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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
NORTHERN (COEUR D'ALENE) DIVISION

KOCHAVA INC., Plaintiff, vs. FEDERAL TRADE COMMISSION, Defendant.	CASE NO. 2:22-cv-00349-BLW Honorable B. Lynn Winmill **KOCHAVA INC.'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS [DKT 12]**

TO THIS HONORABLE COURT:

Kochava Inc. ("Kochava") hereby respectfully submits its response in opposition to Defendant Federal Trade Commission's ("FTC") Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Failure to State a Claim ("Motion").

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I. INTRODUCTION

The FTC's primary argument that Kochava lacks standing to bring its declaratory judgment and injunctive relief claims is irreconcilable with Supreme Court precedent, including *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118 (2007), which dictates the denial of the instant motion. *MedImmune* in fact confirms that Kochava meets the injury in fact requirement of Article III standing to present its claims in this action. Kochava seeks declaratory judgment as to its legal rights in light of the FTC's pre-filing threats and consent order demands, which have threatened to upend Kochava's business and litigate it into non-existence through sensationalized allegations untethered to facts, though played out in the press.

Under *MedImmune*, Kochava indisputably has standing to present its claims against the FTC. In fact, the Supreme Court specifically held: "where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to be enforced." 549 U.S. at 128-129. "The rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III." *Id*. at 134.

The FTC's assertion that the claims of this case overlap with those in *FTC v. Kochava*, Case No. No. 2:22-cv-00377-BLW (D. Idaho Aug. 29, 2022) (which was filed *after* this case) is partially true, but improperly oversimplifies the issues.[1] The point of the declaratory judgment action is to permit regulated parties to seek clarity as to the scope of their obligations under federal law rather than waiting to get sued, and without having to address the significant opportunity cost of unnecessary litigation. *See MedImmune*, 549 U.S. at 129; see also 28 U.S.C. § 2201(a) (authorizing federal court to "declare the rights" "of any interested party ..., whether or not further relief is or could be sought"). The FTC's (other) action would not comprehensively resolve the legal disputes between the parties because, as discussed below, the instant case raises

[1] Kochava Inc., during a pre-filing conference to the FTC's instant motion, itself unilaterally suggested the FTC agree to consolidate for pre-trial purposes *this* matter with the *FTC* matter as they are indeed *related*. The FTC declined.

distinct issues and claims as compared to the FTC's Complaint.

The FTC's position that Kochava's constitutional challenge is not legally viable fares no better. The FTC cannot bring its action *at all* if this Court holds that Congress unconstitutionally vested the independent FTC with executive litigation powers for the reasons more fully explained in the operative pleading and, presumably, in forthcoming dispositive motion practice. *See* 15 U.S.C. § 41; *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (interpreting *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)) (executive litigation authority may not be granted to officers the President cannot remove, in order to ensure "control[] [of] those who execute the laws.") And, Kochava has fully alleged these claims as arising out of the FTC's structure under the pleading standard articulated in *Twombly* and *Iqbal*. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (the pleading standard Rule 8 announces does not require detailed factual allegations); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (same). Complaint ¶¶ 22, 33(i), 36(i). As it pleads, no statute or regulation affords Kochava with constitutionally-mandated fair notice that its business practice could potentially qualify as "unfair" conduct under Section 5(a) of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. §45(a). *FCC v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012) (Due process requires the law to be clear enough that parties can "know what is required of them so they may act accordingly.")

II. FACTUAL BACKGROUND

A. Kochava's Services and Privacy Block

Kochava provides a range of digital analytics services to its clients, including the Kochava Collective that serves as an aggregator of certain data made available through Kochava's proprietary data marketplace. Complaint ¶ 7. On August 10, 2022, Kochava, announced a new capability for its Kochava Collective marketplace – Privacy Block, which removes health services location data from the Collective marketplace. *Id*. at ¶¶ 26-27.

B. The FTC Threatens Litigation against Kochava

In or about July and August 2022, the FTC sent to Kochava a Proposed Complaint for Permanent Injunction and Other Relief which wrongfully alleged Kochava is in violation of or

about to violate Section 5(a) of the FTCA, 15 U.S.C. §45(a), that prohibits "unfair or deceptive acts or practices in or affecting commerce." Complaint ¶ 16. The FTC alleged (and Kochava denies) that, as part of Kochava's Collective services, customers can "[l]icense premium data" including the "precision location" of a consumer's mobile device and that the Kochava Collective's geolocation data can be used to identify people and track them to sensitive locations. *Id*. at ¶¶ 17-18. The FTC further (wrongly) claimed that Kochava employs no technical controls to prohibit its customers from identifying consumers or tracking them to sensitive locations. *Id*. at ¶ 18. The FTC sought a permanent injunction to prevent future violations of the FTCA. *Id*. However, the FTC still has yet to issue any rule or statement with legal force and effect describing the specific geolocation data practices it believes Section 5 prohibits or permits. *Id*.

