IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. FACEBOOK, INC., Defendant.	Case No. 1:20-cv-03590-JEB

FACEBOOK, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL A RULE 26(f) CONFERENCE[1]

After waiting almost a decade to bring claims and after waiting for four months after filing its complaint, the FTC now demands that this Court ignore the Local Rules and commence discovery before the Court has ruled on Facebook's pending motion to dismiss. The State Plaintiffs make the same demand. But neither the FTC nor the States have the authority to proceed here, their claims lack plausible legal and factual support, and their complaints should be dismissed entirely as set forth in Facebook's pending motions to dismiss. *See* Facebook Mem. in Support of Mot. To Dismiss, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-JEB, ECF No. 56-1; Facebook Mem. in Support of Mot. To Dismiss, *New York v. Facebook, Inc.*, No. 1:20-cv-03589-JEB, ECF. No. 114-1.

The Court's Local Rules establish a sensible cadence for the conduct of these cases – should the Court determine that there are cases to conduct. Under those Rules, there is no Rule

[1] Because both the Federal Trade Commission, Plaintiff in *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-JEB, and the State Plaintiffs in *New York v. Facebook, Inc.*, No. 1:20-cv-03589-JEB, have filed motions requesting identical relief and making nearly identical arguments, Facebook has submitted this opposition brief in each action.

26(f) conference commencing discovery until *after* Facebook has filed an answer, and no answer can be filed until after the Court has decided the pending motions to dismiss. Plaintiffs' suggestion that the Local Rules do not apply or need not be followed is incorrect and unsupported by any authority. *See infra* Point I.

Plaintiffs' claimed reasons for departure from the orderly sequencing dictated by the Local Rules are similarly strained. There is no emergency here requiring expedited commencement of discovery. Plaintiffs' basis for rushing is the speculative concern that related class actions against Facebook have an initial schedule calling for trial in *two years*. Plaintiffs say that discovery must start now to avoid the possibility that the class cases will be tried ahead of the cases here. *See* FTC Mem. in Support of Mot. To Compel at 4-5, No. 1:20-cv-03590-JEB, ECF No. 63-1 ("FTC Br."); States Mem. in Support of Mot. To Compel at 3, No. 1:20-cv-03589-JEB, ECF No. 125-1 ("States Br."). But the *Klein* case trails Plaintiffs' cases – the operative *Klein* class complaints were just filed, and motions to dismiss will not even be fully briefed until July. Discovery there has *not* started (contrary to what Plaintiffs claim). The plethora of differing parties and theories in *Klein*, the complexities of class treatment, and the substantial caseload of the Northern District of California make it all but certain that the initial schedule will be changed – as frequently occurs. The notion that *Klein* will be tried at all is chimerical: such cases are very rarely tried and are frequently dismissed or fail class certification. *See*, *e.g.*, *Reveal Chat Holdco LLC v. Facebook, Inc.*, 2021 WL 1615349 (N.D. Cal. Apr. 26, 2021) (recently dismissing with prejudice antitrust class action against Facebook).

If Plaintiffs are correct that their cases should be tried before any private case, and if a competing trial ever actually materializes, they can move to stay it (as the government frequently does in private civil actions). Their claimed worry – years before any such trial, based on a

preliminary schedule – is simply not a valid reason for this Court to leapfrog the Local Rules to rush into discovery in cases where the Court has not even decided whether any of Plaintiffs' claims can be litigated. It is likewise not a valid reason to jam Facebook with an unfairly rushed schedule. *See infra* Point II.

Plaintiffs chose to site their actions in this District: they should therefore expect to comply with its Local Rules. Like their complaints, the instant motions lack legal or factual substance. They should be denied.

BACKGROUND

On December 9, 2020, the FTC, and a group of 48 states and territories (collectively, the "State Attorneys General" or "States"), each filed a complaint against Facebook alleging that it violated antitrust laws. The FTC alleges that Facebook's acquisitions of Instagram (2012) and WhatsApp (2014), as well as former policies governing application developers' access to some Facebook data, unlawfully maintained a monopoly of a purported market for "personal social networking" in violation of Section 2 of the Sherman Act. Compl., *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-JEB, ECF No. 3. The State Attorneys General claim that the two acquisitions – which the FTC reviewed and cleared, and does not directly challenge – violated Section 7 of the Clayton Act. The States also echo the FTC's Section 2 claim. Compl., *New York v. Facebook, Inc.*, No. 1:20-cv-03589-JEB, ECF No. 4.

