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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

Kochava Inc.,

Plaintiff,

v.

Federal Trade Commission,

Defendant.

Case No. 2:22-cv-00349-BLW

**Memorandum in Support of
Defendant's Motion to Dismiss for Lack
of Subject-Matter Jurisdiction and
Failure to State a Claim**

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INTRODUCTION

In August 2022, the Federal Trade Commission (“FTC”) informed Kochava Inc. (“Kochava”), a data analytics and marketing firm, that it was the target of a potential civil enforcement action. Kochava responded by racing to the courthouse and suing the FTC. But in its haste, the company filed a complaint that does not satisfy threshold jurisdictional and pleading requirements. And Kochava’s tactic of filing suit in an attempt to beat the government to the punch is, in any event, disfavored. Its Complaint should be dismissed for at least three reasons.

First, Kochava fails to plausibly allege standing. The Complaint contains nothing more than a barebones, conclusory statement of unspecified injury. That is facially insufficient to establish the requisite concrete and actual injury in fact, or an imminent threat of one.

Second, the Complaint invokes no cause of action. Even had Kochava properly asserted a cause of action, this case embodies the disfavored tactic of a declaratory suit that seeks to preempt a forthcoming enforcement action. Recognizing the judicially disfavored nature of that strategy, courts regularly dismiss such preemptive suits in favor of hearing the case filed by the government, the natural plaintiff. Thus, at bottom, Kochava is not entitled to the declaratory or injunctive relief requested here because all underlying issues will be resolved in the FTC’s pending enforcement action (which also is before this Court).

Third, Kochava’s constitutional argument is not even potentially viable. Its assertion that statutory removal restrictions for FTC administrative law judges violate Article II is irrelevant because Kochava does not even allege that it is subject to any administrative proceeding, much less one pending before an ALJ. Just the opposite is true; the Complaint contemplated that the FTC would file an enforcement action in federal court (and that is what has happened). Kochava’s preemptive suit should be dismissed.

BACKGROUND

Kochava is an Idaho-based “digital marketing and analytics services” firm. Compl., Dkt. 1, at ¶ 7. Among other services, Kochava aggregates “third-party provided mobile device data,” *id.*, including the “latitude, longitude, IP address and [Mobile Advertising Identifier] associated with a consumer’s device,” *id.* ¶ 19. The company links this information to “emails and primary IP addresses” in its “Data Marketplace.” *Id.* Kochava then sells the data. *Id.* ¶ 7.

The FTC began investigating Kochava’s business under the agency’s “continuing duty to prevent . . . unfair or deceptive acts or practices in commerce.” *United States v. Morton Salt Co.*, 338 U.S. 632, 639 (1950); *see* 15 U.S.C. § 45(a)(2). Around “July and August 2022, the FTC sent to Kochava a Proposed Complaint for Permanent Injunction and Other Relief.” Compl. ¶ 16. The FTC’s Proposed Complaint alleged that the company’s data aggregation and marketing services constituted unfair or deceptive acts or practices prohibited by 15 U.S.C. § 45(a). Compl. ¶¶ 15–18. As Kochava acknowledged, the FTC drafted the Proposed Complaint for filing “in the United States District Court,” *id.* ¶ 15, rather than to commence an administrative proceeding before the Commission. *Compare* 15 U.S.C. § 53(b) (authorizing injunctive suits by the FTC in district court), *with id.* § 45(b) (authorizing the FTC to commence administrative proceedings).

Days later, on August 12, 2022, Kochava raced to court and filed this action “under . . . Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.” Compl. ¶ 10. Kochava sought to enjoin *the* FTC from seeking injunctive relief against the company for violations of the FTC Act. *Id.* ¶ 35. It also requested declaratory judgments that “the FTC’s structure violates Article II by providing improper insulation from the president,” that recited the standard for the FTC to seek injunctive relief under 15 U.S.C. § 53(b), and that the company’s business was “not an ‘unfair . . . act or practice.’” *Id.* ¶¶ 33, 36.

A couple of weeks later, on August 29, 2022, the FTC filed the anticipated enforcement action in this Court (“the Enforcement Action”). Compl., Dkt. 1, *FTC v. Kochava Inc.*, No. 2:22-cv-00377-BLW (D. Idaho Aug. 29, 2022). Kochava subsequently moved to dismiss the Enforcement Action, raising legal issues that tracked its Complaint’s concerns about Article II, the FTC Act’s standard for injunctive relief, and the adequacy of the FTC’s claim of a prohibited business act or practice. *See* Def.’s Mot. to Dismiss, Dkt. 7, *FTC v. Kochava Inc.*, No. 2:22-cv-00377-BLW (D. Idaho Oct. 28, 2022). The FTC responded, Kochava replied, and a hearing is set for February 21, 2023. *See* Dkt. 11–13, *FTC v. Kochava Inc.*, No. 2:22-cv-00377-BLW (D. Idaho Nov. 18, 2022).

In this case, Kochava served the United States Attorney on November 4, 2022, *see* ECF No. 6, and the FTC now timely moves to dismiss Kochava’s preemptive suit under Federal Rule of Civil Procedure 12(b)(1) and (b)(6), *see* Fed. R. Civ. P. 12(a)(2).

LEGAL STANDARD

Kochava bears “the burden of establishing” the Court’s subject-matter jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006). In this Rule 12(b)(1) facial attack on jurisdiction, the Court looks to the Complaint and “determines whether the allegations are sufficient as a legal matter to invoke the court’s jurisdiction.” *Salter v. Quality Carriers, Inc.*, 974 F.3d 959, 964 (9th Cir. 2020); *see Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). If they are not, the case must be dismissed. Fed. R. Civ. P. 12(h)(3).

Additionally, Kochava’s Complaint must “state[] a plausible claim for relief” to “survive[] a motion to dismiss” under Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 678. Similarly, a claim that fails as a matter of law “must be dismissed, without regard to whether it is based on an outlandish legal

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