C. Kochava Seeks Pre-Litigation Review of the FTC's Unlawful Actions

On August 12, 2022, Kochava filed the instant lawsuit against the FTC for declaratory judgment and injunctive relief seeking adjudication that Kochava did not violate any laws, as alleged by the FTC in its Proposed Complaint. Complaint ¶¶ 33, 36, and Prayer for Relief. Kochava also seeks a declaration from this Court that the FTC's structure violates Article II of the Constitution and that Section 13(b) of the FTCA, 15 U.S.C. §53(b), only authorizes the FTC to seek injunctive relief if and when the target is violating, or is about to violate, any provision of law enforced by the FTC and does not authorize the FTC to seek injunctive relief for past conduct that has ceased absent evidence that it is likely to recur. *Id*.

D. The FTC Files its Threatened Action against Kochava

On August 29, 2022, the FTC filed its threatened Complaint against Kochava. Complaint, Dkt. 1, *FTC v. Kochava Inc*., No. 2:22-cv-00377-BLW (D. Idaho Aug. 29, 2022) ("FTC's Complaint"). The FTC's Complaint is the subject of Kochava's pending motion to dismiss for failure to state a claim. *See* Kochava's Motion to Dismiss, Dkt. 7, *FTC v. Kochava Inc*., No. 2:22-cv-00377-BLW (D. Idaho Oct. 28, 2022). Specifically, Kochava argues in its Motion, *inter alia*, that (1) there exists no underlying predicate violation supporting the FTC's claim; (2) the FTC cannot meet the requirements of Section 5(a) of the FTCA, 15 U.S.C. § 45 (a), (n) ; and (3)

the FTC lacks constitutional authority to initiate litigation seeking injunctive relief and that the non-delegation and major questions doctrines prohibit the FTC from bringing this lawsuit. *See id*.

III. LEGAL STANDARD

A motion to dismiss an action for failure to state a claim or for want of subject matter jurisdiction may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Jurisdiction under Article III, Section 2 of the United States Constitution requires the plaintiff to allege that: (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, (2000).

"In evaluating a Rule 12(b)(6) motion, the court accepts the complaint's well-pleaded factual allegations as true and draws all reasonable inferences in the light most favorable to the plaintiff." *Adams v. United States Forest Serv*., 671 F.3d 1138, 1142-43 (9th Cir. 2012) (citing *Twombly*, 550 U.S. at 555-56). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Courts have gone so far as to say that although it "appear[s] on the face of the pleadings that a recovery is very remote and unlikely", "that is not the test" before the Court. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The court may affirm a dismissal only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Abboud v. INS*, 140 F.3d 843, 848 (9th Cir. 1998).

The Ninth Circuit has held that "in dismissals for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss and Liehe, Inc. v. N. California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

The issue is not whether plaintiff will prevail but whether he "is entitled to offer evidence to support the claims." *Diaz v. Int'l Longshore and Warehouse Union, Local 13*, 474 F.3d 1202, 1205 (9th Cir.2007).

IV. ARGUMENT

A. Kochava Sufficiently Pleads Standing

To establish standing, "[t]he plaintiff must have suffered or *be imminently threatened* with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable decision." *Lexmark International Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014) (emphasis added); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). The *risk* of real harm can satisfy the requirement of concreteness. *Id.* at 341 (emphasis added). An injury is fairly traceable to the challenged action if it is likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). An injury is redressable if it is "*likely, as opposed to merely speculative*, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc.*, 528 U.S. at 181 (emphasis added). Importantly, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . ." *Lujan*, 504 U.S. at 561 (1992). In *MedImmune,* the Supreme Court decreed that "where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to be enforced." 549 U.S. at 128-129. "The rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III." *Id*. at 134.

The principal authorities relied on by the FTC are distinguishable. First, *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989) is inapposite because it addresses federal diversity jurisdiction, not standing. More specifically, the Supreme Court in *Newman-Green* considered applicability of 28 U.S.C. § 1653, which provides that "[d]efective allegations of jurisdiction

may be amended, upon terms, in the trial or appellate courts" and Federal Rule of Civil Procedure 21, which "provides that a court may add or drop parties at any stage of the action on such terms as are just." *Id*. at 826, 829. Further, *Newman-Green* deals with a breach of contract action against Venezuelan citizens. This case does not concern with any of the issues that the Supreme Court considered in *Newman-Green*. In addition to being distinguishable from the case at hand, *Newman-Green* simply does not stand for the FTC's proposition that the courts look to "the facts as they existed when the complaint was filed" in the context of standing or an injunctive relief claim. What the Supreme Court actually held is that "[t]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed" – a far cry from the FTC's misquote. *See id.* at 830.

