

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION CENTER

Plaintiff,

v.

FEDERAL TRADE COMMISSION

Defendant.

Civ. Action No. 18-942 (TJK)

**MOTION BY FACEBOOK, INC. TO INTERVENE**

Facebook, Inc., respectfully moves the Court for leave to intervene in this case pursuant to Rule 24 of the Federal Rules of Civil Procedure and Local Civil Rule 7(j) of the U.S. District Court for the District of Columbia. Facebook seeks intervention as of right pursuant to Rule 24(a)(2), or in the alternative, permissive intervention under Rule 24(b)(1)(B), in order to assert the defense set forth in Facebook's Answer, filed with this Motion, and to participate fully in this action.

Dated: May 3, 2019

Respectfully submitted,

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## I. INTRODUCTION

Facebook seeks to intervene in this dispute between the Electronic Privacy Information Center (“EPIC”) and the Federal Trade Commission (“FTC”), in which EPIC is demanding that the FTC produce Facebook’s confidential information pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). EPIC received a significant number of documents in response to its FOIA request, some in redacted form. But EPIC has now identified certain documents it wants the FTC to produce in *unredacted* form and has informed the Court it intends to seek summary judgment to compel production of those materials. The release of those unredacted documents to EPIC would disclose Facebook’s confidential business information. Thus, Facebook requests that it be allowed to intervene to protect its interest in maintaining the confidentiality of its business information.

For nearly a decade, Facebook has produced to the FTC numerous documents and engaged with FTC staff in regular communications, to keep the FTC informed of certain issues regarding its business and compliance with the 2012 FTC Consent Order. Many of these documents and communications include Facebook’s confidential business information, including internal policies and practices, and issues related to new business acquisitions. EPIC’s FOIA request encompassed some of these documents. The FTC produced those responsive materials to EPIC with redactions to protect against disclosure of Facebook’s confidential information. But EPIC remains unsatisfied and has informed Facebook and the FTC that it will move for summary judgment to compel certain documents to be reproduced without any redactions. Removing those redactions would reveal Facebook’s sensitive business information to EPIC and—because EPIC regularly publishes the results of its FOIA requests—to the public at large.

It is well established that Facebook, as the entity whose documents are at issue in this FOIA litigation, has a right to intervene to protect its interests in confidentiality. *See, e.g., Am.*

*Oversight, Inc. v. U.S. Dep't of Health & Human Servs.*, 2018 WL 4381099, at \*3 (D.D.C. Aug. 3, 2018); *Gov't Accountability Project v. Food & Drug Admin.*, 181 F. Supp. 3d 94, 95 (D.D.C. 2015). Facebook satisfies each requirement to intervene as of right: Its intervention request is timely because Facebook informed the parties that it planned to intervene one month after first learning that EPIC intended to dispute the redactions at issue here, and before any dispositive briefing was even scheduled. Facebook has a unique and legally protected interest in protecting the confidentiality of its documents and faces an imminent and concrete risk that these confidential materials will be disclosed if EPIC's suit is successful. And Facebook is in the best position to vindicate these interests. For these reasons, the Court should grant Facebook's motion.

## II. BACKGROUND

In 2012, Facebook and the FTC entered into a Consent Order. Compl. ¶¶ 7-9; *In re Facebook, Inc.*, No. C-4365, at 4 (F.T.C. Aug. 10, 2012), <https://bit.ly/2J9YtXv> ("Consent Order"). As part of that Consent Order, Facebook agreed, among other things, to certain requirements regarding data sharing (Consent Order Part I) and to engage a third party—ultimately PriceWaterhouseCooper (PwC)—to conduct biennial assessments of Facebook's privacy program for 20 years (Consent Order Part V). Since then, Facebook has provided the FTC with voluminous documents and exchanged substantial correspondence with the FTC on these topics. During the course of these communications, Facebook has shared with the FTC confidential commercial information, including Facebook's internal policies and practices, and issues related to new business acquisitions.

