IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. **FACEBOOK, INC.** Defendant.	Civil Action No. 1:20-cv-03589 (JEB)

PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT FACEBOOK, INC.'S MOTION TO DISMISS

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INTRODUCTION

The Court should deny Facebook's Motion to Dismiss because the Federal Trade Commission's Complaint states a claim that Facebook holds monopoly power over personal social networking ("PSN") services in the United States, and is violating the antitrust laws by maintaining its monopoly through means other than competition on the merits. The Complaint describes in detail Facebook's unlawful course of conduct, which includes acquiring competitive threats and deterring or hindering the emergence of rivals by imposing anticompetitive conditions on its trading partners. This conduct violates Section 2 of the Sherman Act, 15 U.S.C. § 2, and thus constitutes an unfair method of competition in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Facebook is one of the largest and most profitable companies in the history of the world. Facebook reaps massive profits from its PSN monopoly, not by offering a superior or more innovative product but because it has, for nearly a decade, taken anticompetitive actions to neutralize, hinder, or deter would-be competitors. For more than a century, courts have condemned monopolists under Section 2 of the Sherman Act for resorting to similar anticompetitive practices to maintain their dominance. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (anticompetitive practices included acquiring rivals); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (same); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (refusal to deal with trading partners who dealt with monopolist's rival); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (contractual conditions on trading partners to eliminate risk that nascent threats might erode entry barrier).

Disregarding Facebook's practices, [illegible] Attachted[/Bottom]4 BDC 0 Tc 0 Tw -38.855 15.895 T

maintained monopoly power and harms consumers, or alternatively that the FTC should bring this action through an administrative proceeding rather than in this forum. Neither argument has

as "a large and viable competitor" presenting "a big strategic risk for us." *Id.* ¶¶ 83-84. In February 2012, Mr. Zuckerberg worried that "a huge number" of users were moving their engagement away from Facebook to Instagram, and that Instagram was building a social network that was competitive with Facebook's. *Id.* ¶¶ 89-90. In explaining his rationale for pursuing Instagram as an acquisition target, Mr. Zuckerberg explained to CFO David Ebersman that "there are network effects around social products and a finite number of different social mechanics to invent. Once someone wins at a specific mechanic, it's difficult for others to supplant them without doing something different." *Id.* ¶ 91.

Facebook announced its agreement to acquire Instagram in April 2012. By acquiring Instagram, Facebook n09 Tc x1e-17 -2t.Dn09 Tczeinitsin1e-17 gu aInstare5.7his rPSN.6 an thor

than compete." *Id.* ¶¶ 20, 117. In 2014, Facebook acquired WhatsApp for $19 billion. *Id.* ¶¶ 120-21. The acquisition neutralized WhatsApp as a nascent threat and thereby deprived, and continues to deprive, users of the benefits of competition from an independent WhatsApp. *Id.* ¶¶ 21, 126-27. As Facebook recognized, an independent WhatsApp (on its own or acquired by a third party) would have the ability and incentive to enter the U.S. PSN services market, but under Facebook's control that competitive threat no longer exists. *Id.* Moreover, the acquisition makes it harder for other mobile messaging apps to acquire scale and threaten to enter PSN services. *Id.*

C. Facebook Platform

In 2007, Facebook launched "Facebook Platform," a service allowing third-party apps to interoperate and exchange certain information with Facebook, including via application programming interfaces ("APIs"). Compl. ¶¶ 23, 129. Facebook Platform has proved highly valuable to Facebook—with at times nearly one billion pieces of social data channeled back to Facebook Blue each day. *Id.* ¶¶ 132-34. Facebook Platform also became an important distribution channel for third-party apps, with features like the Find Friends API serving as a valuable growth tool. *Id.* ¶¶ 130, 132, 135.

Between 2011 and 2018, Facebook made Facebook Platform avail

Facebook's illegal monopolization persists today. Facebook continues to hold and operate Instagram and WhatsApp, which neutralizes them as direct competitive threats to Facebook, and maintains a protective "moat" around its PSN services monopoly. *Id.* ¶ 76. Facebook recognizes that so long as it maintains Instagram and WhatsApp operating at scale, it will be harder for new firms to enter and build scale around their respective mechanics. *Id.*

LEGAL STANDARD

A motion to dismiss can be granted only if the FTC's Complaint does not allege facts that, if accepted as true, state a plausible claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). The Court does not need to determine whether the facts alleged are true to deny a motion to dismiss. *See id.*, at 556 ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations.") (internal citation omitted). Instead, the Court "should assume the[] veracity" of the Complaint's factual allegations, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), which "should be liberally construed in [the FTC's] favor." *Hughes v. Abell*, 634 F. Supp. 2d 110, 113 (D.D.C. 2009).