Second, In *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, the plaintiffs challenged surveillance procedures authorized by the Foreign Intelligence Surveillance Act of 1978—specifically, in 50 U.S.C. § 1881a (2012). 568 U.S. at 401. The plaintiffs, who were "attorneys and human rights, labor, legal, and media organizations whose work allegedly require[d] them to engage in sensitive and sometimes privileged telephone and e-mail communications with ... individuals located abroad," sued for declaratory relief to invalidate § 1881a and an injunction against surveillance conducted pursuant to that section. *Id*. at 401, 406. The plaintiffs argued that they had Article III standing to challenge § 1881a "because there [was] an objectively reasonable likelihood that their communications [would] be acquired under § 1881a *at some point in the future*." *Id.* at 401 (emphasis added). The Supreme Court rejected this basis for standing, explaining that "an objectively reasonable likelihood" of injury was insufficient, and that the alleged harm needed to "satisfy the well-established requirement that threatened injury must be 'certainly impending' " or there was "'a *substantial risk*' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Id*. 401, 414, fn. 5 (emphasis added). The Court then held that the plaintiffs' theory of injury was too speculative to meet this standard as the alleged injury was too speculative. *Id.* at 410.

Unlike in *Clapper*, Kochava's injury is not speculative. In this case, the FTC threatened

an imminent litigation that would (and did) result in real harm to Kochava's business, including sensational press, loss of revenue, loss of customers, loss of reputation, exposure to copycat lawsuits and significant attorneys' fees. Moreover, *Clapper*'s standing analysis was "especially rigorous" because the case arose in a sensitive national security context involving intelligence gathering and foreign affairs. *Clapper*, 568 U.S. at 408. This case presents no such national security concerns.

Third, *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279 (D.C.Cir. 2007) and *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F. 3d 358 (5th Cir. 2018) are merely persuasive and this Court is not bound by these decisions, especially in light of binding controlling authorities directly on point, including by the Supreme Court. In addition, both of these cases are clearly distinguishable from this case. In *Public Citizen*, the plaintiff organization asserted a National Highway Traffic Safety Administration ("NHTSA") rule regulating tire pressure would fail to prevent several hundred injuries from car accidents each year. *Id.* at 1293. Some Public Citizen members, it alleged, would be among those injured who would not have been injured if NHTSA had issued a rule that Public Citizen saw as compliant with statute. *Id.* The D.C. Circuit noted that an "imminence" problem arose because for any particular individual, the odds of such an accident occurring were extremely remote and speculative and the time that any future accident would occur was entirely uncertain. *Id.* at 1293. Kochava, who was repeatedly threatened with imminent litigation by the FTC, has no such "imminence" problem, where the threat was certainly impending and immediate.

Legacy Cmty. Health Servs., Inc. v. Smith, 881 F. 3d 358 (5th Cir. 2018) is also clearly distinguishable. In *Legacy*, Federally Qualified Health Center (FQHC) brought action against Texas Health and Human Services Commission ("Commission"), alleging that Texas' reimbursement scheme violated the Medicaid Act by requiring Managed Care Organizations (MCOs) to fully reimburse FQHCs, by failing to ensure that Texas itself would reimburse an FQHC if an MCO did not, and by withholding payments for non-emergency services provided to enrollees of MCO with which FQHC had no contract. 881 F. 3d 358. The court held FQHC

failed to adequately allege injury, and thus it lacked standing to bring a claim for injunctive relief because the FQHC failed to identify a single instance in which it was not reimbursed at its full rate from the MCO, and thus it faced only *the abstract injury of a risk* of not receiving full reimbursement. *Id*. at 370 (emphasis added). As discussed above, Kochava's injury here is not "abstract" – the harm to Kochava's business, including sensational press, loss of revenue, loss of customers, loss of reputation, exposure to copycat lawsuits and significant attorneys' fees is real and has already materialized.

Kochava's injury is not hypothetical or speculative; as alleged in the Complaint, Kochava has been directly threatened with a lawsuit and an injunction by the FTC. Complaint ¶ 15. In fact, the threatened and now formally proposed injunction is so broad that it would interfere incredibly with the nature and function of Kochava's business. *See* Complaint, ¶¶ 15-20 (Kochava's allegations that the FTC's proposed injunction is "challenging Kochava's business of offering digital marketing and analytics services;" " the entry of injunctive relief (or even prospect of same) is injury in fact within the meaning of Article III;" "FTC alleges that the Kochava Collective collects a wealth of information about consumers and their mobile devices [including timestamped latitude and longitude coordinates]" by "among other means, purchasing data from other brokers to sell to its own customers;" Kochava's "customers can 'license premium data' including the 'precise location' of a consumer's mobile device;" "FTC alleges … Kochava's Collective's data can be used to identify people and track them to sensitive locations," and based on these allegations "the FTC's Proposed Complaint … seeks a permanent injunction to prevent future violations of the FTCA."); *see* FTC's Complaint, ¶¶ 7-10, Prayer for Relief, A.