On March 20, 2018, EPIC submitted a FOIA request to the FTC seeking documents related to the biennial assessments and any communications regarding those assessments. Compl. ¶¶ 25-26. EPIC filed suit on April 20, 2018, asserting that the FTC had failed to comply



with FOIA's statutory deadline, *id.* ¶¶ 42-43, and that the FTC unlawfully withheld agency records, *id.* ¶¶ 45-47. The FTC filed its answer on May 24, 2018, Dkt. 6. No dispositive motions have been filed, nor is there a schedule in place for such motions.

In the time since EPIC filed this case, Facebook has, at the FTC's request, reviewed certain documents to evaluate whether any portions of those documents should be withheld pursuant to a FOIA exemption, including the exemption for confidential information, 5 U.S.C. § 552(b)(4). *See* Dkt. 7, at 1; Dkt. 8 ¶ 2. The FTC ultimately made several productions to EPIC, concluding on October 19, 2018. Dkt. 9 ¶ 1. Some of the productions included documents that contained redactions to protect the confidentiality of Facebook's confidential commercial information, *see* 5 U.S.C. § 552(b)(4).

After reviewing these productions, EPIC "posed certain questions to the agency as to approximately 50 pages" sometime prior to the parties' November 19, 2018 Joint Status Report, and the parties agreed to try to narrow the scope of any dispute. Dkt. 10 ¶ 1. On February 22, 2019, the FTC provided EPIC with an index reflecting the bases for its decision to withhold the relevant records. Dkt. 13 ¶ 3. Then, on March 6, 2019, EPIC informed the FTC—who then informed Facebook—that EPIC believed certain specific records were improperly withheld under Exemption 4 and that, unless those documents were produced in unredacted form, it would pursue their release in this litigation. *Id.* ¶ 5.

On April 8, 2019, Facebook informed the FTC that it intended to intervene in this action and conferred with the FTC and EPIC regarding its intervention on April 9, 2019. Dkt. 14 ¶¶ 2-3. EPIC stated that it would oppose Facebook's intervention. The FTC does not oppose Facebook's intervention.

### III. ARGUMENT

“The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when *all* parties with a real stake in a controversy are afforded an opportunity to be heard.” *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972) (emphasis added). Under Federal Rule of Civil Procedure 24, a party has a “[r]ight” to intervene if it “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). And the court “may permit anyone to intervene” who “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B).

There is no doubt that Facebook has a “real stake” in this litigation because EPIC seeks disclosure of documents that Facebook provided to the FTC containing Facebook’s confidential commercial information that Facebook explicitly designated as confidential when it was submitted to the FTC. Courts in this District routinely recognize parties’ right to intervene in FOIA actions when the disclosure of their confidential information is at stake. *See, e.g., Am. Oversight, Inc. v. U.S. Dep’t of Health & Human Servs.*, 2018 WL 4381099, at \*3 (D.D.C. Aug. 3, 2018); *Gov’t Accountability Project v. Food & Drug Admin.*, 181 F. Supp. 3d 94, 95 (D.D.C. 2015); *100Reporters LLC v. DOJ*, 307 F.R.D. 269, 275 (D.D.C. 2014); *Appleton v. FDA*, 310 F. Supp. 2d 194, 197 (D.D.C. 2004). This Court should follow that well-worn path and grant Facebook’s motion to intervene as of right under Rule 24(a), or at the very least, to intervene permissively under Rule 24(b).

**A. Facebook has a right to intervene under Rule 24(a)**

Under Rule 24(a), a court must permit an applicant to intervene if four requirements are met:

(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests.

*Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (internal quotation marks omitted). In addition, a proposed intervenor must have Article III standing. *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232-33 (D.C. Cir. 2018). Facebook satisfies each element.

**1. Facebook's motion to intervene is timely**

Facebook has timely moved to intervene in this case. The “requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation.” *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). Timeliness is “judged in consideration of all the circumstances,” including “the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant’s rights, and the probability of prejudice to those already parties in the case.” *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980). Courts also consider the time since the intervenor “knew or should have known that any of its rights would be directly affected by the litigation,” *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (quotation marks omitted), but “measuring the length of time passed is not in itself the determinative test because [courts] do not require timeliness for its own sake.” *Roane*, 741 F.3d at 151 (quotation marks omitted).

