No. 21-15863

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 (Freeman, J.)

SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLEE FACEBOOK, INC.

ARI HOLTZBLATT
MOLLY M. JENNINGS
PAUL VANDERSLICE
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave NW
Washington, DC 20006
(202) 663-6000

MARK C. HANSEN
AARON M. PANNER
ALEX A. PARKINSON
JULIUS P. TARANTO
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, PLLC
1615 M Street NW
Washington, DC 20036
(202) 326-7900

SONAL N. MEHTA
WILMER CUTLER PICKERING
HALE AND DORR LLP
2600 El Camino Real, Suite 400
Palo Alto, CA 94306
(650) 858-6000

DAVID Z. GRINGER
ALEX W. MILLER
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

January 19, 2022

DISCLOSURE STATEMENT

Defendant-Appellee Meta Platforms, Inc. (f/k/a Facebook, Inc.) is a publicly traded company and has no parent corporation; no publicly held company owns 10% or more of its stock.

Date: January 19, 2022

/s/ Sonal N. Mehta

SONAL N. MEHTA
WILMER CUTLER PICKERING
HALE AND DORR LLP
2600 El Camino Real, Suite 400
Palo Alto, California 94306
(650) 858-6000

TABLE OF CONTENTS

Page

DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. PLAINTIFFS LACK ARTICLE III STANDING TO SEEK INJUNCTIVE RELIEF 4

A. Plaintiffs' Claimed Injuries Are Not Traceable To The Acquisitions Or Redressable By A Divestiture Order 5

B. The Back-End Integration Causes No Actual, Imminent Injury 7

II. PLAINTIFFS LACK ARTICLE III STANDING TO SEEK DAMAGES BASED ON CONDUCT AFFECTING THE "SOCIAL ADVERTISING" MARKET 9

A. Plaintiffs Were Not Injured In The Social Advertising Market 9

B. Any Injuries Plaintiffs Might Have Suffered In Social Advertising Are Not Fairly Traceable To The Challenged Conduct 11

CONCLUSION 12

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Page(s)

Allen v. Wright,
468 U.S. 737 (1984).....11

American Ad Management, Inc. v. General Telephone Company of California, 190 F.3d 1051 (9th Cir. 1999) 10

Bassett v. ABM Parking Services, Inc.,
883 F.3d 776 (9th Cir. 2018) 11

Blue Shield of Virginia v. McCready,
457 U.S. 465 (1982).....10

California v. Texas,
141 S. Ct. 2104 (2021).....6

Clapper v. Amnesty International USA,
568 U.S. 398 (2013).....7, 8

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006).....3

Davidson v. Kimberly-Clark Corp.,
889 F.3d 956 (9th Cir. 2018) 3, 7

Ecological Rights Foundation v. Pacific Lumber Co.,
230 F.3d 1141 (9th Cir. 2000) 5

Hall v. USDA,
984 F.3d 825 (9th Cir. 2020) 5

Lewis v. Casey,
518 U.S. 343 (1996).....3

Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.,
140 F.3d 1228 (9th Cir. 1998) 1

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).....6, 7

Northwest Requirements Utilities v. FERC,
798 F.3d 796 (9th Cir. 2015) 5

Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc., 185 F.3d 957 (9th Cir. 1999).....11

Somers v. Apple, Inc.,
729 F.3d 953 (9th Cir. 2013) 9

Spokeo, Inc. v. Robins,
578 U.S. 330 (2016).....3

Summers v. Earth Island Institute,
555 U.S. 488 (2009).....7

TransUnion LLC v. Ramirez,
141 S. Ct. 2190 (2021).....11

Washington Environmental Council v. Bellon,
732 F.3d 1131 (9th Cir. 2013) 6

INTRODUCTION

Plaintiffs-Appellants lack Article III standing to seek injunctive relief, or damages for Facebook's alleged conduct in the "Social Advertising" market.