The FTC's lawsuit was never merely speculative as the FTC posits; the FTC repeatedly made it clear that it intended to file (and *did* file) an action. *Id.* at ¶¶ 16-18. The imminence of the threatened action and the very real consequences of same to Kochava's business are concrete harms. The threatened action presented the risk of real harm, including sensational press, loss of revenue, loss of customers, loss of reputation, exposure to copycat lawsuits and significant

attorneys' fees—all of which have materialized. And the Supreme Court's precedent is clear that when threatened by the government, Kochava should not be required to lose revenue, customers, reputation or suffer ongoing, additional damage before being able to bring and maintain this lawsuit. *See MedImmune, Inc.*, 549 U.S. at 128-129, 134; *see also Arizona v. Yellen*, 34 F.4th 841, 849 (9th Cir. 2022) (citing *MedImmune, Inc.*, 549 U.S. at 129 (there is no requirement for a plaintiff to actually violate the law in order to challenge its constitutionality.)

B. Kochava's Claims against the FTC Are Legally Recognized

"Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (citing *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666, (1974)). None of Kochava's claims meet this dismissal standard; the FTC incorrectly contends that neither Section 5(a) of the FTCA, nor the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202 ("DJA"), are valid causes of action.

First, the FTC's argument that Section 5(a) of the FTCA, 15 U.S.C. § 45(a), does not provide a private right of action is incongruent with the allegations in the Complaint. Kochava does not allege a *claim* under Section 5(a); rather, Kochava invokes the DJA and specifically alleges that it "seeks judicial interpretation of … 15 U.S.C. § 45(a)" and the action *arises* under the DJA and "Section 5(a) of the FTC Act, 15 U.S.C. §45(a)." Complaint ¶ 10. This is not the same as alleging a claim under Section 5(a) of the FTCA, 15 U.S.C. § 45(a).

Specifically, as alleged in the Complaint, "Kochava … seeks a declaration that its practice of data collection, specifically of latitude and longitude, IP address and MAID associated with a consumer's device is not an 'unfair act…or practice within the meaning of Section 5 of 15 U.S.C. §45(a).'" Complaint, ¶¶ 28, 33(iii), 36(iii). These allegations are premised upon the FTC's threatened complaint under Section 5 of 15 U.S.C. §45(a), *see* Complaint ¶ 16,

and Kochava's Complaint seeks judicial interpretation of this statute. *See* Complaint, ¶¶ 10, 28, 33(iii), 36(iii).

Second, to be justiciable under the DJA, a dispute must be "definite and concrete, touching the legal relations of parties having adverse legal interests," and must be "real and substantial," seeking "specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *MedImmune, Inc.*, 549 U.S. at 127. Courts must consider "all the circumstances" in deciding whether a party has standing to bring its declaratory relief claim. *Id.* "[F]ollowing *MedImmune*, proving a reasonable apprehension of suit is one of multiple ways that a declaratory judgment plaintiff can satisfy the more general all-the-circumstances test to establish that an action presents a justiciable Article III controversy." *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1336 (Fed. Cir. 2008); *see also Royal Palm Filmworks, Inc. v. Fifty-Six Hope Rd. Music, Ltd.,* 747 F. App'x 624 (9th Cir. 2019) (applying *MedImmune's* all-the-circumstances test); *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 867 (9th Cir. 2017) (same); *27 E. & J. Gallo Winery v. Proximo Spirits, Inc.*, 583 F. App'x 632, 634 (9th Cir. 2014) (applying *MedImmune's* all-the-circumstances test and determining that "[a]n actual controversy exists if the declaratory action 'plaintiff has a real and reasonable apprehension that he will be subject [to suit].'"); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1989) (same).

As discussed above, Kochava has properly alleged a reasonable apprehension of the FTC's action and requested specific relief based on a concrete set of facts to satisfy the *MedImmune's* "all-the-circumstances" test. Kochava, therefore, pleads a valid declaratory judgment claim that presents a justiciable Article III controversy. *See MedImmune, Inc.*, 549 U.S. at 127; *27 E. & J. Gallo Winery*, 583 F. App'x at 634; *Hal Roach Studios, Inc.*, 896 F.2d at 1555. For example, Kochava alleges the FTC repeatedly threatened it with litigation and sent Kochava its Proposed Complaint alleging violations of Section 5(a) of the FTCA, 15 U.S.C. §45(a). Complaint, ¶ 16. Kochava also alleges that the FTC's Proposed Complaint sought a permanent injunction to prevent future violations of the FTCA. *Id.*

1. Declaratory Judgment Is an Appropriate Remedy

The DJA authorizes courts to grant declaratory judgment when, as is the case here, there is an actual "case or controversy" within the court's jurisdiction: basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

As discussed above, "following *MedImmune*, proving a reasonable apprehension of suit is one of multiple ways that a declaratory judgment plaintiff can satisfy the more general all-the-circumstances test[2] to establish that an action presents a justiciable Article III controversy." *Prasco, LLC*, 537 F.3d at 1336; *E. & J. Gallo Winery*, 583 F. App'x at 634; *Hal Roach Studios, Inc.*, 896 F.2d at 1555. In *MedImmune*, the Supreme Court observed that "[t]he dilemma posed" by coercive government threats – "putting the challenger to the choice between abandoning his rights or risking prosecution – is '*a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate*."' 549 U.S. at 129 (*quoting Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)) (emphasis added); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167-68 (2014) ("prompt judicial review" of "purely legal" issues allows regulated parties to avoid "substantial hardship").

