No. 21-15863

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REVEAL CHAT HOLDCO, LLC; USA TECHNOLOGY AND MANAGEMENT SERVICES, INC., D/B/A LENDDO USA; BEEHIVE BIOMETRIC, INC.,

Plaintiffs-Appellants,

v.

FACEBOOK, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 5:20-cv-00363-BLF
Hon. Beth Labson Freeman

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF ON ARTICLE III STANDING

Christopher M. Burke
SCOTT+SCOTT ATTORNEYS AT LAW LLP
600 W. Broadway, Suite 3300
San Diego, CA 92101
(619) 233-4565

Kristen M. Anderson
SCOTT+SCOTT ATTORNEYS AT LAW LLP
230 Park Avenue, 18th Floor
New York, NY 10169
(212) 223-6444

Brian J. Dunne
BATHAEE DUNNE LLP
633 West Fifth Street, 26th Floor
Los Angeles, CA 90071
(213) 462-2772

Yavar Bathaee
Edward M. Grauman
BATHAEE DUNNE LLP
445 Park Avenue, 9th Floor
New York, NY 10022
(332) 322-8835

Counsel for Plaintiffs-Appellants Reveal Chat Holdco, LLC, USA Technology and Management Services, Inc., d/b/a Lenddo USA, and Beehive Biometric, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

On January 10, 2022, the Court ordered Plaintiffs-Appellants Reveal Chat HoldCo LLC ("Reveal Chat"), USA Technology and Management Services, Inc. ("Lenddo"), and Beehive Biometric, Inc. ("Beehive") to submit a supplemental brief addressing Plaintiffs' Article III standing to seek (i) injunctive relief and (ii) damages for Facebook's anticompetitive actions in the Social Advertising Market. As explained below, Plaintiffs have Article III standing to seek both forms of relief.

First, Lenddo has Article III standing to seek an injunction halting and unwinding Facebook's imminent and ongoing backend integration of its Instagram, WhatsApp, and legacy Facebook/Messenger products. As explained in the original Complaint and the Amended Class Action Complaint ("FAC"), Facebook's backend integration of these previously distinct products will irreversibly strengthen Facebook's dominant position in the Social Data Market. This will reduce consumer choice, restrict the supply and price of social data, and further strengthen the Social Data Barrier to Entry protecting Facebook's Social Data Market monopoly, thereby sealing off competition from other potential sources of social data—perhaps irrevocably so. As for Lenddo, the company is a going concern that continues to provide lending products and services that rely on, and consume, social data, the product at issue in the Social Data Market. Lenddo faces a real, immediate, and direct

threat of cognizable injury-in-fact due to the backend integration, including through direct monetary harm to Lenddo's ongoing business and concrete harm to its business prospects. And, like the many developers in the putative Rule 23(b)(2) class that it seeks to represent, Lenddo's injury would be prevented by an injunction halting the backend integration.

Second, Plaintiffs Reveal Chat, Lenddo, and Beehive each have Article III standing to seek damages for Facebook's anticompetitive behavior under Section 4 of the Clayton Act. Each Plaintiff plausibly alleges to have suffered a constitutionally cognizable injury-in-fact—to wit, a concrete injury to its business, including direct monetary loss—as a fairly traceable result of Facebook's anticompetitive redesign of its Platform and concomitant refusal to deal with each Plaintiff, including through denying them access to certain APIs they relied on for social data for their business. These injuries could unquestionably be redressed through the damages sought by Plaintiffs under the Clayton Act.

For its part, Facebook does not appear to seriously contest Plaintiffs' ***constitutional*** injury-in-fact (Plaintiffs lost money, and their businesses were completely or partially destroyed), traceability (Facebook's Platform redesign and API refusal to deal caused these injuries), or redressability (damages under the Clayton Act would meaningfully redress Plaintiffs' past injuries to their business and property caused by Facebook's actions), and has gone so far as to argue ***in this***

case that such harms to Plaintiffs' businesses did indeed happen, in April 2015, as a result of actions by Facebook. What Facebook has contested—and presumably will contest again here—is not Article III standing, but antitrust standing, which the Supreme Court has expressly stated is a separate concept. Plaintiffs have both, as explained here and in (for the case of antitrust standing) voluminous District Court briefing and argument. But in response to the Court's specific inquiry, Article III standing is not evaluated with reference to this case's respective relevant markets (*i.e.*, Social Data and Social Advertising) but rather with respect to each form of and claim for relief sought. Here, each Plaintiff has Article III standing to seek damages for Facebook's complained-of anticompetitive conduct (which this brief directly explains), and each Plaintiff also has ***antitrust*** standing in both relevant markets, Social Data and Social Advertising (which this brief explains less voluminously, but with citations to the extensive briefing and argument in the District Court on this issue).

