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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 **Reply in Support of Defendant's Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Failure to State a Claim [Dkt. 12]**

Kochava Inc.'s opposition brief does not disprove the fundamental flaws in this suit. On its face, the Complaint fails to meet the basic pleading standards to show standing or a plausible claim for relief. Kochava's brief tries to paper over the

Complaint's failings by rewriting its allegations and adding facts. This effort is as procedurally improper as it is substantively meritless.

Ultimately, Kochava cannot escape the plain fact that this preemptive suit serves no purpose. The FTC is the natural plaintiff and its pending enforcement action is the proper vehicle to resolve all issues. Indeed, the company already has raised in the enforcement action every argument made here. The Court should dismiss Kochava's anticipatory action and address the company's defenses in the enforcement action.

I. Kochava did not remedy its facially deficient standing allegations

As the FTC's motion to dismiss explained, Kochava did not "plausibly plead facts to establish" the injury-in-fact prong of standing because the Complaint alleged only a speculative risk of an adverse judgment in a future enforcement action. Def.'s Mem., Dkt. 12-1, at 4 (quoting *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1173 (9th Cir. 2018)); *see id.* 4–6. In response, Kochava stumbles out of the gate by refusing to recognize the basic jurisdictional tenet that standing is determined on "the facts existing at the time the complaint *under consideration* was filed." *C.R. Educ. & Enf't Ctr. v. Hosp. Props. Tr.*, 867 F.3d 1093, 1102 (9th Cir. 2017) (quotation omitted); *see* Def.'s Mem. 4. The company claims that the FTC "misquote[d]" *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), which "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." Pl.'s Opp'n, Dkt. 13, at 6; *see* Def.'s Mem. 4 (quoting *Newman-Green*). Actually, *Newman-Green* establishes that very point, as the Supreme Court and Ninth Circuit have recognized. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 n.4 (1992) (quoting *Newman-Green* to support analysis of standing "when this suit was filed"); *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 655 (9th Cir. 2002) (same). Thus, the four corners of the Complaint must contain facts to support standing as of August 12, 2022—the Complaint's filing date. *See* Def.'s Mem. 3 (citing Ninth Circuit cases).

The FTC identified critical factual gaps in the Complaint's sparse allegation that "[t]he entry of injunctive relief (or even the prospect of the same) is injury in fact." Compl., Dkt. 1, at ¶ 15; *see* Def.'s Mem. 4–5. Kochava's opposition does not identify any part of Paragraph 15, or any other paragraph, that plausibly alleges an injury that had actually occurred as of August 12, 2022. Instead, when the company filed suit, "as alleged in the Complaint," it only faced a "threatened . . . lawsuit and an injunction." Pl.'s Opp'n 8 (citing Compl. ¶ 15).

"An injury that has not yet materialized but will occur in the future can be a basis for Article III standing" only if the injury is "imminent," *i.e.* "certainly impending." *Pinkert v. Schwab Charitable Fund*, 48 F.4th 1051, 1055 (9th Cir. 2022) (quoting *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013)). Yet, as the FTC observed, "the Complaint is devoid of any 'concrete facts' about the likelihood of" a hypothetical injunction, "which would turn on *both* the FTC's decision to file suit *and* a federal court's independent determinations about the merits of the FTC's claims and the need for injunctive relief." Def.'s Mem. 5 (quoting *Clapper*, 568 U.S. at 409). Kochava's brief cites no additional facts in the Complaint about the likelihood that *both* events would occur.

Furthermore, the company's discussion of *Clapper*, *see* Pl.'s Opp'n 6, conspicuously avoided the opinion's pertinent language that "speculat[ion] as to whether [a] court will authorize" the feared action "is 'not sufficient' for standing," Def.'s Mem. 5 (quoting *Clapper*, 568 U.S. at 409, 413). As a result, Kochava failed to distinguish this case from *Clapper*, which rejected, as too speculative, a theory of injury dependent on a court's discretionary issuance of future legal process. *See id.* (quoting *Clapper*, 568 U.S. at 413). Like the *Clapper* plaintiffs, Kochava has not plausibly alleged an imminent injury.

The FTC also explained that the mere "prospect of" an injunction is not a cognizable injury because risk alone is abstract, *not* concrete. Def.'s Mem. 5. Although Kochava expends much effort trying to factually distinguish the D.C. and Fifth Circuit cases discussed by the FTC, Pl.'s Opp'n 7–8, the company does not dispute the

fundamental principle for which the FTC quoted those cases: Bare risk is an abstract concept, whereas standing requires a "concrete" injury that is "'real,' and not 'abstract.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016); *see* Def.'s Mem. 5.