The untenable position in which the FTC put Kochava is exactly the type of context contemplated by *MedImmune* and cases following it, which makes application of the DJA particularly appropriate herein. On the one hand, Kochava is threatened by the FTC's action that fails to allege any cognizable law or regulation proscribing Kochava's business activities. On the

[2] The Supreme Court has rejected the requirement that a legal action or loss be immediate or already underway and replaced it with a totality of the circumstances standard. *MedImmune, Inc.*, 549 U.S. at 127 (2007). This test focuses on whether there is a "real and substantial" dispute "touching the legal relations of parties having adverse legal interests" that lends itself to "specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.*

other hand, Kochava's only other option is to comply with the FTC's consent order that threatens Kochava's existence. Kochava is faced with a Hobson's choice: comply with the FTC's unreasonably vague and grossly overbroad injunction in its proposed consent order or file suit to adjudicate its rights and obligations in the face of threatened FTC action. Kochava's precarious position is amplified by the FTC's failure to identify a single law or regulation proscribing Kochava's business activities. This is precisely why Kochava filed this lawsuit; it was not for the purposes of "procedural fencing," as the FTC claims.[3]

The Supreme Court has established the rights of would-be regulated entities, like Kochava, to seek pre-litigation review when governments threaten coercive action. *MedImmune, Inc.,* 549 U.S. at 129. Kochava seeks a declaration that (1) "the FTC's structure violates Article II by providing improper insulation from the president, and Kochava's due process rights would be violated…"; (2) that "Section 13(b) of the FTC Act, 15 U.S.C. §53(b) only authorizes the FTC to seek injunctive relief if and when the target is 'is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission' and does not authorize the FTC to seek injunctive relief for past conduct that has ceased absent evidence that it is likely to recur"; and (3) that "Kochava's practice of data collection, specifically of latitude and longitude, IP address and MAID information associated with a consumer's device is not an 'unfair… act or practice' within the meaning of Section 5 of 15 U.S.C. §45(a)." Complaint ¶ 33.

The FTC's arguments that this is a "duplicative litigation" and that the FTC's action affords Kochava "full opportunity to contest the legality of any prejudicial proceeding against it" also fails. According to the FTC, once the agency files suit, any previously filed declaratory judgment action must be dismissed as "duplicative." That is not the law. The FTC cannot unilaterally terminate declaratory judgment actions spurred by its own threats by deigning to file

[3] The FTC attempts to categorize this action as one "to secure tactical leverage" and argues that the courts reject these types of attempts. Motion, p. 8. As discussed above, the FTC is wrong as shown in *Basic Rsch., LLC v. F.T.C.,* 807 F. Supp. 2d 1078, 1093 (D. Utah 2011) (the Court permitted a first-filed declaratory judgment action seeking clarification of the legal meaning of a consent agreement to proceed even after the FTC filed its action.)

suit. The point of the declaratory judgment action is to permit regulated parties to seek clarity as to the scope of their obligations under federal law rather than waiting to get sued. *See MedImmune*, 549 U.S. at 129; see also 28 U.S.C. § 2201(a) (authorizing federal court to "declare the rights" "of any interested party ..., whether or not further relief is or could be sought"); *Basic Rsch., LLC*, 807 F. Supp. 2d at 1093 (permitting a first-filed declaratory judgment action seeking clarification of the legal meaning of a consent agreement to proceed even after the FTC filed an enforcement action); *see also Minn. Min. & Mfg. Co. v. Norton Co.*, 929 F.2d 670, 673, 675-76 (Fed. Cir. 1991) (allowing the first-filed declaratory judgment suit to proceed and holding that in promulgating the DJA, Congress intended to prevent avoidable damages being incurred by a person uncertain of his rights and threatened with damage by delayed adjudication.)

The instant case raises distinct issues and claims as compared to the FTC's Complaint. For instance, Kochava requests a declaration that that Section 13(b) of the FTC Act, 15 U.S.C. §53(b) does not authorize the FTC to seek injunctive relief for past conduct that has ceased absent evidence that it is likely to recur. Complaint ¶ 33. Kochava alleges the implementation of the Privacy Block, its software feature, removes (among other things) sensitive health data from Kochava's Collective data marketplace, rendering the FTC's concerns about, among other things, sensitive health locations moot. Complaint ¶¶ 26-27. Kochava also seeks a declaration that the FTC's structure violates Article II by providing improper insulation from the president, which is distinct from the constitutional arguments that Kochava advances in its Motion to Dismiss the FTC's Complaint. *Compare*, Complaint ¶ 33 *with* Kochava's Motion to Dismiss, Dkt. 7, *FTC v. Kochava Inc*., No. 2:22-cv-00377-BLW (D. Idaho Oct. 28, 2022). Kochava thus continues to face both injury and hardship from the lack of clarity about its possible liability under the FTCA.

