden for all taxpayers filing a Form 1040 or 1040-SR is 13 hours, with an average cost of \$250 per return.”).

⁵ Intuit bases its arguments in both the standard for administrative agency recusal, as set forth in cases such as *Cinderella* and *Fast Food Workers*, and the standard for judicial recusal, as set forth in cases such as *In re Boston’s Children First*, 244 F.3d 164 (1st Cir. 2001). Though the Commission has agreed “[i]n general” that judicial recusal standards are applicable, it has noted at least one “significant difference”: “[n]amely, the separation of functions provisions of the Administrative Procedure Act allow an agency or its members to vote on whether to initiate a case or proceeding after reviewing pertinent information.” *Intel*, 149 F.T.C. at 1552 & n.9. Rule 4.17(c) provides that motions for disqualification “shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed.” The instant Motion was filed in an administrative adjudication, so the most applicable standards are those applicable in administrative agency cases – most recently in *Fast Food Workers Committee*.

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contrary evidence.” *Fast Food Workers Comm.*, 31 F.4th at 815 n.4 (cleaned up) (citing cases). Pointing the public to the existence of this matter and the Complaint that the Commission voted to issue is not evidence of prejudgment. *See, e.g., Intuit*, 2022 WL 16960890, at *5; *Intuit*, 2023 FTC LEXIS 18, at *49. Intuit’s Motion should be denied.

Respectfully submitted,

Dated: August 9, 2023

/s/ James Evans

Roberto Anguizola, IL Bar No. 6270874

Rebecca Plett, VA Bar No. 90988

James Evans, VA Bar No. 83866

Sara Tonnesen, MD Bar No. 1312190241

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**

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2023, I electronically filed the foregoing Complaint Counsel's Response to Respondent Intuit's Motion to Disqualify Chair Lina M. Khan 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 August 9, 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
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
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

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

Attorneys for Respondent, Intuit Inc.

/s/ James Evans
James Evans