On June 18, 2019, the FTC notified Facebook that it was conducting an investigation of Facebook's compliance with federal antitrust law. Over approximately the next 18 months, it issued broad discovery requests that together included more than 200 specifications or sub-specifications that sought information about, in substance, nearly every aspect of Facebook's business over the course of 12 years. In response to the FTC's requests, Facebook produced

more than 3 million documents totaling more than 12 million pages, and provided hundreds of pages of detailed narrative responses and internal data sets. On top of this, 18 of Facebook's most senior executives appeared for Investigative Hearings that spanned 24 days and more than 150 hours. The State Attorneys General conducted a parallel and similarly extensive investigation, including additional depositions and separate narrative responses.

Although they filed their cases separately, Plaintiffs soon moved to consolidate them for all purposes, including discovery and trial. *See* States Mem. in Support of Mot. To Consolidate at 1, 3, No. 1:20-cv-03589-JEB, ECF No. 45-1; States Reply Mem. in Support of Mot. To Consolidate at 7, No. 1:20-cv-03589-JEB, ECF No. 96 (requesting consolidation "through trial"). Facebook opposed premature consolidation as unsupported by the Federal and Local Rules. *See* Facebook Mem. in Response to Pls.' Mot. To Consolidate at 1, No. 1:20-cv-03589-JEB, ECF No. 80. The Court ruled on January 13, 2021, that the motion would be "held in abeyance." Min. Orders, Nos. 1:20-cv-03589-JEB & 1:20-cv-03590-JEB (Jan. 13, 2021).

Facebook filed motions to dismiss both complaints on March 10, 2021, Plaintiffs filed their opposition briefs on April 7, and Facebook replied on April 21. The motions are now fully briefed. If granted, Facebook's motions to dismiss would dispose of both cases in their entirety. If not granted in full, the motions could also result in the elimination of some claims (*e.g.*, one or both Section 7 acquisition claims) or theories (*e.g.*, refusal to deal with rivals) that would significantly narrow the scope of appropriate discovery.

In a conference with counsel for Facebook on January 8, 2021, counsel for Plaintiffs stated that they expected to proceed immediately with discovery and asked for dates for a Rule 26(f) discovery conference. When counsel for Facebook informed them that the Local Rules do not provide for such a conference before the filing of an answer, Plaintiffs' counsel stated that

because of the "importance" of these cases they planned to seek a variance from the Local Rules. But Plaintiffs did not proceed with their threatened motion at that time.

However, on April 14, 2021, as Facebook prepared to submit its reply briefs in support of its motions to dismiss both cases, Plaintiffs reprised their demand for immediate commencement of discovery. This time, Plaintiffs based the demand on a purported need to stay ahead of the private *Klein* antitrust class actions against Facebook in the Northern District of California. The instant motions followed.

DISCUSSION

I. THIS DISTRICT'S LOCAL RULES PROVIDE FOR NO RULE 26 CONFERENCE UNTIL AFTER AN ANSWER IS FILED

Plaintiffs cannot (and do not) claim that the relief sought in their motions comports with the Local Rules. Those Rules dictate that *no* Rule 26(f) conference can be required before the Court has ruled on motions to dismiss and Defendant has answered. Federal Rule 26(f)(1) provides that parties should confer "as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." Fed. R. Civ. P. 26(f)(1). Rule 16(b), in turn, states that, "[e]xcept in categories of actions *exempted by local rule*," a judge "must issue [a] scheduling order as soon as practicable." Fed. R. Civ. P. 16(b)(2) (emphasis added). Here Local Rule 16.3(b) expressly provides just such an exemption: in this Court, "[t]he requirements of . . . Fed. R. Civ. P. 16(b) and 26(f)[ ] *shall not apply* in cases in which no answer has yet been filed." LCvR 16.3(b) (emphasis added). As a result, under the Local Rules of this District, no Rule 26(f) conference is required until after Facebook has filed an answer.

This rule embodies the "eminently logical" principle that "discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the

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