ARGUMENT

I. THE FTC'S COMPLAINT STATES A CLAIM OF MONOPOLIZATION

The Complaint's allegations establish that for nearly a decade Facebook has engaged in a course of anticompetitive conduct to maintain a monopoly in PSN services in the United States, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. *See* Compl. ¶¶ 169-74. "The offense of monopolization has two elements: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or

historic accident.'" *Microsoft*, 253 F.3d at 50 (quoting *Grinnell*, 384 U.S. at 570-71). The Complaint's factual allegations establish both elements, and therefore state a claim.

A. The Complaint's Allegations Establish that Facebook Possesses Monopoly Power in PSN Services in the United States

The Complaint provides detailed allegations that Facebook possesses monopoly power in the relevant market for PSN services in the United States. *See* Compl. ¶¶ 38-42, 51-67. Monopoly power consists of "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

While courts commonly find that "a firm is a monopolist if it can profitably raise prices substantially above the competitive level," *Microsoft*, 253 F.3d at 51, monopoly power can also manifest in reduced non-price benefits—such as reduced product quality—that customers would enjoy in a competitive market. *See NorthBay Healthcare Grp., Inc. v. Kaiser Found. Health Plan, Inc.*, 2020 WL 7233105, at *2 (9th Cir. Dec. 8, 2020) (defendant's conduct "could, as alleged, diminish the quality of services for the public and thus fall under the type of protection the antitrust laws were intended to afford"); U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 1 (Aug. 19, 2010) [hereinafter, Horizontal Merger Guidelines] ("Enhanced market power can also be manifested in non-price terms and conditions . . . including reduced product quality, reduced product variety, reduced service, or diminished innovation."); Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. Pa. L. Rev. 1663, 1687 (2013) ("[A]nticompetitive conduct or transactions could enable platforms to exercise market power to give customers less of the good things—improved service, innovative products, and good privacy and data security policies[.]"). In other words, a firm is a monopolist if—paralleling the language of *Microsoft*—it can profitably *reduce* non-price consumer benefits *below* the competitive level. *Cf. Microsoft*, 253 F.3d at 51.

The FTC has alleged facts establishing that Facebook possesses monopoly power. Because "direct proof" that a defendant has monopoly power is "only rarely available," *Microsoft*, 253 F.3d at 51, monopoly power is more commonly established through indirect proof—namely, it is "inferred from a firm's possession of a dominant share of a relevant market

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and uses" of PSN services. *Brown Shoe*, 370 U.S. at 323. PSN services are "online services that enable and are used by people to maintain personal relationships and share experiences with friends, family, and other personal connections in a shared social space." Compl. ¶ 52.

The Complaint provides detailed factual allegations regarding the distinct "uses" of PSN services. In particular, the Co

a) Facebook's Assertion that It Provides PSN Services "Free and In Unlimited Quantities" Provides No Basis for Dismissal

Facebook's assertion that it offers its product "free and in unlimited quantities," Mem. 2, 5, provides no basis for dismissing the Complaint. First, Facebook cannot prevail on this motion by injecting its own factual assertions. *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 228 (D.D.C. 2015) ("A motion to dismiss under Rule 12(b)(6) must rely solely on facts within the four corners of the Complaint[.]"). The Complaint describes how PSN providers "have refrained from charging a monetary price," Compl. ¶ 42, but the FTC disputes, and the Complaint does not indicate, that Facebook offers its services to users in "unlimited quantities" or for "free." Facebook offers PSN services to users with a nominal price of zero, but with non-price terms and conditions that include the ability to monetize user data and engagement through advertising. *Id.*

Second, the presence of a nominal price of "zero" in no way undermines the relevant market allegations. Facebook's assertion ignores the fact that sellers routinely compete to offer attractive non-price terms and conditions, in addition to whatever price they charge. *See supra* at 7. Here, the Complaint alleges that PSN providers compete to offer attractive non-price terms, *see* Compl. ¶ 42, and that Facebook's monopolization harmed this competition. *See, e.g., id.* ¶¶ 27, 28, 163, 167. It also ignores the fact that a nominal price of "zero" is still a price, and could represent an "overcharge" compared with a competitive marketplace. *HeracIF2 pri30rms, id.* ¶ *int. Fif T*

demand accurately. Therefore, it is usually necessary to consider other factors that can serve as useful surrogates for cross-elasticity data."); *H&R Block*, 833 F. Supp. 2d at 62 (relevant market established after trial despite "no direct, reliable data on diversion" existing).