2. Injunctive Relief Is an Appropriate Equitable Remedy

The FTC's argument that Kochava's injunctive relief claim should be dismissed "under the basic doctrine of equity jurisprudence" is also legally infirm. The FTC argues that Kochava is not entitled to the equitable remedy of an injunction because the FTC's enforcement suit

provides an adequate remedy. But this does not make sense on its face. Kochava has no adequate remedy for the whole of its injunctive judgment claim because the issues in the two suits do not overlap and because one addresses certain constitutional challenges to the propriety of the FTC process while the other seeks relief arising out of an alleged (mis)interpretation of "unfair competition." *See* Section IV.B.1, *Metro. Prop. & Liab. Ins. Co. v. Kirkwood*, 729 F.2d 61, 64 (1st Cir. 1984) ("The reasons for granting judgment are stronger where, as here, the alternative appears neither simple nor totally adequate.").

All of the authorities relied on by the FTC for its proposition that Kochava has an adequate remedy by way of the FTC's enforcement suit are either clearly distinguishable or not binding on this Court. In non-binding *Fed. Trade Comm'n v. Am. Vehicle Prot. Corp.*, No. 22-CV-60298-RAR, 2022 WL 14638465 (S.D. Fla. Oct. 25, 2022), the court considered the DJA (and not an injunctive relief claim) arising out of the Administrative Procedure Act ("APA").[4] Further, in *American Vehicle Protection*, the FTC brought a lawsuit against American Vehicle Protection Corporation ("AVP") *first*, under sections 13(b) and 19 of the FTCA and the Telemarketing Act, in connection with AVP's marketing and sale of purported extended automobile warranties. *Id.* at *1-*2. AVP filed its own lawsuit against the FTC *after* the FTC filed its lawsuit. *See id.* As such, *American Vehicle Protection* is clearly distinguishable from this action because Kochava filed its lawsuit against the FTC first and because this case does not arise under purported violation of Telemarketing Act.

In similarly distinguishable *Am. Fin. Benefits Ctr. v. Fed. Trade Comm'n,* No. 17-04817, 2018 WL 3203391, at *3 (N.D. Cal. May 29, 2018), plaintiffs invoked jurisdiction pursuant to the DJA, seeking "a declaration from [the] court that the debt relief provisions of the [Telemarketing Sales Rule] do not apply to [them], or alternatively, that [plaintiffs] are in compliance with [these provisions]." *Id*. They did not seek injunctive relief. Further, in *American Financial*, the FTC made no threat of federal court litigation until after plaintiffs filed their DJA action. *See id*. Here, Kochava alleges it filed its lawsuit because of the FTC's threatened litigation and the resulting

[4] The FTC concedes in its Motion that APA is not at issue in this case. *See* Motion, p. 7.

harms. Importantly, the *American Financial* court's decision to dismiss plaintiffs' complaint turned on plaintiffs' failure to satisfy the APA requirements, which the FTC admits is not at issue herein.

Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau, 979 F. Supp. 2d 104, 113 (D.D.C. 2013) is also inapplicable as it is not binding on this Court and deals with Title X of the Dodd–Frank Wall Street Reform and Consumer Protection Act. In *Morgan Drexen*, plaintiffs, a paralegal services company and a client of the company, brought action against Consumer Financial Protection Bureau (CFPB) alleging that Title X of Dodd–Frank Wall Street Reform and Consumer Protection Act was unconstitutional as violation of separation of powers principles. *Id*. *Morgan Drexen* does not involve the FTC and deals with Sections 1031 and 1036 of the Consumer Financial Protection Act, 12 U.S.C. § 5536 and the Telemarketing Sales Rule,16 C.F.R. § 310. *See id.* at 108-109. Further, the lawsuit in *Morgan Drexel* was a result of a civil investigative demand issued by the CFPB. Kochava's allegations in this case invoke neither the Consumer Financial Protection Act, nor the Telemarketing Sales Rule. Further, Kochava does not allege that a civil investigative demand was issued in connection with the instant litigation.

In *United States v. Elias*, 921 F.2d 870, 871 (9th Cir. 1990), the court considered whether the government's *administrative forfeiture proceedings* "provided the claimant with an adequate remedy at law for the return of the property that was seized." *Id.* at 872, 874 (emphasis added). The court found that an adequate remedy at law had been available and thus, the court lacked jurisdiction to entertain a motion for return of property once the property has been administratively forfeited. *Id.* at 872, 874-875. *Elias* is thus distinguishable from this case because the FTC chose not to initiate an administrative proceeding but instead filed a lawsuit against Kochava. Further, the court in *Elias*, 921 F.2d 870, was considering a motion filed for return of property seized incident to lawful arrest, not in the context of an injunction. *See id*.

