UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina M. Khan, Chair
Rebecca Kelly Slaughter
Christine S. Wilson
Alvaro M . Bedoya

DOCKET NO. 9411

ORDER DENYING PETITION FOR RECUSAL

On July 25, 2022, Meta Platforms, Inc. ("Meta") filed a petition to recuse Chair Lina M. Khan from participating in any decision concerning the Commission's review of Meta's proposed merger with Within Unlimited, Inc. ("Within") . Meta argues that Chair Khan's prior statements require recusal. In truth, those statements concern a different industry, a different

of the Commission[1]. That petition concerned a federal case, brought before Chair Khan joined the agency, alleging that Facebook monopolized the market for personal social networking services, including through the acquisitions of WhatsApp and Instagram. Complaint, *FTC v. Facebook, Inc.*, No. 20-cv-03590-JEB (D.D.C. Dec. 9, 2020), ECF No. 3. The petition argued that due process and federal ethics rules required Chair Khan to be recused from participating in any decision concerning whether and how to continue the federal action because, according to Facebook, Chair Khan throughout her career had "consistently and very publicly concluded that Facebook is guilty of violating the antitrust laws." July 2021 Petition at 1, 6. To support this claim, Facebook cited: Chair Khan's work for the Open Markets Institute ("OMI"), a political advocacy group for which she was the Legal Director; her academic writings; her role, as Majority Counsel for the U.S. House Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, in leading the congressional investigation and publication of a report concerning digital markets; and her public appearances, speeches, and posts on Twitter. *Id.* at 3-4, 6.

Because no proceeding was pending before the Commission when the July 2021 Petition was filed, the Secretary rejected it for noncompliance with Id JTD [(EBn)-10 (c)4 (om)-2 (pl)-((l)Ds-t Cll

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Complaint, Meta's Petition for Recusal was transferred to the Commission as a motion for disqualification ("Motion for Disqualification"), pursuant to Commission Rule 4.17, 16 C.F.R. § 4.17.

D. The Rule 4.17 Process

Rule 4.17 provides that a motion to disqualify a Commissioner from any adjudicative proceeding shall be addressed in the first instance by the Commissioner whose disqualification is sought. 16 C.F.R. § 4.17(b)(3)(i). In the event the Commissioner declines to recuse himself or herself from further participation in the proceeding, the Commission must determine the motion without the participation of such Commissioner. *Id.* § 4.17(b)(3)(ii). Pursuant to the procedure laid out in Rule 4.17, Chair Khan has declined to recuse herself from participation in the matter. The Commission, without the participation of Chair Khan, now finds that disqualification is not warranted in this proceeding, including as an adjudicator in this matter.

II. Due Process Requirements Do Not Bar Chair Khan's Participation in the Meta/Within Adjudication.

A. Legal and Evidentiary Standards

The disqualification of an administrative official acting in a judicial or quasi-judicial capacity is governed by the requirements of due process. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."). An administrative adjudicator must be disqualified if "a disinterested observer may conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career & Finishing Schs., 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)); *Texaco Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965). Both unfairness and the appearance of unfairness must be avoided. *See Cinderella*, 425 F.2d at 591.

Administrative adjudicators are presumed to be unbiased. *Schweiker*, 456 U.S. at 195. A party seeking the disqualification of an agency adjudicator based on a public statement has the burden of overcoming that presumption by showing that the adjudicator is not "capable of judging a particular controversy fairly on the basis of its own circumstances." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (quotation omitted); *see also Schweiker*, 456 U.S. at 196 ("[T]he burden of establishing a disqualifying interest rests on the party making the assertion."); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (the contention of bias in an administrative adjudication "must overcome a presumption of honesty and integrity in those serving as adjudicators."). The test may be stated in terms of whether the adjudicator's mind is "irrevocably closed" on the issues as they arise in the context of the specific case. *Cinn. Gas & Elec. Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 991 (D.C. Cir. 1984) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948)).

For federal judges, a "comment is disqualifying only if it connotes a fixed opinion—'a closed mind on the merits of the case.'" *United States v. Haldeman*, 559 F.2d 31, 136 (D.C. Cir.

