IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

CIVIL ACTION NO.: 2018 CA 008715 B
Judge Fern Flanagan Saddler
Next Court Date: March 22, 2019
Event: Initial Conference

REPLY MEMORANDUM IN FURTHER SUPPORT OF FACEBOOK, INC.'S OPPOSED MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY PROCEEDINGS

INTRODUCTION

The District's opposition brief confirms that this case should be dismissed. (1) This Court lacks personal jurisdiction over Facebook for the claims asserted in the Complaint. (2) The District cannot state a claim because Facebook's privacy policies disclosed each of the practices at issue. This Court should dismiss in full and without leave to amend.

Personal Jurisdiction. General jurisdiction is not authorized here because Facebook is not "at home" in the District, which the opposition brief does not contest. *See Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (holding that general jurisdiction is restricted to a corporation's state of incorporation and principal place of business).

As to specific jurisdiction, the District *concedes* that the *only* purportedly relevant fact alleged in the Complaint is that Facebook users reside in D.C. Opp. 6-10; Ex. 1 at 7:14-19 (admitting same at oral argument). But the fact that Facebook users live here—like every other State and nearly every country—is not an adequate basis to subject Facebook to jurisdiction. *Every* court has rejected that theory of jurisdiction. *Georgalis v. Facebook, Inc.*, 324 F. Supp. 3d 955, 960 (N.D. Ohio 2018); *Ralls v. Facebook*, 221 F. Supp. 3d 1237, 1244 (W.D. Wash. 2016); *Gullen v. Facebook.com, Inc.*, 2016 WL 245910, at *2 (N.D. Ill. Jan. 21, 2016). Concluding otherwise here would "shred" the Due Process Clause's "constitutional assurances out of practical existence." *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) (mere accessibility of website in D.C. insufficient); *Smith v. Facebook, Inc.*, 262 F. Supp. 3d 943, 951 (N.D. Cal. 2017) (allegation that various websites sent data to Facebook insufficient to confer personal jurisdiction over non-Facebook defendants in California).[1]

---

[1] *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) has *not* been applied to find personal jurisdiction absent "specific activities directed toward that state," Opp. 8. In each case the District cites, the defendants *did* direct activities towards the relevant state. *Keeton*, 465 U.S. at 774 ("'purposefully directed'"); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011) ("specific focus" on "California[]" "industries"); *Gather, Inc. v. Gatheroo, LLC*, 443 F. Supp. 2d 108, 116, 118 (D. Mass. 2006) ("communicat[ed] directly with," "solicit[ed]" revenue from in-State users; competed with "'Boston based" website); *Bulldog*, 457 Mass. at 218 (in-forum solicitation); *MaryCLE*, 166 Md. App. at 506 (sent emails to resident only); *D.C. v.*

The District says it should benefit from a more lenient personal jurisdiction inquiry because it is a government entity. *See* Opp. 5. But it is *Facebook's* due process rights at issue, and those don't change based on the Plaintiff's identity. The cases the District cites to support its argument did *not* hold that a State's interest as a plaintiff is relevant to the due process minimum-contacts analysis; only that the State's interest can be considered in assessing whether jurisdiction "comports with fair play and substantial justice"—a separate inquiry. *Bulldog Inv'rs Gen. P'ship v. Secretary*, 457 Mass. 210, 218 (2010); *State v. N. Atl. Ref. Ltd.*, 999 A.2d 396, 409 (N.H. 2010); *MaryCLE, LLC v. First Choice Internet, Inc.*, 166 Md. App. 481, 511 (2006); *see also State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 765 (Tenn. 2013) (no personal jurisdiction in enforcement action even though defendant sold millions of cigarettes in state); *Commonwealth ex rel. Pappert v. TAP Pharmaceuticals Prods., Inc.*, 868 A.2d 624, 632-33 (Pa. Commw. Ct. 2005) (same in enforcement action alleging harm to in-state consumers).