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C. Kochava Sufficiently Alleges its Constitutional Challenge to the FTC's Structure and its Due Process Claim

The FTC argues that Kochava's constitutional challenge to the FTC's structure fails because the FTC believes *Axon Enter., Inc. v. Fed. Trade Comm'n,* 986 F.3d 1173 (9th Cir. 2021), cert. granted in part, 211 L. Ed. 2d 604, 142 S. Ct. 895 (2022) is not applicable herein. The FTC's argument is premised on a misconception of Kochava's allegations as *Axon Enterprises* is – in fact – not squarely on point with the issues in this case; rather, Kochava alleges in its Complaint that this case "appears to raise *similar* issues as those in *Axon Enterprise,*" and such comment does not form the basis of any claim. Complaint ¶ 4 (emphasis added).

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Twombly*, 550 U.S. at 554-56; *Iqbal*, 556 U.S. at 677-78. "The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.*

Kochava seeks "a determination as to whether the FTC's structure violates Article II of the Constitution by providing improper insulation from the president, and whether Kochava's due process rights would be violated…" Complaint, ¶ 5. Kochava alleges that "the FTC acts as 'prosecutor, judge and jury' in violation of the U.S. Constitution's Fifth Amendment guarantees of due process and equal protection under the law." *Id.* at ¶ 14. The complaint also raises constitutional questions including "whether the non-delegation and major questions doctrines prevent the FTC from adjudicating this matter." *Id*. at ¶ 2.

1. Kochava's Constitutional Challenge Based on the FTC's Lack of Constitutional Authority to Bring a Lawsuit against Kochava

The FTC lacks valid constitutional authority to bring an action against Kochava because Congress unconstitutionally vested the independent FTC with unfettered executive litigation powers without the possibility of removal of any FTC director by the President. When Congress created the FTC in 1914, it gave this administrative agency only "quasi-legislative or quasi-

judicial powers" – i.e., conducting administrative adjudications, making investigations and reports to Congress, and making recommendations to courts as a master in chancery. *Humphrey's Executor*, 295 U.S. at 628 (citing Pub. L. No. 63-203, ch. 311, §§ 5-7, 38 Stat. 717, 719-22 (1914)). However, in 1970s, Congress provided the FTC with quintessentially executive law enforcement powers, such as the FTC's ability to sue for monetary and permanent injunctive relief. *See Seila Law*, 140 S. Ct. 2183. The problem for the FTC is that this act of Congress is in direct violation of the Constitution[5] because it is incompatible with the FTC's status as a valid independent agency – prior to 1973, the FTC's independence was upheld because the agency exercised "only . . . quasi-legislative or quasi-judicial powers." *Seila Law*, 140 S. Ct. at 2198.

Indeed, *Seila Law* emphasized that the ability to bring enforcement suits in federal court seeking monetary and injunctive relief, is "a quintessentially executive power not considered in *Humphrey's Executor*." 140 S. Ct. at 2200; *see Buckley v. Valeo*, 424 U.S. 1, 113, 137-38 (1976) (holding Article II precluded the Federal Election Commission from exercising the "discretionary power to seek judicial relief" against election-law violators in court because "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed'"). Just as "conducting civil litigation in the courts of the United States for vindicating public rights" is an "'executive power'" that may not be granted to officers the President cannot appoint (see *Buckley*, 424 U.S. at 139-40), such litigation authority may not be granted to officers the President cannot remove, in order to ensure "control[] [of] those who execute the laws." *Seila* Law, 140 S. Ct. at 2197; 2199-2200 (recognizing that for-cause removal restrictions for purely executive officials have been upheld only for certain "inferior officers with limited duties").

[5] Under Article II of the Constitution, "the 'executive Power'—all of it—is 'vested in [the] President.'" *Seila Law*, 140 S. Ct. at 2191. Because principal executive officers "must remain accountable to the President, whose authority they wield," the President's executive power includes "appointing, overseeing, and controlling" such officers. *Id.* at 2197. And "[t]hat power, in turn, generally includes the ability to remove" such officers on an "unrestricted" basis, as "has long been confirmed by history and precedent." *Id.* at 2197-98.

As such, Congress violated the Constitution when it amended the FTCA to grant the independent FTC the executive litigation powers to seek permanent injunctive relief, set forth in 15 U.S.C. § 53(b). Such "unconstitutional statutory amendment 'is a nullity' and 'void' when enacted," and thus grants no valid power that can be exercised in this case. *Barr v. American Ass'n of Political Consultants*, 140 S. Ct. 2335, 2353 (2020) (plurality op.) (citations omitted); *see Bowsher v. Synar*, 478 U.S. 714, 734-35 (1986) (invalidating executive powers unconstitutionally granted to the Comptroller General); 15 U.S.C. § 57 (FTCA's separability clause).