Here, the FTC may proffer expert testimony at trial demonstrating that a quantitative cross-elasticity analysis supports the relevant market alleged in the Complaint. But at the pleading stage, the FTC is not required to quantify cross-elasticities or to describe the methods such expert testimony might employ, as "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 550 U.S. at 563.

c) Facebook's Claim that PSN Services Are Reasonably Interchangeable with Other Services Disputes the Complaint's Factual Allegations

Facebook's assertions that other services are substitutes for PSN services dispute the Complaint's factual allegations and are not a basis for dismissing the Complaint. Mem. 13. In particular, Facebook asserts that the Complaint fails to provide sufficient allegations that "exclude other alternatives" to PSN services, and asserts that PSN service features are "arbitrary" and that "myriad online services" are not set apart enough from PSN services to be "unacceptable substitutes." Mem. 10-11, 14, 18-19. Yet these assertions are merely attempts to dispute the accuracy of the Complaint's factual allegations that consumers do not view these "online services" as reasonable substitutes because PSN services provide distinct functionality and characteristics. *See supra* § I.A.1. Accordingly, they are inappropriate for a motion to dismiss. *See Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 126 (D.D.C. 2019) ("A defendant cannot ignore, or contradict, a complaint's factual allegations in a bid to seek its dismissal[.]"); *RealPage*, 852 F. Supp. 2d at 1225 (defendant's claims that additional firms should be included

Courtyard Mgmt. Corp., 624 F. App'x 23, 28-29 (2d Cir. 2015) (rejecting single-brand market for Marriott hotels); *cf. Todd*, 275 F.3d at 200 n.3 (collecting cases). Here, the Complaint does

those calculations" prior to expert report); Order Adopting R. & R. No. 4, *id.* (D.D.C. Oct. 14, 2016), ECF No. 189 (denying motion in relevant part).

Second, Facebook suggests the Complaint "leads to two mutually exclusive conclusions" because Facebook offers services other than PSN services. Mem. 16-17. As an initial matter, relevant markets are routinely defined to include less than everything a defendant sells. *See Microsoft*, 253 F.3d at 52, 87-88 (defining a relevant market of operating systems despite Microsoft also offering word processing software and browser); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 122-27 (D.D.C. 2016) (defining relevant market for office supplies that excluded printer ink, toner, and other products that the defendants also sold). In those instances, providers of services outside the relevant market are not treated as competitors for the relevant product, even though the defendant also offers those out-of-market services. *See Staples*, 190 F. Supp. 3d at 122-23 (ink and toner providers not in the relevant market).

Facebook suggests that there may be complications in assessing or quantifying "use of [PSN] – as distinct from other features – on Facebook." Mem. 16-17. In doing so, Facebook implies that the FTC must specify a method for quantifying how people allocate their usage of Facebook and other PSN providers. Facebook's arguments about how the FTC might handle certain usage metrics at trial, which will be the subject of both fact and expert discovery, are not a basis for a motion to dismiss. *See supra* (discussing *Anthem* discovery orders) & *infra* § I.A.3.

Finally, Facebook asserts that the FTC's market definition is "contradicted by its own allegations" because some of the apps that Facebook targeted with its anticompetitive conduct were not PSN providers. Mem. 2, 14-15. As *Microsoft* held, however, "[n]othing in § 2 of the Sherman Act limits its prohibition to actions taken against threats that are already well-developed enough to serve as present substitutes." 253 F.3d at 54 (internal citation omitted). So

separate antitrust violation."); *see also Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S.

them on the merits. *See Microsoft*, 253 F.3d at 62, 65 (conduct is "anticompetitive" when it hinders competitive threats through "means other than competition on the merits").

Facebook inaccurately suggests, without citation to authority, that Section 2 might require the FTC to prove the threats extinguish

As courts have recognized, the very nature of a monopoly maintenance claim is that the

not, *see Eastman v. Quest Diagnostics Inc.*, 2016 WL 1640465, at *9 (N.D. Cal. Apr. 26, 2016), *aff'd* 724 Fed. App'x 556 (9th Cir. 2018); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *Nat'l ATM Council, Inc. v. Visa Inc.*, 922 F. Supp. 2d 73, 87 (D.D.C. 2013).

Regardless, the Complaint details the harm to consumers stemming from Facebook's neutralization of the competitive threats posed by Instagram and WhatsApp, including the loss of alternative suppliers, the loss of a competitive check on Facebook, and the loss of additional sources of innovation and competitive decision-making. *See* Compl. ¶¶ 27, 105, 127, 163. And it details the seriousness of the threat posed by each, and therefore their associated role in contributing to the maintenance of Facebook's monopoly. *See id.* ¶¶ 79-80, 84, 87, 89-93, 108-14, 118, 126. This robustly states a claim. *See Microsoft*, 253 F.3d at 79 (causal connection to monopoly established if conduct "reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power"); Areeda & Hovenkamp ¶ 701c (explaining that a monopolist's acquisition of even a "minor" rival is important).

