

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

FACEBOOK, INC.

Defendant.

Civil Action No. 1:20-cv-03590 (JEB)

**MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL A RULE 26(f) CONFERENCE**

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Plaintiff, the Federal Trade Commission (“FTC”), respectfully asks the Court to order Defendant (“Facebook”) to confer, pursuant to Fed. R. Civ. P. 26(f) and Local Rule 16.3(c), with Plaintiff and with the plaintiffs in the related case before this Court, *State of New York, et al. v. Facebook, Inc.*, No. 1:20-cv-03589 (the “State Plaintiffs”). The FTC has repeatedly asked Facebook for such a conference (hereinafter, a “Rule 26 conference”), and Facebook has repeatedly refused, which has prevented the parties from using time efficiently while the Court considers Defendant’s motion to dismiss. The FTC is not asking for discovery to begin at the time of the requested conference: instead, the FTC simply seeks to confer with Defendant and submit a report to the Court that includes a proposal regarding an appropriate start date for discovery, as well as all other relevant case management issues. *Cf.* Local Rule 16.3(d). Accordingly, as reflected in the attached Proposed Order, the FTC respectfully requests that the Court order the parties to confer no later than May 20, 2021, and to submit to the Court no later than June 3, 2021, a case management Report and Proposed Order that contains the parties’ proposals regarding a start date for discovery and other matters appropriate under the Local Rules.

While the FTC recognizes that Local Rule 16.3(b) provides that parties in this District are not *required* to conduct a Rule 26 conference until a defendant files an answer, the Local Rule preserves the Court’s discretion to order a pre-answer conference. This case presents compelling reasons for the Court to exercise its discretion in spite of the general practice in this District: specifically, a prompt Rule 26 conference will vindicate an important public interest in resolving government antitrust litigations promptly and in advance of related private cases, create efficiencies for all parties and many non-parties, and preserve scarce judicial resources. Here, the Court should exercise its discretion to order a Rule 26 conference because it will allow the

FTC, the State Plaintiffs, and Facebook to cooperate efficiently with a related class action involving common issues of fact that is currently underway in the Northern District of California. *See* ECF No. 4 (related case notice for *Klein v. Facebook, Inc.*). Fact discovery in that case, *Klein v. Facebook, Inc.*, will close in September of 2022 and trial will begin in March 2023. *See* Ex. A (Order, *Klein v. Facebook, Inc.*, 20-cv-08570-LHK, ECF No. 82 (N.D. Cal. Apr. 2, 2021)). A prompt Rule 26 conference will advance the important public interest in concluding government antitrust litigation in advance of the related *Klein* class action, and will do so without imposing any burden on Defendant or on the Court.

I. THE COURT HAS BROAD DISCRETION TO ORDER A RULE 26 CONFERENCE PRIOR TO DEFENDANT’S ANSWER

This Court has “‘broad discretion to manage the conduct of discovery,’ with the ultimate goal of ensuring the ‘just, speedy, and inexpensive determination of every action and proceeding.’” *Sai v. Dep’t of Homeland Sec.*, 99 F. Supp. 3d 50, 58 (D.D.C. 2015) (quoting *Chavous v. Dist. of Columbia Fin. Responsibility and Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001); Fed. R. Civ. P. 1). The Court’s broad discretion unquestionably encompasses the power to control the timing of Rule 26 conferences, which must occur “as soon as practicable.” Fed. R. Civ. P. 26(f)(1) (instructing that “parties must confer as soon as practicable.”). Indeed, the Advisory Committee Comments to the Federal Rules expressly state that a court’s discretion to order a conference extends even to proceedings entirely exempted from Rule 26(f)’s conference requirement, which this case is not.¹ *See* 2000 Advisory Comm. Comments to Rule 26 (“[C]ourt may order that the conference . . . occur in a case otherwise exempted . . .”).

¹ Rule 26 conferences are required in all civil cases except for the specified categories of proceedings that are exempted from Rule 26(f) “because the nature of the action [does] not involve discovery or because of the nature of the parties.” Wright & Miller, 8A Fed. Prac. & Proc. Civ. § 2053 (3d ed.); *see also* 1993 Advisory Comm. Comments to Rule 26 (Rule 26(f) exempts “cases in which there will be no discovery . . . cases in which discovery is rarely needed

The Court's broad discretion is unaffected by Facebook's pending motion to dismiss, notwithstanding the common practice in this District to postpone Rule 26 conferences until after a defendant's answer is filed. While Local Rule 16.3(b) notes a Rule 26 conference is not required prior to an answer, the Local Rules also recognize that Rule 26 conferences may proceed while a dispositive motion is pending, and instruct the parties in such situations to consider and recommend to the Court whether or not discovery should proceed prior to resolution of the dispositive motion. *See* Local Rule 16.3(c)(1) (explaining that at the Rule 26 conference "parties must confer to discuss . . . [w]hether the case is likely to be disposed of by dispositive motion; and whether, if a dispositive motion has already been filed, the parties should recommend to the Court that discovery or other matters should await a decision on the motion"). Courts in this District recognize that the timing of a Rule 26 conference is not dictated by a motion to dismiss, but instead depends entirely on the needs of the case: for Rule 26 conferences "[n]o categorical rule is appropriate; rather each case should be considered based on its unique facts and context." *Sai*, 99 F. Supp. 3d at 58. In this case, as discussed below, a prompt Rule 26 conference will increase efficiency, and should occur in advance of Facebook's Answer, as is commonplace around the country. *E.g., Glazer's Wholesale Drug Co., Inc. v. Klein Foods, Inc.*, 3:08-cv-774-L, 2008 WL 2930482, at *1 (N.D. Tex. July 23, 2008) ("[H]ad the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect." (quoting *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990))).² Indeed, Facebook is currently engaged in discovery in the

. . . or in which a meeting of the parties might be impracticable." No exemption is appropriate for this matter: discovery in this case will be needed, and a meeting of the parties is clearly practicable.

² *See also Escareno v. Lundbeck, LLC*, 3:14-cv-257-B, 2014 WL 1976867, at *2-3 (N.D. Tex. May 15, 2014); *Pena v. Taylor Farms*, 2:13-cv-1282-KJM-AC, 2013 WL 3933934, at *1, *6

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