1976) (en banc) (per curiam) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)). The due process standard applicable to disqualification of administrative adjudicators is more flexible and less stringent than the statutory standards governing the disqualification of federal judges, such that a comment that would not disqualify a federal judge would necessarily also not disqualify an administrative adjudicator. *See N.Y. State Inspection, Sec. & L. Enf't Emps., Dist. Council 82 v. N.Y. State Pub. Emp. Rels. Bd.*, 629 F. Supp. 33, 48 (N.D.N.Y. 1984) ("Instead of transplanting standards from the judicial to the administrative context, the court finds that it must evaluate the procedures allegedly employed by the defendants against a more flexible touchstone derived from *Withrow* and its progeny."); *S. Pac. Commc'ns*, 740 F.2d at 991 n.9 (explaining that because the statutory requirements for disqualification of federal judges "establish a more stringent standard for disqualification than is required by the right to a fair trial

2. Chair Khan's expressions of her views regarding law and policy do not require disqualification.

Chair Khan's statements voicing her views about whether Facebook's conduct violated the law in previous matters or indicating her support for government enforcement efforts do not warrant her disqualification. As Judge Boasberg observed in *Facebook* when presented with the same statements cited here, contrary to Facebook's claim that Chair Khan had an "axe to grind" against the company, "there is no allegation that Khan has a personal animosity against Facebook beyond her own views about antitrust laws." *Facebook*, 581 F. Supp. 3d at 64. And, as discussed above, expressions of views about the law are not disqualifying. This includes statements concerning whether certain conduct is or is not unlawful under the antitrust laws and expressions of support for government enforcement. *See Cement Inst.*, 333 U.S. at 702-03 ("[I]t is not a violation of procedural due process for a Commissioner to sit in a case after he has expressed an opinion as to whether certain types of conduct were prohibited by law."); *Nuclear Info. & Res. Serv. v. NRC* (

sub nom. Andrada-Pastrano v. USA, Nos. CV-14-02608-PHX-JAT, CR-12-00877-PHX-JAT, 2016 WL 1399361 (D. Ariz. Apr. 11, 2016) ("Almost by definition, a pattern of rulings in prior cases would not support such a showing [of bias or prejudice] . . . [S]uch rulings may just as likely result from a stringent view of the applicable law. A judge's views on legal issues may not serve as the basis for motions to disqualify." (quotation omitted); *see also Cement Inst.*, 333 U.S. 683 at 703 ("[J]udges frequently try the same case more than once and decide identical issues each time, although these issues involved questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stricter constitutional compulsions in this respect than a court.")

So, too, Chair Khan's purported assertions regarding what is or should be prohibited conduct and whether Facebook may have in the past violated the law do not require disqualification in this separate matter concerning Meta and Within. None of the cited

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Similarly, Chair Khan's prior academic writings suggesting that Facebook foreclosed competitors from its social networking platform or misused information gleaned from its social networking users are not part of the same "particular case" as the Meta/Within merger in the V/R industry.[10] Nor are statements by OMI suggesting remedies for Facebook's social networking monopoly; concerns raised in the House Report about Facebook's acquisitions of WhatsApp and Instagram; passing mentions of potential future activities in V/R generally in the House Report; or potential definitions in the House Report of a relevant antitrust market in social networking.[11] *See Bankhead v. Castle Parking Sols.*, No. 1:17-cv-04085, 2018 WL 3599258, at *3 (N.D. Ga. July 27, 2018) (no reasonable person would doubt the court's impartiality where pending matter involved "different parties, different law, and different facts" from conflicted matter).

Nor does Chair Khan's single post on Twitter from December 2020, broadly stating that "FB is now following this playbook in the virtual reality space," demonstrate an "irrevocably closed" mind on the adjudication of factual and legal issues as they arise in a "specific case." July 2021 Petition Ex. D at 3; *S. Pac. Commc'ns*, 740 F.2d at 991 (quoting *Cement Inst.*, 333 U.S. at 701). The Twitter post, authored from Khan's perspective as an academic, referenced a press article that claimed that Facebook may be using an "acquire-to-kill" strategy in V/R; she advocated that enforcers "prevent a repeat."[12] July 2021 Petition Ex. D at 3. Neither the Twitter post nor the article addressed this particular matter or identified Within. Moreover, even the use of broad and arguably "strong language" in 2020 does not establish that Chair Khan is incapable of judging the specific facts and law applicable to the present Meta/Within transaction. *Planned Parenthood of S.E. Pennsylvania v. Casey*, 812 F. Supp. 541, 545 (E.D. Pa. 1993).