Finally, if Facebook is attempting to posit that the acquisitions were justified despite the serious harm to the competitive process reflected in a monopolist acquiring competitive threats, this is a factual argument that is not cognizable on a motion to dismiss. *See BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr.*, 176 F. Supp. 3d 606, 624-25 (W.D. La. 2016) (rejecting plaintiff's justification defense as "better suited for a summary judgment motion"). Any such claimed justification would face significant hurdles in any event. Horizontal Merger Guidelines § 10 ("Efficiencies almost never justify a merger to monopol

absence of an overwhelming demonstration that substantial efficiencies are involved and either cannot be achieved in other ways or will inevitably destroy the other firms.").

c) Prior HSR Review Does Not Bar this Action or Create a Heightened Pleading Standard

As Facebook concedes, the FTC has statutory authority to challenge acquisitions that it previously reviewed pursuant to the HSR Act, 15 U.S.C. § 18a(i)(1). *See*

it limit the FTC's ability to challenge a previously reviewed acquisition "at any time" under any "provision of law." 15 U.S.C. § 18a(i)(1).

Thus, an agency decision not to challenge an acquisition has no probative value as to its lawfulness. *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 714 (4th Cir. 2021) (upholding the district court's exclusion of evidence that the Department of Justice had twice investigated the merger without challenging it because "many factors may motivate such a decision, including the Department's limited resources") (citation omitted). Indeed, there are numerous examples of the FTC or Department of Justice challenging consummated acquisitions that were subject to the HSR Act. *See, e.g.*, Complaint, *FTC v. Cardinal Health, Inc.*, No. 15-cv-3031 (S.D.N.Y. Apr. 20, 2015) (Section 2 claim challenging, inter alia, two consummated acquisitions more than 10 years after HSR Act notifications); Complaint, *United States v. Parker-Hannifin Corp.*, No. 1:17-cv-01354-UNA (D. Del. Sept. 26, 2017) (challenging a consummated merger despite prior notification under the HSR Act).

In arguing for novel treatment in this case, Facebook mischaracterizes the case law. *See* Mem. 28-29. For example, *Eastman v. Quest Diagnostics Inc.* does not stand for the proposition that "prior FTC clearance weigh[s] against the conclusion that [an] acquisition could be plausibly characterized as an unreasonable restriction on competition," as the FTC did not clear the acquisition in question, but required a divestiture to remedy competitive concerns. 2016 WL 1640465, at *9. Nor does *Texaco Inc. v. Dagher* stand for the proposition that prior FTC review of an acquisition establishes a presumption that the acquisition is lawful. Mem. 28. In *Texaco*, plaintiffs did not challenge the formation of a joint venture, and the court only presumed it was lawful for purposes of focusing its review on plaintiffs' price-fixing claim. 547 U.S. 1, 6 n.1 (2006).

Facebook's reliance on *Trinko* is also inapposite. *See* Mem. 29. *Trinko* assessed whether access requirements imposed by the Telecommunications Act of 1996 ("Telecommunications Act"), an extensive regulatory scheme overseen by a different federal agency, created a *new* antitrust duty for telecommunication firms to provide access to rivals. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 412-15 (2004). But the Court never suggested that the Telecommunications Act precluded enforcement of the antitrust laws. And further, it would be perverse to construe the HSR Act—a statute designed to enhance enforcement of the antitrust laws—to *preclude* enforcement of those laws.

d)

monopolists has continued even after passage of the Clayton Act in 1914, and subsequent amendments to Section 7 in 1950. *See, e.g.*, *Grinnell*, 384 U.S. at 576 (finding Section 2 violation involving acquisitions in 1966); *BRFHH*, 176 F. Supp. 3d at 622 (rejecting defendant's argument that an acquisition, without other anticompetitive conduct, does not violate Section 2); *Behrend v. Comcast Corp.*, 2012 WL 1231794, at *20 (E.D. Pa. Apr. 12, 2012) ("In *Grinnell*, the Court held that acquiring competitors in order to perfect a monopoly is predatory conduct [in

to Facebook's Mot. to Dismiss, *New York v. Facebook, Inc.*, No. 1:20-cv-03589-JEB, at § IV (D.D.C. Apr. 7, 2021).

2. The Complaint Alleges that Facebook Maintained Its Monopoly Through Its Platform Policies

As alleged in the Complaint, Facebook's anticompetitive efforts to maintain its monopoly position include announcing and enforcing anticompetitive conditions on access to its valuable Platform interconnections in order to deter the emergence of competitive threats. *See* Compl. ¶¶ 22-26, 129-30. Facebook incorrectly maintains that this conduct is immune and cannot be challenged "as a matter of law." Mem. 36.

a) Facebook's Platform Policies Constitute Unlawful Conditional Dealing

Facebook starts by suggesting that its Platform conduct is controlled by a "clear, general no-duty-to-deal rule" established in *Trinko*. Mem. 36. This assertion, however, overlooks that the Complaint does not simply allege that Facebook refused to provide competitors with access to its Platform, but rather that Facebook *conditioned* access to its Platform on trading partners not competing with it or assisting competitors. *See* Compl. ¶¶ 142-43.

