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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MAXIMILIAN KLEIN, et al.,

Plaintiffs,

vs.

META PLATFORMS, INC.,

Defendant.

Consolidated Case No. 3:20-cv-08570-JD

ADVERTISER PLAINTIFFS' OPPOSITION TO META'S MOTION TO DISMISS THE FIRST AMENDED CONSOLIDATED ADVERTISER CLASS ACTION COMPLAINT

Hon. James Donato
Hearing Date: May 26, 2022
Time: 10:00 a.m.

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PRELIMINARY STATEMENT

On February 28, 2022, Advertisers filed a First Amended Complaint ("FAC," Dkt. 237) against Defendant Meta Platforms, Inc. ("Meta") with leave of the Court. (*See* Dkt. 214.) The new allegations in the FAC allege overt acts exclusively within the Clayton Act's four-year limitations period, including facially timely overt acts—all post-dating December 18, 2016—pertaining to (1) anticompetitive Extended API ("whitelist") data agreements with targeted developers; (2) anticompetitive market division and data sharing agreements with eBay, Netflix, and Foursquare; (3) anticompetitive leveraging of deceptively obtained Onavo data to maintain Meta's Social Advertising dominance; and (4) an anticompetitive integration of Meta's disparate AI and machine-learning systems and sources. The FAC also alleges, in detail, that each of the foregoing overt acts was indeed anticompetitive—*i.e.*, proscribed by Sherman Act § 2 as violating the rule of reason—and injured the Advertiser Plaintiffs, including by contributing to inflated advertising prices in the Social Advertising Market. Given the Court's previous ruling that (i) the Social Advertising Market has been adequately pleaded and (ii) Advertisers adequately pleaded Section 1 and 2 claims based on Meta's anticompetitive agreement with Google, the FAC plausibly asserts viable Section 2 claims against Meta based on five categories of exclusionary conduct—all timely on their face.

In view of the above, there are really no serious timeliness or plausibility questions left in this case. What remains are factual questions—and the parties have indeed proceeded into factual discovery, with expert discovery shortly on the way. Nonetheless, rather than answering, Meta has moved to dismiss portions of the FAC. (Dkt. 262, "Mot.") Meta's motion misstates the Court's previous ruling as to the scope of leave to amend; makes meritless and incoherent timeliness arguments; and ignores and dismembers the FAC's allegations of anticompetitive conduct by Meta in favor of blindered strawmen. The five categories of exclusionary conduct recited in the FAC are all timely; they are all adequately pleaded (and indeed, one category has already been upheld by this Court); and they all pertain to an adequately pleaded market. Meta's motion should be denied.

BACKGROUND

Advertisers commenced this action on December 18, 2020. (*See Affilious, Inc. v. Facebook, Inc.*, No. 5:20-cv-09217, Dkt. No. 1). After consolidation with the Consumer cases, which were

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filed beginning December 3, 2020 (Dkt. No. 68), and the appointment of the undersigned as lead and executive committee counsel for the Advertiser classes (Dkt. No. 73), Advertisers filed a Consolidated Amended Complaint on April 22, 2021 (Dkt. No. 86, the "CAC").

Meta moved to dismiss the CAC. On January 14, 2022, after briefing and oral argument, then-District Judge Koh sustained Advertisers' Social Advertising Market (Dkt. 214 at 33-38) and Advertisers' Section 1 and 2 claims based on allegations that Meta and Google entered into an unlawful market division agreement in September 2018 (*id.* at 100-06). The Court gave Advertisers leave to amend as to the remaining Section 2 allegations in the CAC, which the Court referred to (collectively with Consumers' similar allegations) as "Copy, Acquire, Kill" claims.[1] (*Id.* at 70-100.)

On February 28, 2022, Advertisers timely filed their FAC. In addition to facts supporting the Advertisers' previously sustained Section 1 and 2 claims, the FAC alleges four more categories of exclusionary acts in further support of Advertisers' Section 2 claims: (1) post-December 18, 2016 anticompetitive API / whitelisting agreements providing certain developers access to portions of Meta's scuttled developer Platform (FAC ¶¶ 302-315); (2) 2017 and 2018 anticompetitive data sharing agreements with eBay, Netflix, and Foursquare, which were extracted after [redacted] (FAC ¶¶ 316-536); (3) post-December 18, 2016 anticompetitive use of deceptively obtained data acquired through Onavo spyware to surveil and target rivals and their users, including by using this deceptively obtained data to train Meta's AI and machine learning targeting systems (FAC ¶¶ 537-569); and (4) the anticompetitive integration—begun in late 2019 and lacking legitimate, non-pretextual technical justification—of Meta's disparate AI and machine-learning systems from across its business (FAC ¶¶ 657-764). For the sake of brevity, detailed allegations concerning the above categories of conduct are discussed (as relevant) in the context of the arguments set forth below.

On March 21, 2022, Meta moved to dismiss any claims in the FAC to the extent they are based on new factual allegations.

[1] The phrase "copy, acquire, kill" did not appear in the CAC.

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