Kochava's brief tries to flesh out the injury with examples like exposure to "sensational press" and "copycat lawsuits." Pl.'s Opp'n 6–8. However, those purported harms were not alleged *in the Complaint* (presumably because those harms would have been speculative when the Complaint was filed), as they must have been to demonstrate standing. *See Salter v. Quality Carriers, Inc.*, 974 F.3d 959, 964 (9th Cir. 2020) (facial attack tests the sufficiency of the complaint's "allegations"). And it "is 'axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.'" *Cork v. CC-Palo Alto, Inc.*, 534 F. Supp. 3d 1156, 1183 n.8 (N.D. Cal. 2021) (quoting *Apple Inc. v. Allan & Assoc. Ltd.*, 445 F. Supp. 3d 42, 59 (N.D. Cal. 2020)); *see, e.g.*, *S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) ("It is well-established that parties cannot amend their complaints through briefing . . . ."). Within the four corners of the Complaint, Kochava has not "plausibly plead[ed] facts to establish" standing. *Dutta*, 895 F.3d at 1173.

Nonetheless, the company claims that *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), "confirms that Kochava meets the injury in fact requirement of Article III standing," Pl.'s Opp'n 1. Specifically, it looks to *MedImmune*'s "recognition 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." 549 U.S. at 128–29; *see* Pl.'s Opp'n 1, 5. That is generally true, but *MedImmune* did not purport to exempt from the basic requirements of standing plaintiffs like Kochava who seek declaratory and injunctive relief. On the contrary, the Supreme Court has made clear that "just like suits for every other type of remedy, declaratory-judgment actions must satisfy Article III's case-or-controversy requirement," which "includes the requirement that litigants have standing." *California v. Texas*, 141 S. Ct. 2104, 2113, 2115 (2021); *see,*

e.g., *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) ("[A]ny person invoking the power of a federal court must demonstrate standing to do so."). Because Kochava has not met the basic burden of all federal litigants to plausibly plead the elements of standing, this case should be dismissed. *See, e.g.*, *California*, 141 S. Ct. at 2120 (dismissing declaratory plaintiffs who "failed to show a concrete, particularized injury fairly traceable to the defendants' conduct"); *Dutta*, 895 F.3d at 1173.

II. Kochava's claims for relief continue to fail on their face

The FTC explained that, "[e]ven if Kochava had standing to sue," this suit must be dismissed under Federal Rule of Civil Procedure 12(b)(6) because the Complaint does not allege any plausible claim and, given the FTC's pending enforcement action, does not assert any basis for declaratory or injunctive relief. Def.'s Mem. 6. As with standing, Kochava's opposition merely confirms that dismissal is appropriate.

Off the bat, Kochava incorrectly applies the standard for jurisdictional dismissals, Pl.'s Opp'n 9, when in fact, the Rule 12(b)(6) standard governs whether the company has adequately pleaded "the elements of a cause of action," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Precisely what cause of action Kochava intended to invoke remains unclear. *See* Def.'s Mem. 6–7. The company "does not allege a *claim* under Section 5(a)" of the FTC Act, 15 U.S.C. § 45(a). Pl.'s Opp'n 9. Rather, "the action *arises* under the [Declaratory Judgment Act] and 'Section 5(a) of the FTC Act,'" which "is not the same as alleging a claim under Section 5(a)." Pl.'s Opp'n 9 (quoting Compl. ¶ 10).

But the Declaratory Judgment Act "creates only a remedy, not a cause of action," *Leigh-Pink v. Rio Props., LLC*, 849 F. App'x 628, 630 (9th Cir. 2021), so what cause of action *is* alleged here? If Kochava means to assert *the FTC's own* cause of action under the FTC Act, *cf. City of Reno v. Netflix, Inc.*, 52 F.4th 874, 879 (9th Cir. 2022), the company cites no instance (and the FTC is aware of none) when a private litigant was permitted to borrow a cause of action exclusively belonging to the government to enforce federal

law, *cf. Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981) (no private right of action under 15 U.S.C. § 45(a)).[1]

Even if private litigants could borrow the federal government's exclusive causes of action, "[t]he fact that a court *can* enter a declaratory judgment does not mean that it *should*." *Hewitt v. Helms*, 482 U.S. 755, 762 (1987). Contrary to Kochava's intimation, *see* Pl.'s Opp'n 11–12, the Declaratory Judgment Act "confers a discretion on the courts rather than an absolute right upon the litigant," *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952). Kochava's assertion of the very same cause of action that the FTC itself has brought against the company vividly illustrates why this suit should be dismissed. *See* Def.'s Mem. 8 (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995)).