Since there is no basis for jurisdiction in the District's Complaint, the District seeks to rely on documents that are neither cited nor referred to in the Complaint. *See* Opp. 6, 13. As an initial matter, the District cannot rely on these extraneous documents because there are no allegations about them in the Complaint. "Plaintiff must *allege* specific facts on which personal jurisdiction can be based," *Moore v. Motz*, 437 F. Supp. 2d 88, 91 (D.D.C. 2006) (emphasis added); *accord Ballard v. Holinka*, 601 F. Supp. 2d 110, 117 (D.D.C. 2009) (recognizing plaintiff's "burden to make a *prima facie* showing"); *Cornell v. Kellner*, 539 F. Supp. 2d 311, 313 (D.D.C. 2008); *Family Fed'n for World Peace & Unification Int'l v. Moon*, 2012 WL 3070965 (D.C. Super. Ct. June 19, 2012). A plaintiff cannot present a theory of personal jurisdiction "divorced from the factual allegations in the complaint," *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 248 (D.D.C. 2015), which means that the District's new contentions—raised for the first time in its

---

CashCall, Inc., No. 2015 CA 006904 B at 2 (D.C. Super. Ct. July 11, 2016) ("issue[d]," collected on "illegal high-interest loans"). Sending an email to *all* Facebook users potentially affected by Kogan's conduct does not evidence purposeful availment. *Hayes v. FM Broad. Station WETT*, 930 F. Supp. 2d 145, 152 (D.D.C. 2013) (party did not "purposefully avail[]" itself of D.C. "any more than" "every other jurisdiction in which [its] website was accessible").

opposition brief—cannot be considered by the Court.

Even if they could be considered, these documents are not nearly enough to demonstrate either that Facebook purposely availed itself of the District (more than any other state) or that the alleged conduct in the District is sufficiently connected to the claims at issue in this lawsuit.

First, the District cites routine regulatory filings—such as Facebook's Applications for Certificate of Authority for Foreign Business & Professional Corporation, Opp. Ex. 2—but those are irrelevant: "Obtaining a license to do business in a state does not, standing alone, constitute minimum contacts with that state." *Drake v. Lab. Corp. of Am. Holdings*, 2008 WL 4239844, at *6 (E.D.N.Y. Sept. 11, 2008) (collecting cases). The District cites *Stricker v. Shor*, 2018 WL 1745783 (N.D. Cal. Apr. 11, 2018), but the license there was *not* a relevant minimum contact, *id.* at *3; rather, it was relevant only to whether it was "fair" to force the defendant to litigate in California, *id.* at *4—the second and separate step in the Due Process inquiry for specific jurisdiction, as the District concedes, Opp. 11 n.12. If such a license could sustain jurisdiction, a defendant would be subject to suit in *any* jurisdiction where it operates—directly contrary to *Daimler's* "at home" test. 571 U.S. at 127; *see Gullen*, 2016 WL 245910, at *2 (rejecting personal jurisdiction even though Facebook is "registered to do business" in Illinois).

Second, the District attaches an electronic conversation thread, Opp. Ex. 4, involving members of Facebook's sales team in D.C.—not the teams responsible for Facebook's user- or developer-related policies and practices, which the District challenges here. Compl. ¶¶ 44-65 (alleging misrepresentations in disclosures to consumers), 66-76 (same).[2] That conversation is plainly insufficient for *specific* jurisdiction. *See Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 28 (D.D.C. 2017), *aff'd*, 2018 WL 4440459 (D.C. Cir. July 17, 2018) (rejecting specific jurisdiction based on advertising to in-forum audience where claims had no connection to the

[2] The District's allegations fail the "discernible relationship" test, but Facebook reserves the right to challenge its constitutionality. *See Triple Up*, 235 F. Supp. 3d at 27; *see* Opp. 10 n.9.

advertising).[3]

For the same reasons, the District's arguments fail to meet the requirements of the long-arm statute. *See* D.C. Code § 13-423; MTD at 9-12. The District relies on pre-*Daimler* cases such as *Daley v. AKA Sorority, Inc.*, 26 A.3d 723, 728 (D.C. 2011), to suggest that any conduct by Facebook in D.C. might suffice to exercise jurisdiction under the long-arm statute. That is wrong. But even in those cases, the defendants engaged in relevant D.C. conduct—e.g., holding a "week[long]" D.C. meeting where all "named appellees voluntarily participated" to deal "with the management of a District of Columbia corporation." *Id.* Nothing like that is alleged here.

The District has had ample opportunity to make its best case for jurisdiction, including substantial pre-suit discovery. *E.g.*, *Hayes*, 930 F. Supp. 2d at 152 (A plaintiff "is not entitled to jurisdictional discovery just because he hopes that it might turn something up."). It has failed.