As the D.C. Circuit explained in *United Steelworkers of America*, 647 F.2d at 1209 (discussing the *Cinderella* standard as applied to hybrid rulemaking proceedings), an adjudicator's ultimate decision need not be disturbed unless she has "demonstrably made up her mind about important and specific factual questions and [is] impervious to contrary evidence." The statements cited by Meta in its petition for disqualification focus on social media and general antitrust policy. However, not "important and specific factual questions" in this proceeding will relate to an acquisition's effect on the alleged market for VR-dedicated fitness apps.

Indeed, by its own design, the company at issue in the challenged statements is not the same company that is today acquiring Within. By its own CEO's admission, the company's name change from "Facebook" to "Meta" is intended to signal to the world a new, different focus for the company: "a next chapter" in which it will build "the next platform," the

[10] July 2021 at 3, 9-10.

[11] *Id.* at 7-8, 11-12.

[12] *See* David McLaughlin, *Facebook Accused of Squeezing Rival Startups in Virtual Reality*, BLOOMBERG (Dec. 3, 2020), https://www.bloomberg.com/news/articles/2020-12-03/facebook-accused-of-squeezing-rival-startups-in-virtual-reality#xj4y7vzkg.

metaverse.[13] Chair Khan's past comments regarding Facebook's legacy social networking platform cannot represent prejudgment of Meta's new metaverse initiative, including its self-proclaimed primary focus on the V/R space, because they do not relate to it. *See*, 709 F.3d

5. Chair Khan's statements differ in substance and context from those made by Chair Dixon in [illegible] ro60 Tc 0 Tw -26..7 0.84 0 6in

the Judiciary of the U.S. Senate. *Id.* at 763. In that role, he had played an active part in

complains of statements in the Report regarding Facebook's past purchases of Instagram and

> disqualify every administrator who has opinions on the correct course of his agency's future action. *Id.*

Facebook I, 581 F. Supp. 3d at 62. Moreover, to "disqualify administrators because of opinions they expressed or developed in earlier proceedings would mean that 'experience acquired from their work . . . would be a handicap instead of an advantage.'" *United Steelworkers of Am.*, 647 F.2d at 1209 (quoting *Cement Inst.*, 333 U.S. at 702).[38] So long as the administrator has not adjudged *the particular case* in advance of hearing it—and the case here centers on the question of whether Meta's acquisition of a VR app developer is anticompetitive—due process does not require administrative adjudicators to be blank slates. Instead, depriving the Commission of Chair Khan's expertise on the intersection of antitrust law and technology would undermine both the interests of the agency as an expert body and the intent of the President who nominated her and the Senate that confirmed her. u2J ()]T(2J375Bt T446.640 m)d3

may well temper candor with a concern for appearances . . . to the detriment of the decision-making process."); *Fed. Open Mkt. Comm. of Fed. Rsrv. Sys. v. Merrill*, 443 U.S. 340, 359-60 (1979) ("[I]f advice is revealed, associates may be reluctant to be candid and frank."). Frank discussion of legal or policy matters" would be "inhibited if discussion were made public," resulting in poorer decisions and polices. *NLRB*, 421 U.S. at 150, *quoting* S. Rep. No. 813, 89th Cong., 1st Sess., at 3 (1965) (discussing rationale for FOIA exemption covering privileged documents); *see also* H.R. Rep. No. 1497, 89th Cong., 2d Sess. at 10 (1966) ("[Agency witnesses] contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced 'to operate in a fishbowl.'").

Public disclosure of materials prepared for the Commission, as sought by the dissent, would be in direct opposition to the Commission's own long-standing policy. In 1984, under FTC Chairman Jim Miller, the Commission adopted a policy that individual Commissioners cannot quote directly from or reveal pre-decisional advice from a staff member without the consent of a majority of participating Commissioners. *See* 140 Commission Minutes 674-75 (July 25, 1984). The reason the Commission took this action was "to protect the deliberative privilege regarding materials submitted by staff and *to reaffirm the need as a body for full and frank staff debate* for FTC decisions" *Id.* (emphasis added). The Commission's reasoning is consistent with the policy underpinnings for DPP. *See FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) (noting that compelled disclosure of two BE memoranda would encourage "the Commission to have deliberative reports and recommendations prepared only by those economists who will draw the conclusions sought by the Commission").

The Commission precedent cited by the dissent is not factually analogous to the present case and does not provide justification for the Commission to abandon its long-standing policy of protecting materials prepared for and considered by the Commission from public disclosure. The dissent points to five instances where the Commission disclosed staff materials protected by DPP. However, three of the five instances simply pre-date the adoption of Commission's 1984 policy.[32]

Finally, the dissent's reliance on other agencies' practices with respect to DAEO