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To: Khan, Lina <lkhan@ftc.gov>; Sussman, Shaoul <ssussman@ftc.gov>

Subject: Meta/Within

Chair Khan and Shaoul,

Since speaking yesterday, I have done a deeper dive on the prejudgment question. Here's where I landed.

The standard for prejudgment in a Part 3 proceeding is "whether '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.'" *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)). I am not aware of any writings of the Chair regarding the particular transaction at issue – Meta's proposed acquisition of Within Unlimited, which was announced in late 2021 and has been under investigation since then. While the investigation was ongoing, the Chair indicated, in an [interview](#) with protocol, that she sees augmented and virtual reality as "nascent, expanding markets" that are "on our radar and top of mind." The Chair made [similar comments](#) to Piazza Dumo 2. These comments indicate interest, not prejudgment.

If Meta seeks disqualification of the Chair, it will point to the House Judiciary Committee majority [staff report](#), for which she is listed second among several authors, after Slade Bond. While this report was initially released in October 2020 and adopted by the Committee in April 2021, it was formally published [yesterday](#). Despite its formal publication date and the release of several supporting exhibits yesterday, the report is dated, and focuses on Facebook's (and then it was just Facebook, not Meta Platforms) acquisitions of Instagram and WhatsApp. It does discuss Facebook's acquisition of Oculus and Oculus game developers in the context of Facebook's strategy of acquiring firms that it viewed as competitive threats. See pages 124, 149-50. But because the report was written in 2020, there is of course no discussion of the Within Unlimited transaction (and very little discussion of VR generally).

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Chair Khan's prior statements make clear to a disinterested observer that, before she became an FTC Commissioner, she had prejudged Facebook's Section 2 liability and was biased against the company. See Recusal Petition at 11-13 (collecting statements). Binding D.C. Circuit precedent requires an FTC Commissioner's recusal where "a disinterested observer" would "conclude that [she] has in some measure adjudged the facts as well as the law of a particular case in advance." *Cinderella Career Coll. & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970); see Recusal Petition at 17-20 (collecting authorities); Rodriguez Decl. at 3-6 (same). Less than a year ago, Chair Khan, by her own admission, "led the congressional investigation into digital markets [by the House Antitrust Subcommittee] and the publication of" a report that purported to conclude that Facebook engaged in conduct that meets all the elements of a Section 2 violation. See Lina Khan, Bio, <http://www.linamkhan.com/bio-1> (no longer active) [<https://perma.cc/9GB5-F78G> (visited Oct. 4, 2021)] (emphasis added). The report purported to make factual and legal findings that Facebook has "monopoly power" in a relevant antitrust market, maintained that monopoly power through anticompetitive means, and harmed consumers. See Majority Staff of Subcomm. on Antitrust, Com. & Admin. Law of the H. Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations 132-73 (Oct. 2020). Having completed this report just months before her nomination and confirmation to the FTC, Chair Khan cannot plausibly be expected to set those conclusions aside and conduct a fresh, impartial review of the evidence.

Mem. Supp. Mot. to Dismiss Amended Compl. at 40-41, *FTC v. Facebook*, No. 1:20-cv-03590-JEB (Oct. 4, 2021). Meta may also point to earlier statements in academic and news publications in which the Chair critiqued some Facebook practices as anticompetitive.

In the absence of any statements or analysis by the Chair regarding the specific transaction or even the relevant market for the acquisition, it is unclear how Meta would show that the Chair has, in some measure, prejudged the facts or law of this particular transaction. To prevail, Meta would need to show some sort of generalized bias against the company, such that the Chair would adjudge *any* significant acquisition by Meta to be an illegal effort to absorb a nascent competitor. While I can't rule out the possibility of an adverse finding on this issue, I do not see the Chair's prior statements, or the statements in the HJC report, as sufficient to justify what would amount to a company-wide disqualification of the Chair from participating in adjudications involving Meta. *Cf. Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 768 (6th Cir. 1966) ("We do not hold that the service of Mr. Dixon as counsel for the subcommittee, standing alone, necessarily would require disqualification. Our decision is based upon the depth of the investigation and the questions and comments by Mr. Dixon as counsel, as shown by the record in this case . . ."). While not directly applicable, it is worth noting that the [Code of Conduct for U.S. Judges](#) would not mandate disqualification based solely on a judge's prior role as counsel to a government entity in a different proceeding:

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A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

See page 8 (emphasis added). In her prior role as counsel for the HJC, Chair Khan did not participate "concerning the proceeding" (which by analogy here would be the Meta/Within transaction), nor did she opine on the merits of this particular case in controversy. Therefore, the HJC report's findings about Facebook's historic transactions should not disqualify the Chair, as one of its authors, from assessing an entirely separate transaction that did not exist at the time of the report's drafting.

I am happy to address any questions you may have or to meet if that would be helpful.

Liz