Plaintiffs' only remaining requested injunctive relief seeks to unwind Facebook's acquisitions of Instagram and WhatsApp and, as an interim measure, to stop the back-end integration of Instagram and WhatsApp with the Facebook application. Facebook's answering brief explained that the three plaintiffs did not suffer antitrust injury from either the initial acquisitions or the integration. For many of the same reasons, Plaintiffs also do not have Article III standing to seek injunctive relief on their claims.[1] Their sole theory of harm from the years-ago acquisitions stacks speculation upon speculation, positing that if Facebook had not acquired Instagram and WhatsApp, then both platforms would have begun offering the same data to the Plaintiffs that Facebook previously offered—even though neither platform ever offered that data or ever suggested that it might. Thus, any injury is not "fairly traceable" to the challenged conduct but instead depends on a string of

[1] At the district court and on appeal, Facebook identified fundamental defects in Plaintiffs' antitrust injury showing, including Plaintiffs' failure to adequately allege that their claimed injuries were caused by the complained-of conduct. Because the bar for antitrust injury is higher than for Article III standing, *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1232-1233 (9th Cir. 1998), Facebook raised those defects in that context. A determination that Plaintiffs have not adequately alleged that Facebook's conduct caused their injuries would also eliminate Article III standing as to the injunctive relief and damages for conduct in the alleged Social Advertising market.

speculation about what third parties could have done in a hypothetical world. As for the incremental back-end integration, two of the three plaintiffs were defunct long before it was even alleged to have begun.[2] Obviously, those plaintiffs could not—and did not—suffer any injury at all from the integration. The third is, admittedly, only "potentially injur[ed]" by the integration, claiming that it may prevent the company from obtaining unspecified data from new (again unspecified) market entrants. Reveal Chat Br. 33-34 n.2. Such concededly speculative injury cannot support this Court's exercise of its Article III authority.

Plaintiffs also do not have Article III standing to seek damages for conduct that occurred in the alleged "Social Advertising" market because they have identified no injury they suffered in that market, nor any injury traceable to the challenged conduct. Nor could they. Plaintiffs concede that two of the three named plaintiffs were neither competitors nor customers in the Social Advertising market, and that the third only purchased advertising at a price not alleged to have been anticompetitive. Any theory Plaintiffs might now attempt to string together about

[2] Reveal Chat, then operating as a platform called LikeBright, "failed by the end of 2015." ER-238 ¶29. Beehive failed at some point between 2015 and 2019. ER-244 ¶60; ER-245 ¶¶64-65. The integration was allegedly announced on March 6, 2019 and "slated to be complete in the first few months of 2020." ER-584, 586 ¶¶294, 301.

how Facebook's actions in the Social Advertising market nonetheless injured them would be far too speculative to support Article III standing.

ARGUMENT

To meet "the irreducible constitutional minimum of standing," Plaintiffs "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of [Facebook], and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Plaintiffs "bear the burden of establishing these elements," and "where, as here, a case is at the pleading stage," they "must clearly allege facts demonstrating each element." *Id.*

Standing "is not dispensed in gross." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). Instead, "plaintiff[s] must demonstrate constitutional standing separately for each form of relief requested," *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018), and the remedies Plaintiffs seek "must of course be limited to the inadequacy that produced the injury in fact that [they have] established," *DaimlerChrysler*, 547 U.S. at 353 (quoting *Lewis*, 518 U.S. at 357).

Here, that means to seek injunctive relief, Plaintiffs must separately establish that they have Article III standing (1) to seek divestiture of Instagram and WhatsApp; and (2) to stop the integration of those assets. On both, Plaintiffs have

failed to carry their burden. In addition, Plaintiffs lack standing to seek damages based on any conduct that occurred in the alleged Social Advertising market.

I. PLAINTIFFS LACK ARTICLE III STANDING TO SEEK INJUNCTIVE RELIEF

Plaintiffs primarily seek an injunction requiring Facebook to unwind its decade-old acquisition of Instagram and eight-year-old acquisition of WhatsApp. But Plaintiffs have failed to establish Article III standing to seek such relief. No Plaintiff has alleged any injury traceable to Facebook's purchases of Instagram and WhatsApp or redressable by an order requiring their divestiture. And as to the "backend integration" of those assets—even assuming such relief can be considered apart from the acquisitions themselves—no plaintiff has identified any cognizable injury at all. Nor could they, given that two of the three plaintiffs are long defunct, the third has pleaded only that it might be "potentially injur[ed]" by the conduct it seeks to enjoin, and even if the integration were halted, neither Instagram nor WhatsApp would be independent. Reveal Chat Br. 33-34 n.2.[3]

[3] Although Plaintiffs sought additional forms of injunctive relief below, their appeal challenges only the dismissal of claims for injunctive relief related to the acquisitions and subsequent integration of WhatsApp and Instagram. *See, e.g.*, Reply 1 (characterizing "the actual injunction sought by Appellants" as one "targeting … back-end product integration"); Facebook Br. 22 n.5 (noting that Plaintiffs previously disclaimed injunctive relief except as to acquisition-related conduct).