LEGAL STANDARD

To establish Article III standing, a "plaintiff must demonstrate that: (1) [they have] suffered an 'injury in fact' that is concrete, particularized, and actual or imminent, (2) the injury is 'fairly traceable' to the defendant's conduct, and (3) the injury can be 'redressed by a favorable decision.'" *Gonzalez v. U.S. Immigr. &*

Customs Enf't, 975 F.3d 788, 803 (9th Cir. 2020) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

"[S]ubject-matter jurisdiction depends on the state of things at the time of the action brought," *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473 (2007). "A plaintiff must demonstrate standing separately for each form of relief sought," *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000), and at the pleading stage, "must clearly allege facts demonstrating each element," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (cleaned up).

ARGUMENT

I. PLAINTIFF-APPELLANT LENDDO HAS ARTICLE III STANDING TO SEEK INJUNCTIVE RELIEF.

"A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Davis v. Fed Election Comm'n*, 554 U.S. 724, 734 (2008). Here, the threat to Lenddo from Facebook's backend integration plainly meets this standard.

As the initial complaint and FAC allege, Lenddo is a microlender that uses a "credit score based on available personal and social data gathered from the online social footprint" to determine the "borrower's propensity to pay an owed amount" and ultimately score users' credit risk by, among other things, observing "endorsements or negative behavior of individuals in a borrower's social network." 3-ER-240; *see* 3-ER-239-42. Launched in 2011, Lenddo's microlending application

relies on social data, including data acquired through Facebook's Platform APIs and data derived directly from (consenting) users through their mobile phones, to make loans and provide credit-scoring and fraud-management services to billions of people in emerging markets who lack traditional credit scores or identity documentation. 3-ER-239-40.

Until 2015, Facebook's Graph APIs were the principal source of social data for Lenddo's flagship microlending product. 3-ER-239, 241-42. However, in 2015, Facebook withdrew Lenddo's access to this source of social data and refused Lenddo's repeated requests to negotiate continued access despite entering into secret whitelist agreements with other companies, such as financial-services company Royal Bank of Canada. 3-ER-240-41. Since 2015, Lenddo has continued as a going concern and continues to operate data-driven lending services, including a Software-as-a-Service product. 3-ER-241. In the absence of Facebook-sourced social data, Lenddo has sought social data from Android, Yahoo!, and Gmail as inputs to its products and services, but Facebook's dominance of the Social Data Market has made these alternate sources less than ideal for Lenddo's business. *Id.*

Lenddo already faces substantial hurdles in acquiring social data to operate its lending products and services given Facebook's monopolization of the Social Data Market and refusal to deal. *See* 3-ER-241. Facebook's ongoing backend integration of its Instagram, WhatsApp, and legacy Facebook/Messenger products will make

the competitive situation for Lenddo materially and concretely worse—irreversibly so. *See* 4-ER-584-90 (describing the backend integration); 4-ER-606, 616-18 (discussing the imminent harm to Plaintiffs from such integration); *see also* 3-ER-389-90 (discussing Lenddo's injury from Facebook's ongoing backend integration). For example, as explained in the Complaint, completion of Facebook's backend integration would irreversibly create an integrated pool of single-sourced social data so broad and deep that remaining non-Facebook social data suppliers would be driven out of the market (and potentially out of business); meaningful entry by new suppliers would be effectively impossible in the near-to-medium term; and Instagram and WhatsApp would be irreversibly prevented from becoming viable non-Facebook-controlled social data alternatives, even if (by way of example) the Federal Trade Commission is able to prove that these businesses should be divested for competitive reasons. 4-ER-586-90; 4-ER-606; 3-ER-389-90.

For Lenddo—which operates a business that consumes social data, and would like to scale that business, but is hindered by an already scarce Social Data Market—Facebook's backend integration will directly impair revenues and profits, reduce Lenddo's ability to scale and grow, and cause other concrete injuries to Lenddo's ongoing business. And similar injuries would be suffered by similarly-situated potential Rule 23(b)(2) class members who, like Lenddo, consume social data for their businesses. These injuries could be avoided or substantially mitigated by an

injunction against the backend integration. This is, frankly, a canonical situation in which injunctive relief is both available and appropriate.