Conditional dealing by a monopolist—which was not at issue in *Trinko*—violates Section 2 when it has an anticompetitive effect or tendency and contributes to the maintenance of monopoly power. *See Lorain Journal*, 342 U.S. at 152-53; *Covad Commc'ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 675-76 (D.C. Cir. 2005). Conditional dealing encompasses a monopolist's inducement of trading partners or other firms not to compete with it or do business with its rivals, by conditioning access to some resource of the monopolist. *See Lorain Journal*, 342 U.S. at 152-53.

In *Lorain Journal*, for example, the Supreme Court held that a monopolist newspaper engaged in anticompetitive conduct by conditioning the sale of its newspaper advertising on

customers' agreements not to purchase advertising from a local radio station. The Court found that the newspaper "use[d] its monopoly to destroy threatened competition" by inducing advertisers not to deal with the radio station. *Id.* at 152-54. Likewise, in *Covad*, the Court of Appeals held that a monopolist could violate Section 2 by refusing to sell internet service to would-be customers who had placed orders for internet service with the monopolist's rival. 398 F.3d at 675-76 (reversing motion to dismiss).

Here, Facebook worked to deter the emergence of competitive threats by granting third parties full access to its Platform only on the condition that they not threaten its monopoly by: (1) providing PSN services, (2) providing mobile messaging functions, (3) providing promising social functionality, or (4) connecting with or promoting other PSN providers. *See* Compl. ¶¶ 136, 153-56. Given the value of Facebook's Platform interconnections, *see id.* ¶¶ 130-32, 158, Facebook's denial of access to its Platform on these conditions was a meaningful inducement to app developers to avoid competing with Facebook or aiding its competitors. *Cf. Lorain Journal*, 342 U.S at 183-84 (newspaper's inducement effective because of its advertising reach).

Facebook disputes that this conduct "unreasonably harmed competition." Mem. 38-39. That factual dispute is not appropriately resolved on a motion to dismiss. Moreover, it ignores the specific factual allegations in the Complaint that Facebook's own employees recognized that Facebook introduced these policies to suppress competition. *See* Compl. ¶ 140. The Complaint also details how Facebook enforced these conditions to throttle th

b) Facebook's Platform Conduct Is Also Actionable Under *Trinko* and *Aspen*

As explained, Facebook's conditioning of access to its Platform is unlawful under *Lorain Journal*. That alone is enough to sustain the Platform conduct allegations, particularly given that they are part of an overall course of anticompetitive conduct and not a standalone claim. *See supra* § I.B (case law discussing need to avoid compartmentalizing conduct). In any event, even if treated as an unconditional refusal to deal, Facebook's Platform conduct is actionable under that framework, pursuant to the two leading cases, *Trinko* and *Aspen*.

Contrary to Facebook's suggestion, Mem. 36, "a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." *Trinko*, 540 U.S. at 408; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985) ("The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified."). A refusal to deal is "exclusionary" when it tends to "impair the oppci0o 6 [TdTT4 0.0007c -30.002 T(eraoperat3ex

In *Aspen*, the defendant terminated a joint ski ticket, which provided skiers with an all-access pass to the plaintiff's and the defendant's ski slopes, and subsequently frustrated the plaintiff's efforts to re-create the joint ski ticket by refusing to sell it tickets. *See* 472 U.S. at 593-94. In affirming that the defendant's conduct was unlawful, the Court highlighted the defendant's refusal to sell tickets to the plaintiff even though doing so "would have provided it with immediate benefits, and would have satisfied its potential customers." *Id.* at 610. As a result, the Court found the defendant "was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610-11.

Trinko applied this same approach, but found that the monopolist telecommunication firm's refusal to provide interconnection services to its rival was not actionable. *Trinko*, 540 U.S. at 415-16. The Court noted that, unlike in *Aspen*, there was no indication that the defendant was motivated by "anticompetitive malice," as it refused a request to provide an interconnection service that it had a regulatory obligation to provide at a cost-based rate, but that it had never provided voluntarily. *Id.* at 409.

No proxies for anticompetitive motive are needed here, as Facebook's anticompetitive intent, and lack of business justifications, are plain from the fact that Facebook refused to provide Platform access only to those app develo

show that Facebook's practices are actionable anticompetitive conduct. *See Thalomid*, 2015 WL 9589217, at *15 ("Both [*Aspen* and *Trinko*] indicate that motivation is central.").

In any event, the *Aspen* proxies for anticompetitive motive are also present here. Facebook's voluntary provision of Platform access to all app developers before later revoking the access of only those app developers who competed with or threatened Facebook, or aided firms that competed with Facebook, *see* Compl. ¶¶ 130, 136-38, establishes a voluntary course of dealing. *See Trinko*, 540 U.S. at 409. Further, as in *Aspen*, Facebook sacrificed "short-run benefits and consumer goodwill." 472 U.S. at 610-11. Facebook benefited by providing Platform access to app developers, *see* Compl. ¶¶ 133-34, and its decision to forgo those benefits to harm competition elucidates its anticompetitive intent. *Compare Aspen Skiing*, 472 U.S. at 608 ("The jury may well have concluded that Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor."), *with Trinko*, 540 U.S. at 409 (reluctance to interconnect under regulatory mandate "tells us nothing about dreams of monopoly").