Facebook timely notified the parties of its intention to intervene as soon as it learned that specific documents would be the subject of an ongoing controversy between EPIC and the FTC. From the time this lawsuit was filed until March of this year, Facebook was working with the

FTC to provide EPIC with the documents it requested, consistent with Facebook's legitimate need to protect against disclosure of confidential materials. *See* Dkt. 7, at 1; Dkt. 8 ¶ 2. After EPIC announced on March 6, 2019, that it would litigate for the public release of certain documents at issue here, Dkt. 13 ¶ 5, Facebook informed the FTC and EPIC on April 8, 2019 (33 days later) that Facebook intended to move to intervene and negotiated a briefing schedule, Dkt. 14 ¶¶ 2-3. Facebook is filing this motion to intervene in keeping with that agreed-to schedule, Dkt. 14, and fewer than 60 days after first learning of EPIC's intention to litigate these issues. Moreover, EPIC has not yet filed its motion for summary judgment, so Facebook's intervention will not result in any delay of the proceedings or prejudice to EPIC.

Facebook's intervention is thus timely; indeed, any earlier intervention would have run the risk of being premature. *See Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) (granting intervention where motion was filed four years after case began because movant had just discovered that certain stipulated facts in summary judgment briefing were adverse to its interest, and moved to intervene 57 days after stipulated facts were filed); *see also Eagle Pharms., Inc. v. Price*, 322 F.R.D. 48, 49-50 (D.D.C. 2017) (granting intervention to generic drug manufacturer in case regarding FDA approval where intervenor moved to intervene one month after obtaining regulatory approval to sell drug at issue in the litigation, even though summary judgment was fully briefed).

## **2. Facebook has a legally protected interest in the action**

Maintaining the confidentiality of commercially sensitive information is a protected interest. "Th[e] test for a legally protected interest is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *United States v. Morten*, 730 F. Supp. 2d 11, 16 (D.D.C. 2010) (internal quotation marks omitted). As the D.C. Circuit has held, "[a]n intervenor's interest is obvious when he

asserts a claim to property that is the subject matter of the suit.” *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981). For that reason, “this Court routinely has recognized that the submitter of documents to a government agency has a cognizable interest in maintaining the confidentiality of those documents that is sufficient under Rule 24(a).” *100Reporters*, 307 F.R.D. at 277. Here, Facebook submitted the documents at issue to the FTC; EPIC has requested that the FTC release these materials without redactions; and Facebook believes that some of the redacted materials include confidential information and are therefore exempt from release under FOIA Exemption 4.

### **3. The FOIA action threatens to impair Facebook’s interest in maintaining confidentiality**

This action threatens to impair Facebook’s interest in protecting the confidentiality of its documents. This factor is “not a rigid one.” *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 13 (D.D.C. 2010). It “look[s] to the ‘practical consequences’ of denying intervention.” *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (internal quotation marks omitted). One practical consequence “that frequently qualifies as impairment is when the disclosure of materials following the disposition of a FOIA action could impair the [intervenor’s] ability to protect their trade secrets or confidential information.” *100Reporters*, 307 F.R.D. at 279 (internal quotation marks omitted); *see also Am. Oversight, Inc.*, 2018 WL 4381099, at \*3 (An intervenor’s “interest in preserving the confidentiality of its documents, which would otherwise be impaired by disposing of the action, establishes justification for intervention.”); *Appleton*, 310 F. Supp. 2d at 197 (“disclosures resulting from the disposition of this action could impair [intervenor’s] ability to protect [its] trade secrets or confidential information.”).

If EPIC is permitted access to the unredacted version of Facebook’s documents, then Facebook’s internal policies and procedures, and discussions of new business acquisitions,

among other confidential business information would be made public. This is precisely the type of information that Exemption 4 protects against disclosure. *See, e.g., 100Reporters LLC v. DOJ*, 248 F. Supp. 3d 115, 142-43 (D.D.C. 2017) (documents exempt from disclosure that discuss, among other things, “mergers and acquisitions” (quotation marks omitted)); *M/A-COM Info. Sys. v. HHS*, 656 F. Supp. 691, 692 (D.D.C. 1986) (holding that Exemption 4 prevented disclosure of “internal procedures”). Moreover, because “nothing in FOIA prevents the requester from disclosing the [requested] information to anyone else,” *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996), disclosure to EPIC is tantamount to disclosure to the public at large. Indeed, EPIC regularly publishes on its website documents it receives from FOIA requests.