The above represents a constitutionally cognizable injury-in-fact (and indeed, a statutorily cognizable injury under 15 U.S.C. § 26) that is real, immediate, and direct to Plaintiff Lenddo from completing the ongoing backend integration of Facebook's Instagram, WhatsApp, and legacy Facebook/Messenger products. *See Gonzalez*, 975 F.3d at 803-05 (discussing injury-in-fact for prospective injunctive relief). This injury (reduced revenues and profits, reduced ability to scale and grow, and other concrete impairments to Lenddo's ongoing business) is plainly traceably or causally connected to the activity sought to be enjoined—an ongoing backend product integration that will imminently, measurably, and likely irreversibly strengthen and fortify the barrier to entry surrounding the Facebook-dominated Social Data Market, thereby making Lenddo's prospective access to social data for its business even more difficult, constrained, and expensive. *See generally* 4-ER-584-90; 4-ER-606, 616-18; *see Gonzalez*, 975 F.3d at 805-06 (discussing traceability/causation in the injunction context). And this injury is (and was, at the moment this suit was filed) plainly capable of being redressed through the injunctive relief Lenddo seeks, on its own behalf and on behalf of a Rule 23(b)(2) class of similarly-situated present-day developers who consume social data for their ongoing businesses: halting and unwinding Facebook's backend integration of its Instagram,

WhatsApp, and legacy Facebook/Messenger products. *See Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1158-59 (9th Cir. 2021) (plaintiff seeking injunction must meet a "relatively modest" burden of showing "a substantial likelihood that the relief sought would redress the injury" (citations omitted)); *Gonzalez*, 975 F.3d at 806.

In short, Lenddo has Article III standing to seek an injunction against Facebook's backend product integration, both on its own behalf and on behalf of a putative Rule 23(b)(2) class of other developers who continue to seek and consume social data in a market that Facebook imminently and concretely threatens to further monopolize through anticompetitive product integration.

II. PLAINTIFFS-APPELLANTS HAVE ARTICLE III STANDING TO SEEK DAMAGES FOR FACEBOOK'S ANTICOMPETITIVE CONDUCT.

All three Plaintiffs—Reveal Chat, Lenddo, and Beehive—have straightforward Article III standing to seek damages for Facebook's anticompetitive actions as alleged in the FAC. Reveal Chat, Lenddo, and Beehive each suffered constitutionally cognizable injury-in-fact—including actual monetary losses and the destruction or crippling of their businesses or portions thereof—as a fairly traceable (indeed, a clear and direct) result of Facebook's complained-of conduct, including an anticompetitive product redesign culminating in an April 2015 refusal to deal

with each of them. These money-and-business injuries to Reveal Chat, Lenddo, and Beehive are indisputably redressable through the damages sought in this action.

As to the Court's specific inquiry about the Social Advertising Market, Facebook's complained-of actions in the FAC—principally, its anticompetitive product redesign and refusal to deal—harmed competition in two relevant markets, those for Social Data and Social Advertising. Plaintiffs' injuries-in-fact flow not only from Facebook's complained-of conduct, but from the harm to competition in each market, as explained in the antitrust injury sections of Plaintiffs' FAC and briefing in the District Court below. *See* 3-ER-237-45, 329-34 (FAC); 2-ER-175-83 (MTD briefing on antitrust injury). However, this is not an Article III standing issue—indeed, the Supreme Court has said it is not, *see Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983) ("Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact," and antitrust injury is a separate inquiry)—but instead one of antitrust standing.

With that said, each Plaintiff unquestionably has antitrust standing here, both in the Social Data Market (where Reveal Chat, Lenddo, and Beehive were all consumers and potential producers, *see* 3-ER-237 (Reveal Chat), 239-40 (Lenddo), 243-44 (Beehive); *see* 2-ER-171-81 (briefing on antitrust standing in social data market)), and in the Social Advertising Market (where Facebook's destruction of

Plaintiffs and those similarly situated was the ***means*** of monopolizing the Social Advertising Market, and Plaintiffs' injuries were thereby inextricably intertwined with harm to competition in that market, *see* 2-ER-181-83 (briefing on antitrust standing in the social advertising market); 2-ER-109-114 (oral argument on antitrust standing in the social advertising market); *see generally Blue Shield of Va. v. McCready*, 457 U.S. 465, 483-84 (1982); *Am. Ad Mgmt, Inc. v. Gen Tel. Co. of Cal.*, 190 F.3d 1051, 1057 n.5 (9th Cir. 1999) (citing *McCready*)).

* * *

Returning to the Article III standing inquiry, the FAC describes in detail the injury-in-fact suffered by each Plaintiff-Appellant as a result of Facebook's complained-of conduct:

- *Reveal Chat*. Plaintiff Reveal Chat developed a dating app called LikeBright, which was designed "as a platform to make dating safe and fun for women," including by using social data, primarily from Facebook, to facilitate matches. 3-ER-237. When Facebook removed LikeBright's access to its friends and newsfeed APIs as part of its anticompetitive scheme, LikeBright was forced to shutter its business because "[w]ithout Facebook's social data, LikeBright simply could not function as a dating app that matched users based on their mutual interests and commonalities among their social media profiles." 3-ER-238.

