

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Civil Action No. 20-3590 (JEB)

MEMORANDUM OPINION

Second time lucky? The Federal Trade Commission’s first antitrust suit against Facebook, Inc. stumbled out of the starting blocks, as this Court dismissed the Complaint last June. In doing so, the Court concluded that the Commission had failed to plausibly allege “that Facebook has monopoly power in the market for Personal Social Networking (PSN) services.” FTC v. Facebook, Inc., 2021 WL 2643627, at *1–2 (D.D.C. June 28, 2021). Because that “defect could conceivably be overcome by re-pleading,” however, the Court left the door ajar for the agency to amend the Complaint and reinstate its suit. Id. at *1.

Eagerly accepting such invitation, the FTC has filed an Amended Complaint containing significant additions and revisions aimed at addressing the shortcomings identified in the Court’s prior Opinion. The core theory of the lawsuit remains essentially unchanged. The Commission continues to allege that Facebook has long had a monopoly in the market for PSN services and that it has unlawfully maintained that monopoly via two types of actions: first, by acquiring competitors and potential competitors — most notably, Instagram and WhatsApp — that it believed were well situated to eat into its monopoly; and second, by implementing and enforcing

policies that prevented interoperability between Facebook and other apps that it viewed as nascent threats. The facts alleged this time around to fortify those theories, however, are far more robust and detailed than before, particularly in regard to the contours of Defendant's alleged monopoly.

Facebook nonetheless moves to dismiss once again, contending that the FTC's latest effort is akin to rearranging the deck chairs on the Titanic. Although the agency may well face a tall task down the road in proving its allegations, the Court believes that it has now cleared the pleading bar and may proceed to discovery. That holding flows from several conclusions. First, the FTC has now alleged enough facts to plausibly establish that Facebook exercises monopoly power in the market for PSN services. Second, it has adequately alleged that the company's dominant market share is protected by barriers to entry into that market. Third, the agency has also explained that Facebook not only possesses monopoly power, but that it has willfully maintained that power through anticompetitive conduct — specifically, the acquisitions of Instagram and WhatsApp. The Court will not, however, allow the allegations surrounding Facebook's interoperability policies (also known as the Platform policies) to move forward; they founder for the same fundamental reasons as explained before: Facebook abandoned the policies in 2018, and its last alleged enforcement was even further in the past.

Last, the company lets fly a new arrow this time around, urging dismissal on the independent basis that the FTC's vote authorizing the Amended Complaint was invalid because Chair Lina Khan's alleged prejudgment of Facebook's antitrust liability required her recusal. The Court believes that such contention misses its target, as Khan was acting in a prosecutorial capacity, as opposed to in a judicial role, in connection with the vote.

Ultimately, whether the FTC will be able to prove its case and prevail at summary judgment and trial is anyone's guess. The Court declines to engage in such speculation and simply concludes that at this motion-to-dismiss stage, where the FTC's allegations are treated as true, the agency has stated a plausible claim for relief under Section 2 of the Sherman Act. The Court, consequently, will deny Facebook's Motion.

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I. Background

In its prior Opinions in this case and in a parallel antitrust suit filed by a number of States, the Court described in detail the background of social networking, Facebook Blue — *i.e.*, the product that “its millions of users think of when they think of ‘Facebook,’” — the company’s acquisitions of Instagram and WhatsApp, and the history of Facebook Platform and the company’s interoperability policies. See Facebook, 2021 WL 2643627, at *2–6; New York v. Facebook, Inc. (New York), No. 20-3589, 2021 WL 2643724, at *2–6 (D.D.C. June 28, 2021). The Court will spare the reader another factual recitation here and will instead confine this brief background section to the case’s procedural history. As the critical question in this Motion is whether the FTC’s new allegations have filled the holes in its previous Complaint, that will be the focus of the Court’s analysis below.

The FTC filed this action on December 9, 2020, asserting one count of monopoly maintenance under Section 2 of the Sherman Act. See ECF No. 3 (Redacted Complaint), ¶¶ 169–74. The suit was filed after three of the FTC’s five Commissioners voted to authorize it. See FTC, FTC Sues Facebook for Illegal Monopolization (Dec. 9, 2020), <https://bit.ly/30Q3I8Y>. Chair Khan was not yet a Commissioner at the time. Id. As noted in the Court’s previous Opinions, although this FTC suit was initially assigned to Judge Christopher R. Cooper of this district, he reassigned it to this Court, which was handling the earlier-filed and related State case. See Facebook, 2021 WL 2643627, at *7; see also No. 20-3590, Minute Order of Jan. 12, 2021. Facebook subsequently moved to dismiss both cases. While the Court granted the dismissal of the States’ entire case, New York, 2021 WL 2643724, at *29, here it dismissed only the Complaint, “leaving the agency the chance to replead if it believes it can successfully remedy the infirmities described” in the Court’s Opinion. Facebook, 2021 WL 2643627, at *7.

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