**4. Facebook has a unique interest in maintaining confidentiality of its own documents**

The D.C. Circuit “look[s] skeptically” on government agencies serving as advocates for private parties.” *Crossroads Grassroots Policy Strategies v. Fed. Election Comm’n*, 788 F.3d 312, 321 (D.C. Cir. 2015). The D.C. Circuit has stated that this is because the government’s interests may not necessarily align with the interests of private parties with more narrow interests. *Fund for Animals*, 322 F.3d at 736; *see also Dimond v. Dist. of Columbia*, 792 F.2d 179, 192–93 (D.C. Cir. 1986) (“A government entity ... is charged by law with representing the public interest of its citizens. State Farm, on the other hand, is seeking to protect a more narrow and ‘parochial’ financial interest ....”); *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (similar positions “does not necessarily mean [] adequacy of representation is ensured”); *Cayuga Nation v. Zinke*, 324 F.R.D. 277, 283 (D.D.C. 2018) (Native American tribe’s interests could not be adequately represented by the federal government). Indeed, an agency “remains free to change its strategy during the course of litigation,” and keeping the intervenor on the sideline “until [it] disagrees with a decision by the agency is inefficient and impractical.”

*100Reporters*, 307 F.R.D. at 280. That is why courts in FOIA cases routinely conclude that the government may not adequately protect the interests of the private entity whose documents are at issue, even where the government and private entity are aligned at the outset of the case. *E.g., id.* at 279-80.

Facebook has an acute “interest in protecting [its] trade secrets and confidential information”; in contrast, the FTC’s “interest lies in responding appropriately to the plaintiff’s [FOIA] request.” *Appleton*, 310 F. Supp. 2d at 197; *see also Fund for Animals*, 322 F.3d at 736 (explaining that the government’s “obligation is to represent the interests of the American people,” while the intervenor’s obligation is to represent its own interests).

#### **5. Facebook has standing to intervene**

In addition to meeting the elements for Rule 24 intervention, Facebook also has Article III standing to intervene because Facebook faces an “imminent and concrete risk” that its confidential materials may be disclosed if EPIC’s FOIA action is successful. *100Reporters*, 307 F.R.D. at 284. To establish standing, a prospective intervenor must establish injury, causation, and redressability. *See Safari Club Int’l v. Salazar*, 281 F.R.D. 32, 37-38 (D.D.C. 2012); *see also Fund for Animals*, 322 F.3d at 732-33. “[W]hen a putative intervenor has a ‘legally protected’ interest under Rule 24(a), it will also meet constitutional standing requirements, and *vice versa*.” *Wildearth Guardians*, 272 F.R.D. at 13 n.5; *see also Fund for Animals*, 322 F.3d at 735 (conclusion that intervenor “has constitutional standing is alone sufficient to establish that [it] has an interest relating to the property or transaction which is the subject of the action” (internal quotation marks omitted)).

As already established, *see supra*, Facebook has a legally cognizable interest in the litigation. Courts in this District have recognized that companies have an interest in protecting their confidential information from disclosure. *See supra*. And that is sufficient to establish

standing because “any person who satisfies Rule 24(a) will also meet Article III’s standing requirement.” *Roeder*, 333 F.3d at 234; *see Waterkeeper All., Inc. v. Wheeler*, 2018 WL 7508437, at \*4 n.6 (D.D.C. Jan. 29, 2018) (“It follows from the Court’s analysis . . . of the second and third factors for intervention as of right that the industry movants have Article III standing to intervene.”).