CPPA Claim. The District's CPPA claim also fails in light of Facebook's undisputed disclosures, which the District fails to meaningfully address. Significantly, in addressing *these exact same contracts*, the Ninth Circuit affirmed dismissal, *Smith v. Facebook, Inc.*, 745 F. App'x 8 (9th Cir. 2018), holding that Facebook's policies "contain numerous disclosures related to information collection on third-party websites," and a "reasonable person" would understand them. *Id.* at 8-9. And, as Judge Chhabria of the Northern District of California explained in addressing a motion to dismiss identical claims based on the same facts at issue here:

> [I]f you read the words [of Facebook's policies], you come away **knowing** that even if you limit your settings so that you're sharing only with friends, these third-party apps can communicate with your friends and get all of the information that your friends have access to unless you further change your settings. And then even then, you can further change your settings, but if you want to have a meaningful

[3] *See Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1781 (2017) ("[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction."); *City of Oakland v. BP p.l.c.*, 2018 WL 3609055, at *3 (N.D. Cal. July 27, 2018) ("[A]lthough plaintiffs list significant fossil-fuel-related activities that defendants have allegedly conducted in California[,] plaintiffs fail to sufficiently explain how these 'slices' of global-warming-inducing conduct causally relate to the worldwide activities alleged in the amended complaint."); *Estate of Manook v. Research Triangle Inst., Int'l & Unity Res. Grp., L.L.C.*, 693 F. Supp. 2d 4, 12-13 (D.D.C. 2010) (no jurisdiction despite D.C. office).

> Facebook experience, apps are still going to get some subset of information about you. **All of that seems to be disclosed**.

Reply in Support of Mot. to Stay Ex. 1, at 135:3-11 (emphasis added).

Courts dismiss CPPA claims where there is no plausible misrepresentation. *Chambers v. NASA Fed. Credit Union*, 222 F. Supp. 3d 1, 14-15 (D.D.C. 2016). Despite the District's attempt to find something—anything—in Facebook's disclosures that was misleading, the purported "inconsistencies" the District flags (Opp. 15-16) are not inconsistent at all. That Facebook was "not responsible" for what third parties did with data is consistent with statements that Facebook "can audit" apps and "can require" them to delete data, as well as contracts requiring third parties "not [to] sell user data." *Id.* That Facebook made *efforts* to ensure third-party compliance with its policies does not mean it could control what third-party apps actually did with user data.

As to the claim Facebook should have done *more* to disclose what Kogan did with user data, Facebook undisputedly had no disclosure obligation under D.C.'s data breach law, D.C. Code § 28-3852—thus, there can be no consumer deception claim. *Graham v. Bernstein*, 527 A.2d 736, 739 (D.C. 1987) (specific statute governing subject displaces generic claim).

The Stay. If the court does not dismiss, it should stay this case because *identical* claims are pending elsewhere. Facebook's motion to dismiss the amended complaint in the MDL will be heard on May 29, 2019, *see* 18-md-2843 (N.D. Cal.), Dkt. No. 254.[4] And public reports suggest that the FTC's investigation is nearly done. *See The Man Deciding Facebook's Fate*, N.Y. Times (Mar. 8, 2019), https://nyti.ms/2HjlAgl (noting investigation is "expected to conclude" "[i]n the coming weeks"). This Court should stay this action to allow those matters to proceed to completion, as they could meaningfully impact the District's claim and its resolution.

CONCLUSION

The Complaint should be dismissed without leave to amend, or stayed.

---

[4] That the Northern District of California remanded the Cook County action for lack of federal subject matter jurisdiction (Opp. 19) is irrelevant to Facebook's request for a stay. In any event, Facebook intends to move for a stay of that state-court action, just like this one.

Dated: March 20, 2019

Respectfully submitted,

/s/ Joshua S. Lipshutz
Joshua S. Lipshutz [1033391]
Chantale Fiebig [487671]
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
Tel: (202) 955-8217
jlipshutz@gibsondunn.com
cfiebig@gibsondunn.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, *Plaintiff*, v. FACEBOOK, INC., *Defendant*.	CIVIL ACTION NO.: 2018 CA 008715 B Judge Fern Flanagan Saddler Next Court Date: March 22, 2019 Event: Initial Conference

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2019, I caused a copy of the foregoing to be served upon all counsel of record via CaseFileXpress.

Dated: March 20, 2019

Respectfully submitted,

/s/ Joshua S. Lipshutz
Joshua S. Lipshutz [1033391]
Chantale Fiebig [487671]
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
Tel: (202) 955-8217
jlipshutz@gibsondunn.com
cfiebig@gibsondunn.com

Attorneys for Defendant