Facebook misconstrues controlling precedent by asserting that conduct cannot constitute an anticompetitive refusal to deal unless the defendant is a monopoly provider of an input sold at retail with a prior profitable course of dealing, or where the refusal is irrational but for its anticompetitive effect. Mem. 36-37. As indicated above, *Trinko* and *Aspen* treated circumstances like prior dealing and sacrifice of short-run benefits as proxies for anticompetitive motive, but they did not indicate that those circumstances (which in any event are present here) were always necessary, nor did they announce an "irrationality" test. *See Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 462-64 & n.13 (7th Cir. 2020) (stating the termination of a prior, profitable course of dealing "is neither necessary nor sufficient for conduct to be exclusionary"

and doubting the need to show the refusal "was irrational but for its anticompetitive effect"); *Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of Rhode Island*, 311 F. Supp. 3d 468, 483 (D.R.I. 2018) (stating that "confusion" over *Aspen* and *Trinko* can result from "misread[ing] or deliberately extend[ing]" their holdings, including "construing them in a rigid fashion to require, for example, an explicit prior course of dealing"). Further, with respect to Facebook's claims about defining an "input" market, Mem. 36-37, Facebook's Platform—which serves as a valuable "distribution channel" and "growth tool" for third-party apps, Compl. ¶¶ 130, 132—directly parallels the valuable joint ski ticket in *Aspen*.

Finally, Facebook's asserted justifications are conclusory and premature. *See* Mem. 37-38. Facebook cannot prevail on a motion to dismiss by making an unsubstantiated claim that it imposed its policies or terminated Platform access to prevent freeriding. *Viamedia*, 951 F.3d at 460 ("[B]alancing anticompetitive effects against hypothesized justifications depends on evidence and is not amenable to resolution on the pleadings[.]"). In fact, both cases cited by Facebook involved motions for summary judgment, not motions to dismiss. *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1296 (11th Cir. 2004) (noting defendant had burden of establishing its business justification was valid); *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1559, 1562 (11th Cir. 1983) (assessing defendants' restrictive covenant based on the specific facts of the case).

c) Facebook Inaccurately Claims that Courts Have Ruled on Its Platform Conduct

As a final salvo, Facebook asserts that courts in California have already ruled on the FTC's allegations related to Facebook's Platform policies, and dismissed "similar refusal-to-deal claims" on grounds that Facebook has "a right to control its own product." Mem. 38. Facebook,

however, misconstrues these cases: no court has ruled that the Platform policies at issue here are not actionable anticompetitive conduct as conditional dealing or as a refusal to deal.

Indeed, only one of the cases that Facebook cites even discusses whether a claim is an unlawful refusal to deal. In *Reveal Chat*, the court dismissed the complaint because it was time-barred and because the plaintiffs failed to allege antitrust injury, not because Facebook's conduct could not, as a matter of law, constitute an unlawful refusal to deal. *Reveal Chat Holdco LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981, 996, 998 (N.D. Cal. 2020). The court addressed the plaintiffs' refusal-to-deal claim only in dicta, stating that it did so "briefly" in order "to provide Plaintiffs with guidance for their amended complaint." *Id.* at 998. The court did not address whether the conduct at issue constituted conditional dealing.

The other cases Facebook references do not apply conditional dealing or refusal-to-deal

Mem. 39-44, ignoring the Complaint's factual allegations that Facebook "is violating" Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by monopolizing PSN services.

Facebook's attack on the Commission's authority to bring this suit fails for two reasons. First, the FTC Act vests the Commission with the discretion to decide it "has reason to believe" that Facebook is violating or about to violate the law. Second, the Complaint plainly alleges facts supporting the Commission's reason to believe that Facebook is violating Section 2 of the Sherman Act via an ongoing course of anticompetitive conduct.

A. Section 13(b) Empowers the FTC to Sue in Federal Court When the Commission "Has Reason to Believe" a Defendant Is Violating the Law

The plain language of the FTC Act invests the Commission, not federal courts, with discretion to determine it "has reason to believe" a defendant is violating or about to violate the antitrust laws. *FTC v. Hornbeam Special Situations, LLC*, 391 F. Supp. 3d 1218, 1222-23 (N.D. Ga. 2019); *FTC v. Vyera Pharm., LLC*, 479 F. Supp. 3d 31, 43-44 (S.D.N.Y. 2020). In *Hornbeam*, the FTC alleged that a violation had ceased but was likely to recur, and the defendant filed a motion to dismiss on Section 13(b) grounds. 391 F. Supp. 3d at 1222-23. The court denied the defendant's motion, holding that Section 13(b) conferred discretion on the FTC and that the FTC's "reason to believe" determination could not be reviewed. *Id.* (describing "the FTC's internal standard argument" as "persuasive."). As such, the court concluded that the complaint did not warrant dismissal on Section 13(b) grounds where it "set[] forth at least some facts to support a reasonable *inference*" that the defendant was about to violate the law. *Id.* (emphasis added). Similarly, in *Vyera*, the court denied a motion to dismiss on Section 13(b) grounds, noting that "the FTC does contend that the defendants are currently engaged in violations of federal antitrust laws, or, at the very least, that it has sufficient 'reason to believe' that the defendants are engaging in violations of federal antitrust laws." 479 F. Supp. 3d at 44.