Even considering the Article III inquiry separately, Facebook has standing. “For standing purposes, it is enough that a plaintiff seeks relief, which, if granted, would injure the prospective intervenor.” *Crossroads*, 788 F.3d at 318. When, as here, “it is clear that the FOIA requestor seeks the release of documents that are likely to contain the intervenor’s confidential information, the intervenor’s injury is both particularized and sufficiently imminent.” *100Reporters*, 307 F.R.D. at 283. Courts in this district have repeatedly recognized the principle that when a party seeks to intervene in a FOIA action, the agency’s “disclosure of their trade secrets or confidential information would cause them to suffer an injury-in-fact that intervention to defend against disclosure could redress.” *Appleton*, 310 F. Supp. 2d at 197 (intervenors had standing); *see also Am. Oversight, Inc.*, 2018 WL 4381099, at \*2 (“This Court has recognized in countless cases, including this case, that where documents concerning or belonging to a third party are the subject of a FOIA request, the party has the right to intervene in the action to assert additional defenses.”); *cf. Venetian Casino Resort, LLC v. EEOC*, 409 F.3d 359, 367 (D.C. Cir. 2005) (intervenor “has standing” because the “alleged disclosure policy will harm its concrete and particularized interest in retaining the confidentiality of protected information.”). Because the documents EPIC seeks contain Facebook’s confidential business information, Facebook faces an “imminent and concrete risk” that its confidential materials may be disclosed if EPIC’s FOIA action is successful. *100Reporters*, 307 F.R.D. at 284.



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This Court has held time and again that a third party has a right to intervene under Rule 24(a) when FOIA litigation threatens to disclose information provided to the government that the third party considers confidential. The Court should grant Facebook's motion to intervene under Rule 24(a).

**B. Alternatively, this Court should permit Facebook to intervene permissively under Rule 24(b)**

“If a movant does not meet the requirements to intervene as a matter of right, intervention may nonetheless be allowed, pursuant to Rule 24(b).” *Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 64 (D.D.C. 2018). “[P]ermissive intervention is an inherently discretionary enterprise,” and district courts are afforded “wide latitude” in determining whether a third-party should be permitted to intervene. *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). In order to litigate a claim on the merits under Rule 24(b), “the putative intervenor must ordinarily present: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action. *Id.*<sup>1</sup> Courts “may also consider whether parties seeking intervention will significantly contribute to the just and equitable adjudication of the legal question presented.” *Sierra Club v. McCarthy*, 308 F.R.D. 9, 12 (D.D.C. 2015) (internal quotation marks and alterations omitted).

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<sup>1</sup> “It remains ... an open question in [the D.C.] Circuit whether Article III standing is required for permissive intervention.” *Sevier v. Lowenthal*, 302 F. Supp. 3d 312, 323 (D.D.C. 2018); see *Def. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) (same). This Court need not decide that question here; as demonstrated above, Facebook has standing because of its interest in protecting the confidentiality of its business information.

There can be no question there is an independent ground for subject matter jurisdiction in this situation. Here, both the underlying lawsuit and Facebook's proposed defense[s] arise under federal law, and accordingly both fall within the Court's federal-question jurisdiction under 28 U.S.C. § 1331. In short, because "the Court has federal question jurisdiction over this case," it also "has independent jurisdiction over the movant[']s answers and future motions." *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 2019 WL 1789458, at \*8 (D.D.C. Apr. 24, 2019) (granting motion to intervene under 24(b)). Nothing more is needed.

Second, Facebook has filed a timely motion. As discussed *supra*, Facebook moved to intervene shortly after it learned that certain redacted documents were being considered for release. And Facebook moved to intervene before the parties even proposed a briefing schedule on dispositive motions. Facebook's entry as a party would not prejudice either EPIC or the FTC.

Third, Facebook has a defense that has a common question of law or fact with the underlying action between EPIC and the FTC: Facebook asserts that Exemption 4 covers the information EPIC seeks in this FOIA action, and the FTC has also raised that defense in this action.

Finally, allowing Facebook to intervene will contribute to the "just and equitable adjudication of the legal question presented," as Facebook's arguments will assist the Court in determining whether FOIA requires the release of the unredacted documents EPIC seeks. *Ctr. for Biological Diversity v. EPA*, 274 F.R.D. 305, 313 (D.D.C. 2011) (quotation marks omitted); *Sault Ste. Marie*, 2019 WL 1789458, at \*8 (granting permission to intervene to three new parties so they could participate in summary judgment briefing "to defend the [federal agency's] decision" at issue).

#### **IV. CONCLUSION**

For the foregoing reasons, the Court should grant Facebook's motion to intervene.

DATE: May 3, 2019

Respectfully submitted,

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