2. Kochava's Constitutional Challenge Based on the Non-Delegation and Major Questions Doctrines

The non-delegation and major questions doctrines also challenge the FTC's authority to bring its lawsuit against Kochava. Complaint ¶ 2. The Supreme Court has derived the non-delegation doctrine from the constitutional provision that all legislative powers herein granted shall be vested in a Congress of the United States, meaning that Congress may not constitutionally delegate its legislative power to another branch of government. U.S. Const. Art. I, § 1; *Touby v. U.S.*, 500 U.S. 160 (1991). The non-delegation doctrine provides that it is unconstitutional for Congress to delegate legislative authority to an agency without providing an intelligible principle to guide such agency's actions. *See Gundy v. United States*, 139 S. Ct. 2116, 2119 (2019) (plurality opinion) ("[A] statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise that authority is directed to conform."); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Interpreting Kochava's purported acts or practices as "unfair" without an express congressional authorization would bring about "an enormous and transformative expansion in [the FTC's] regulatory authority." *Util. Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 324 (2014) (holding EPA's interpretation of the statute at issue unreasonable because "it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear

congressional authorization" – "it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that … the statute is not designed to grant.")

Other than its reference to the vague Section 5 in its Proposed Complaint and the FTC's Complaint, the FTC fails to allege that Kochava violated an existing law, rule, regulation or policy specifically prohibiting the alleged conduct related to geolocation data. Similarly absent from the Proposed Complaint and the FTC's Complaint are allegations regarding any FTC rule or statement with legal force and effect describing the specific geolocation data practices the FTC believes Section 5 prohibits or permits. Further, the FTC fails altogether to identify a single law or rule that requires – or even mentions – any of the safeguards to remove data associated with sensitive locations that Kochava allegedly failed to implement. Nonetheless, by bringing its lawsuit, the FTC unconstitutionally embarks on the legislative powers that are vested in Congress by attempting to create laws and regulations not currently in existence. Such legislative act by the FTC is in direct conflict with the bedrock principle of separation of powers and should not be tolerated. *See* U.S. Const. Art. I, § 1 (vesting the legislative power of the federal government in Congress).

The major questions doctrine provides that Congress will be assumed to have delegated rulemaking authority to executive agencies over questions of great economic and political magnitude only when it does so explicitly. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000). The major questions doctrine forbids agencies from interpreting ambiguous statutory language in a way that "would bring about an enormous and transformative expansion in [their] regulatory authority without clear congressional authorization." *Util. Air*, 573 U.S. at 324. The basic idea is that if agencies are to exercise authority over some large sector of the economy, it must be because Congress has explicitly said that they can do so – at least if the authority was not clearly granted when the statute was initially enacted. The major questions doctrine prohibits the FTC from interpreting the vague and ambiguous language of Section 5(a) of the FTCA, 15 U.S.C., § 45(a) to apply to Kochava's business activities related to geolocation data. Interpreting Kochava's purported acts or practices as "unfair" without an express

congressional authorization would bring about "an enormous and transformative expansion in [the FTC's] regulatory authority" and should not be allowed. *See id*.

3. Kochava's Constitutional Challenge Based on Lack of Fair Notice in Violation of Kochava's Due Process Rights

Neither Section 5 of the FTCA, nor any FTC regulation, guidance, rule or statement with legal force and effect provided notice to Kochava that the specific geolocation data practices the FTC believes Section 5 prohibits or permits are "unfair." Because the statutory term "unfair" is "elusive," *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986), Congress gave the FTC the authority to develop its meaning through rulemaking and agency adjudication, *see* 15 U.S.C. §§ 45(b), 57a. Indeed, Congress wanted the FTC to promulgate "rules which define *with specificity* acts or practices which are unfair," 15 U.S.C. § 57a(a)(1)(B) (emphasis added), precisely because of Section 5's uncertain breadth. *See Katharine Gibbs Sch. (Inc.) v. FTC*, 612 F.2d 658, 662 (2d Cir. 1979) (vacating FTC rule for not defining unfair acts with specificity); S. Rep. No. 93-1408, at 31 (1974) (Conf. Rep.). Yet the FTC has not done so. The fair notice requirement forbids finding a legal violation "if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited.'" *Fox Television Stations, Inc.,* 567 U.S. at 253. (citation omitted). The principle applies with particular force to regulatory agencies enforcing broad statutory terms: "[T]he [agency's] policy" must provide private parties with "fair notice" that the conduct at issue will be treated as "a violation of [the statute] as interpreted and enforced by the agency." *Id.* at 254.

V. CONCLUSION

For the reasons set forth above, Kochava respectfully requests that this Court deny the FTC's Motion in its entirety.

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Respectfully submitted,

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