In weighing declaratory relief, the Ninth Circuit instructed in *Argonaut Insurance Co. v. St. Francis Medical Center*, 17 F.4th 1276, 1280 (9th Cir. 2021), that courts should consider "the relevant factors from" *Government Employees Insurance Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998), which the FTC explained heavily favor dismissal, *see* Def.'s Mem. 8–11. Kochava denies filing suit "for the purposes of 'procedural fencing'" or "to secure tactical leverage," Pl.'s Opp'n 12 & n.3, but that rings hollow given the sequence of events. In "July and August 2022, the FTC sent to Kochava a Proposed Complaint;" "[o]n August 12, 2022, Kochava filed the instant lawsuit;" and "[o]n August 29, 2022, the FTC filed its threatened Complaint." Pl.'s Opp'n 2–3. This is a paradigmatic example of a declaratory plaintiff who received notice of potential litigation and then filed suit "mere days or weeks before the coercive suit[] filed by a 'natural plaintiff.'" Def.'s Mem. 8 (quoting *AmSouth Bank v. Dale*, 386 F.3d 763, 768 (6th Cir. 2004)).

[1] In discussing the defensive use of the Declaratory Judgment Act, *City of Reno* only referenced examples where the putative defendant could itself bring the cause of action on a different set of facts (*e.g.*, a private entity might equally sue and be sued for patent infringement). *See* 52 F.4th at 879.

Kochava tries to excuse its conduct due to a purported "Hobson's choice": agree to the FTC's proposed settlement or file a preemptive suit. Pl.'s Opp'n 12. But if that excuse (which could be offered by every declaratory plaintiff) were sufficient, no anticipatory suits would be dismissed. And courts *do* dismiss such suits based on another option available to plaintiffs—defending against the natural plaintiff's suit. *See* Def.'s Mem. 8–9 (citing cases). Indeed, despite not acknowledging that option in its brief, the company has pursued that very course.

Kochava admits that "[t]he FTC's assertion that the claims of this case overlap with those in" the enforcement action "is partially true." Pl.'s Opp'n 1. In fact, it is *entirely* true. The company's request for a declaratory judgment that its business "is not an 'unfair act . . . or practice within the meaning of . . . 15 U.S.C. § 45(a),'" Pl.'s Opp'n 9 (quoting Compl. ¶¶ 28, 33(iii), 36(iii)), was directly "premised upon the" allegations in the FTC's proposed complaint, *id.* And Kochava's pending motion to dismiss in the enforcement action argues "that (1) there exists no underlying predicate violation supporting the FTC's claim;" and "(2) the FTC cannot meet the requirements of Section 5(a) of the FTCA, 15 U.S.C. § 45 (a), (n)." Pl.'s Opp'n 3. The other arguments in Kochava's opposition also have been raised in the enforcement action, including the standard for injunctive relief under Section 13(b) of the FTC Act, the impact of Privacy Block on the availability of injunctive relief, the constitutionality of the FTC's structure, as well as the applicability of the non-delegation and major questions doctrines and the Due Process Clause. *Compare* Pl.'s Opp'n 13, 16–19, *with* Pl.'s Opp'n 3–4, *and* Def.'s Mot. to Dismiss, Dkt. 7, at 2, 8–9, 14–19, *FTC v. Kochava Inc.*, No. 2:22-cv-00377-BLW (D. Idaho

Oct. 28, 2022).[2] Thus, Kochava's declaratory suit runs afoul of the Ninth Circuit's admonition to "avoid duplicative litigation." Def.'s Mem. 9 (quoting *Gov't Emps. Ins. Co.*, 133 F.3d at 1225).

Far from being an outlier, dismissal of this declaratory suit would fit seamlessly within the large body of caselaw that has "rejected attempts 'to secure tactical leverage' by turning the [FTC] from plaintiff into defendant." Def.'s Mem. 8 (quoting *POM Wonderful LLC v. FTC*, 894 F. Supp. 2d 40, 45 (D.D.C. 2012)); *see id.* 8–9 (citing additional cases). Kochava's opposition glaringly fails to grapple with these on-point authorities. Following the reasoning in those other cases, the relevant "considerations of practicality and wise judicial administration" support the dismissal of Kochava's declaratory judgment action. *Id.* 8 (quoting *Wilton*, 515 U.S. at 288).