The *Hornbeam* and *Vyera* courts' holdings that the "reason to believe" language of Section 13(b) vests discretion in the FTC duplicates the rule that courts apply to identical language in a different section of the FTC Act. In *Standard Oil Co. v. FTC*, 596 F.2d 1381, 1383 (9th Cir. 1979), *rev'd on other grounds*, 449 U.S. 232 (1980), the court addressed Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), which authorizes the FTC to issue an administrative complaint "[w]henever the Commission shall have reason to believe" that a defendant "has been or is using any unfair method of competition or unfair or deceptive act or practice." *Id.* at 1383, n.1. The court held that "what constitutes 'reason to believe' is unreviewable because the 'reason to believe' determination is committed to the FTC's discretion." *Id*.

Courts considering Administrative Procedure Act challenges have likewise held that the FTC has discretion to determine that it "has reason to believe" a violation is or is about to occur under Section 13(b), or that a defendant "has been or is using" an unfair method of competition in violation of Section 5(b). *FTC v. Nat'l Urological Grp., Inc.*, 2006 WL 8431977, at *3 (N.D. Ga. Jan. 9, 2006) (holding that Section 13(b)'s language "do[es] not furnish the court with a meaningful standard by which to measure the lawfulness" of FTC's determination to file suit); *Boise Cascade Corp. v. FTC*, 498 F. Supp. 772, 779, n.3 (D. Del. 1980) (FTC's determination that it has "reason to believe" under Section 5(b) is "not reviewable."); *cf. Board of Trade v. CFTC*, 605 F.2d 1016 (7th Cir. 1979) (statute authorizing the Commodities Futures Trading Commission to take certain actions "whenever it has reason to believe that an emergency exists" conferred unreviewable discretion on the agency) (quoting 7 U.S.C. § 12a(9)).

Facebook relies heavily on *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019), but that case neither undermines the authority discussed above, nor supports Facebook's effort to dismiss the FTC's Complaint. It does not undermine the above-cited authority because the *Shire*

court expressly declined to consider whether Section 13(b)'s "reason to believe" language confers discretion on the agency, as the FTC had not raised the issue before the district court. *See id.* at 159 n.17. And *Shire* does not support Facebook's argument here, because the *Shire*

Facebook's control of these companies has prevented them from challenging Facebook Blue's dominance, or from being acquired by third parties that might have done so. *See* Compl. ¶¶ 71-72, 102, 105, 126-27. Furthermore, because of the network effects barrier to entry, Facebook's control of Instagram and WhatsApp "maintains a protective 'moat'" that deters and hinders competition and entry in PSN services. *Id.* ¶¶ 105, 127. Indeed, as the Complaint alleges, every day, Facebook makes choices about how Instagram and WhatsApp will operate to foreclose competition and protect its monopoly position, including by managing them to limit adverse impact on, and to insulate, Facebook Blue. *See id.* ¶¶ 102-03, 126.

Facebook's course of conduct also includes its anticompetitive conditioning of access to its Platform. *See* Compl. ¶¶ 129-60. Facebook "suspended" enforcement of these conditions in December 2018 in the face of heightened public scrutiny of its anticompetitive treatment of developers. *Id.* ¶¶ 148-49. But it has not terminated or disavowed the relevant policies, and can cut off any application's access to valuable Platform interconnections at any time. The Complaint alleges that, unless enjoined, Facebook is likely to resume enforcing its anticompetitive conditions once the current scrutiny has passed. *See id.* ¶¶ 29, 149, 172. Finally, the Complaint alleges that Facebook "continues to monitor the industry for competitive threats, and likely would seek to acquire" such threats. *Id.* ¶ 172.

Facebook ignores that the Complaint alleges a course of conduct, attempting instead to treat each alleged element of the course of conduct as a discrete occurrence disconnected from all of the others. As discussed abov0.oShs ls lsnpplroprited.

possession of a firm or assets that were acquired in violation of the antitrust laws represents a continuing violation of the antitrust laws.