- *Lenddo*. Plaintiff Lenddo drew heavily on Facebook's Graph APIs to assess borrower creditworthiness and propensity to repay. 3-ER-239-40. Lenddo was able to use this data as well as data collected directly from borrowers (with their consent) to assess creditworthiness for borrowers in developing countries who lacked traditional credit scores or financial

documentation. *Id.* The social data Lenddo drew on also predicted fraud risk. 3-ER-240. Lenddo patented its algorithm for using social data for this purpose in April 2014, *id.*, and spent millions of dollars collecting data about loan defaults by making loans with diverse risk profiles—an investment rendered near-worthless when Facebook monopolized Social Data Market and refused to deal with Lenddo. *Id.* When Facebook purported to withdraw the APIs that Lenddo relied on for its app, its business was instantly injured, 3-ER-242, forcing Lenddo to rely on inferior sources of social data and harming Lenddo's efforts to scale its business, *id.*

- *Beehive*. Plaintiff Beehive developed technology that used social data to identify and authenticate real humans, while still preserving privacy. 3-ER-243. Beehive obtained venture capital and was part of the TechStars startup accelerator program, and it deployed its product as a service to dating apps so that they could eliminate fake accounts and reduce fraud risk, including through credit card chargebacks. "Beehive's business was halted" when Facebook anticompetitively redesigned its Platform and refused to deal with Beehive, including by denying Beehive access to the Friends and Newsfeed APIs. *Id.* Beehive searched "for other sources of social data to fuel its product, including from Twitter and LinkedIn," but without access to Facebook's social data, its business failed. 3-ER-245.

Each of the above injuries-in-fact is canonically cognizable under Article III, including under the Supreme Court's most recent pronouncement on the subject, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) ("If a defendant has caused . . . monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.").

Next, each Plaintiff directly and plausibly alleges that its injuries are the direct result of Facebook's conduct described in the FAC—namely Facebook's

anticompetitive Platform redesign and withdrawal of API access from tens of thousands of developers' apps, including Reveal Chat's, Lenddo's, and Beehive's—in April 2015. *See* 3-ER-238 (Reveal Chat/LikeBright); 3-ER-241-42 (Lenddo); 3-ER-244-45 (Beehive). Facebook cannot seriously dispute that its Platform conduct actually injured each of the Plaintiffs, and indeed has repeatedly argued that in April 2015, a concrete and indeed known injury happened to each Plaintiff. *See, e.g.*, 2-ER-58 ("In this case, they knew they were the victim of the API deprecation, which is the core of their claims."); 2-ER-128 ("In fact, by their own theory, as consumers of social data, the moment they lost access to the API's, they were injured. That would be true whether there was injury to competition or not. . . . [T]he injury they are claiming is a business injury that results from the loss of access to data, not an injury to competition."). The causal nexus between Facebook's ***conduct*** and Plaintiffs' ***injuries*** is alone sufficient for traceability under Article III. *See Associated Gen. Contractors*, 459 U.S. at 535 n.31.

Finally, there can be no dispute that the damages sought by Plaintiffs in the FAC through Section 4 of the Clayton Act redress injuries alleged here, including through the award of trebled damages based on "harm to business or property," 15 U.S.C. § 15, such as actual business losses and lost profits sustained by the Plaintiffs.

CONCLUSION

Plaintiff Lenddo has Article III standing to seek an injunction, and all Plaintiffs have Article III standing to seek damages.

Dated: January 19, 2022

s/ Brian J. Dunne

Christopher M. Burke
SCOTT+SCOTT ATTORNEYS AT LAW LLP
600 W. Broadway, Suite 3300
San Diego, CA 92101
(619) 233-4565

Kristen M. Anderson
SCOTT+SCOTT ATTORNEYS AT LAW LLP
230 Park Avenue, 18th Floor
New York, NY 10169
(212) 223-6444

Attorneys for Plaintiffs-Appellants

Brian J. Dunne
BATHAEE DUNNE LLP
633 W. Fifth Street, 26th Floor
Los Angeles, CA 90071
(213) 462-2772

Yavar Bathaee
Edward M. Grauman
BATHAEE DUNNE LLP
445 Park Avenue, 9th Floor
New York, NY 10022
(332) 322-8835

CERTIFICATE OF COMPLIANCE

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number 21-15863

I am the attorney or self-represented party.

This brief contains _2761_ words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[X] complies with the length limit designated by court order dated Jan. 10, 2022.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Brian J. Dunne **Date** January 19, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on January 19, 2022, by operation of the Court's CM/ECF system per Fed. R. App. P. 25.

Signature s/ Brian J. Dunne **Date** January 19, 2022