Kochava also lacks any basis for injunctive relief. The company says the FTC's argument that the enforcement action is an adequate remedy at law (and thus precludes injunctive relief) "does not make sense on its face" because "the issues in the two suits do not overlap." Pl.'s Opp'n 14; *see* Def.'s Mem. 10–11. However, as discussed above, the purported differences are illusory; in both, Kochava has challenged the constitutional "propriety of the FTC" and "an alleged (mis)interpretation of 'unfair competition.'" Pl.'s Opp'n 14. Meanwhile, the company's brief never rebuts the core legal proposition in the cases cited by the FTC—namely, that the pending FTC enforcement action, by its nature as a judicial proceeding, is an adequate remedy at law sufficient to foreclose injunctive relief. *See* Def.'s Mem. 11.

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[2] To the extent Kochava seeks broader declarations about the meaning of the FTC Act, divorced from its own factual situation, *see* Pl.'s Opp'n 13, those "abstract question[s]" are beyond the purview of the Declaratory Judgment Act, *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *cf. Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) ("a federal court has no authority to give opinions upon . . . abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it") (internal quotation omitted).

Lastly, Kochava acknowledges that any potential constitutional claim must plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," Pl.'s Opp'n 16 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), while falling far short of that standard. These are the sum total of the Complaint's allegations on the tripartite constitutional claim discussed in Kochava's brief:

- *Separation of Powers*: "the FTC's structure violates Article II of the Constitution by providing improper insulation from the president," Compl. ¶ 5; *see id.* ¶¶ 22, 33(i), 36(i);
- *Nondelegation and Major Questions Doctrine*: "Constitutional questions are at issue, including . . . whether the nondelegation and major questions doctrines prevent the FTC from adjudicating this matter administratively at all," *id.* ¶ 2; and
- *Due Process Clause*: "Kochava's due process rights would be violated through any administrative proceeding that could take years," *id.* ¶ 5; *see id.* ¶¶ 22, 33(i), 36(i).

On their face, these allegations are "legal conclusions," entitled to no presumption of truthfulness. *Iqbal*, 556 U.S. at 678. Further, as "mere conclusory statements," they "do not suffice" to state a plausible claim. *Id.*

Kochava cannot salvage any possible claim by rewording the allegations through its brief. The Complaint spoke of "rais[ing] similar issues" to *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173 (9th Cir. 2021), and anticipated "the FTC's administrative enforcement proceedings." Compl. ¶¶ 4, 21. But the FTC showed how dissimilar this case was from *Axon* and how the Complaint itself debunked the fear of administrative proceedings. *See* Def.'s Mem. 12–13. Now, Kochava says the Complaint's extensive discussion of *Axon* "does not form the basis of any claim" and instead substitutes a theory about the FTC possessing "executive litigation powers without the possibility of removal of any FTC director [*sic*] by the President." Pl.'s Opp'n 16. This new theory is

entirely unsupported by any "well-pleaded factual allegations" in the Complaint, *Iqbal*, 556 U.S. at 679, which cannot be amended by a brief, *see, e.g.*, *Cork*, 534 F. Supp 3d at 1183 n.8.[3] Indeed, this theory serves only to cancel out the company's contradictory argument that the FTC's enforcement suit is a "legislative act." Pl.'s Opp'n 19.

Similarly, Kochava says the nondelegation, major question, and due process arguments relate to the FTC's ability to "interpret[] the vague and ambiguous language of . . . 15 U.S.C. § 45(a)." Pl.'s Opp'n 19; *see id.* 18–20. But the Complaint alleges otherwise.[4] The due process challenge is expressly tethered to a theoretical FTC "administrative proceeding," Compl. ¶¶ 33(i), 36(i); so too the nondelegation and major question doctrines, which supposedly would "prevent the FTC from adjudicating this matter administratively at all," *id.* ¶ 2. The Complaint also acknowledged that the FTC would "invoke[] judicial as opposed to administrative process," *id.* ¶ 1, so no constitutional challenge to an administrative process is possible.

CONCLUSION

For the reasons herein and in the FTC's opening brief, the Court should grant the motion to dismiss.

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[3] Those additions *still* would fall short of even a "[t]hreadbare recital[] of the elements of a cause of action." *Iqbal*, 556 U.S. at 678. Kochava has never even argued "that the unconstitutional provision *actually caused* [it] harm." Def.'s Mem. 13 (quoting *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137 (9th Cir. 2021) (emphasis added); *see also Collins v. Yellen*, 141 S. Ct. 1761, 1781 (2021).

[4] In any event, a vagueness challenge to the FTC Act's long-standing prohibition against unfair or deceptive acts or practices is squarely foreclosed. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384–85 (1965) (explaining that "the proscriptions in [15 U.S.C. § 45(a)] are flexible, 'to be defined with particularity by the myriad of cases from the field of business'") (quoting *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394 (1953)).

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