For example, in *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975), the government alleged that defendant ITT, a baking-goods company, acquired assets in several rival bakeries in violation of an FTC consent order prohibiting such acquisitions. *See id.* at 228. The government sought daily penalties based on ITT's continued holding of the acquired assets. *See id*. at 229. The defendant resisted the imposition of ongoing penalties by arguing, as Facebook does here, that an acquisition consists only of the initial act of purchase, not the ongoing holding of the acquired assets. *See id.* at 233. The Supreme Court rejected this argument and held that ITT's *continued holding* of a competing bakery was an ongoing violation of the order at issue. Relying on Section 7 of the Clayton Act, which prohibits anticompetitive acquisitions, 15 U.S.C. § 18, the Court held that an acquisition "means holding as well as obtaining assets." *ITT Continental Baking Co.*, 420 U.S. at 240.

The Supreme Court and at least one court of appeals have reached similar conclusions in other cases. *See du Pont*, 353 U.S. at 597 ("[T]he Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce."); *FTC v. Western Meat Co.*, 272 U.S. 554, 559 (1926) ("Further violations of the act through continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed."), *cited in California v. American Stores*, 495 U.S. 271, 285 n.11 (1990); *Gottesman v. General Motors Corp.*, 414 F.2d 956, 965 (2d Cir. 1969) ("[T]he very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 [in *du Pont*]

anticompetitive activity to die down, and for this case to go away. *See* Compl. ¶¶ 29, 148-49. The law is clear that courts need not conclude that a defendant's illegal behavior is over simply because it has stopped for a time, particularly when the defendant retains the ability and incentive to resume the conduct. *See, e.g.*, *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1202 (10th Cir. 2009) (approving injunctive action where the defendant "had the capacity to engage in similar unfair acts or practices in the future") (citation omitted); *In re Sanctuary Belize*, 482 F. Supp. 3d 373, 467 (D. Md. 2020) (granting permanent injunction under Section 13(b) after considering, among other things, "whether defendant is positioned to commit future violations," "defendant's recognition of culpability," and "the sincerity of defendant's assurances against future violations") (citation omitted). Facebook cites no law that contradicts this point.

Contrary to Facebook's characterizations, the FTC does not argue that it "can bring all Section 2 cases in federal district court." Mem. 44. The FTC acknowledges that Section 13(b) does not authorize suit in federal court when the Commission lacks reason to believe that a defendant's violation is ongoing or about to occur. But that simply is not the case here, where the Complaint plainly reflects the Commission's reason to believe that Facebook is violating the law. The fact that Facebook's illegal conduct *began* many years ago does not undermine the Commission's reason to believe that Facebook's violation is ongoing. *See Vyera*, 479 F. Supp. 3d at 44 ("The FTC is not required to bring suit at the exact moment contractual negotiations ripen into executed contracts. It is the extant scheme that provides the basis for the lawsuit.").

CONCLUSION

Facebook's Motion to Dismiss should be denied for the reasons set forth above.

Dated: April 7, 2021

Respectfully submitted,

/s/ Daniel Matheson

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. **FACEBOOK, INC.** Defendant.	Civil Action No. 1:20-cv-03589 (JEB)

DECLARATION OF DANIEL J. MATHESON IN SUPPORT OF PLAINTIFF FEDERAL TRADE COMMISSION'S OPPOSITION TO DEFENDANT FACEBOOK, INC.'S MOTION TO DISMISS

Pursuant to 28 U.S.C. § 1746, I, Daniel J. Matheson, declare as follows:

1. I am an attorney admitted to practice law in the District of Columbia and am a

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: April 7, 2021

/s/ Daniel Matheson
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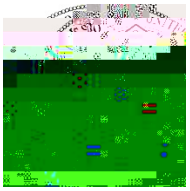


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

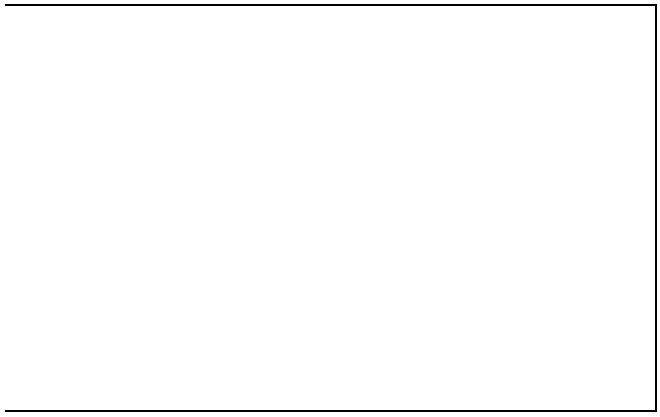
August 22, 2012

Thomas O. Barnett, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

Re: Proposed Acquisition of Instagram, Inc. by Facebook, Inc. File No. 121-0121

Dear Mr. Barnett:

The Commission has been conducting an investigation to determine whether the proposed acquisition of Instagram, Inc. by Facebook, Inc. may violate Section 7 of the Clayton Dord CoSecthe. tis notate Section(tibe-2.3strun 5 ofer s a d.19 -2.a)10 ox [11TJat aFa [11by [11 0 To1cd[(Durrn



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