A. Plaintiffs' Claimed Injuries Are Not Traceable To The Acquisitions Or Redressable By A Divestiture Order

Plaintiffs have failed to identify any harm traceable to the challenged acquisitions. *See* Facebook Br. 31; ER-329-334 ¶¶426-445. As the district court held, their complaint instead consists of "naked assertions devoid of further factual enhancement," ER-35, and relies on an attenuated and implausible chain of causation to link the acquisitions to Plaintiffs' business setbacks, Facebook Br. 32. Plaintiffs claim only that, absent the transactions, Instagram and WhatsApp would have independently elected to make available the particular kinds of user data Plaintiffs' businesses relied upon, despite never having done so before and having no alleged plans to ever do so. *See, e.g.*, ER-302 ¶302. Such speculation is insufficient to establish Article III standing.

To be sure, "a 'causal chain does not fail simply because it has several links,'" but those links may not be "'hypothetical or tenuous.'" *Northwest Requirements Utilities v. FERC*, 798 F.3d 796, 806 (9th Cir. 2015). A plaintiff cannot "rely on conjecture about the behavior of other parties." *Ecological Rts. Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir. 2000); *Hall v. USDA*, 984 F.3d 825, 834 (9th Cir. 2020) (standing cannot be based on an "'injury that results from the independent action of some third party not before the court'"). And yet, that is all that Plaintiffs have pleaded, stitching together an implausible and factually unsupported story about how Instagram and WhatsApp might have behaved in a

hypothetical world. Facebook Br. 32. Article III demands a "far stronger" showing of traceability than this "highly attenuated chain of possibilities." *California v. Texas*, 141 S. Ct. 2104, 2119 (2021).

Nor have Plaintiffs shown that the injunction they seek would redress any injury connected to the acquisitions. For one, because Plaintiffs identify no harm plausibly caused by the acquisitions, an order undoing those transactions would do nothing for them today. *See Washington Env't Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013) ("[T]he fairly traceable and redressability components for standing overlap and are two facets of a single causation requirement."). Moreover, Plaintiffs never say how the remaining plaintiff would benefit from an independent Instagram or WhatsApp in the event of divestiture. Across hundreds of pages of pleadings spanning two complaints, Plaintiffs have alleged no facts to support even an inference that a newly divested Instagram or WhatsApp—or some other newly enabled entrant to the market, *see* Reply 16—would turn over useful data to the sole existing plaintiff. Facebook Br. 9-10. Instead, because "independent third parties" stand between the claimed injury and any redress from a divestiture order, there is no reason to believe the injunction Plaintiffs seek "would likely reduce" those harms. *Washington Env't Council*, 732 F.3d at 1144, 1146-1147. So, it is "merely speculative" that Plaintiffs' alleged "injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

B. The Back-End Integration Causes No Actual, Imminent Injury

Plaintiffs also claim to separately seek "prospective injunctive relief as to Facebook's backend integration" of WhatsApp and Instagram, Reveal Chat Br. 4, but that cannot solve the jurisdictional defect in their theory of harm. When seeking "injunctive relief, which is a prospective remedy, the threat of injury must be 'actual and imminent, not conjectural or hypothetical.'" *Davidson*, 889 F.3d at 967 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). "In other words, the 'threatened injury must be *certainly impending* to constitute injury in fact' and 'allegations of *possible* future injury are not sufficient.'" *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). Plaintiffs have not met this burden.

Again, two of the plaintiffs simply could not have been harmed by the back-end integration alone. The integration began *after* they were long out of business, which left them unable to make use of any data new market entrants would have provided or reenter the purported markets themselves. ER-586 ¶¶301-302; Reply 16. "Although imminence is concededly a somewhat elastic concept," it would "stretch[]" the doctrine "beyond its purpose" to allow defunct entities entirely unaffected by the integration to proceed on the basis of such a "speculative" injury. *Clapper*, 568 U.S. at 409 (quoting *Lujan*, 504 U.S. at 564 n.2).

The third plaintiff apparently continues to operate, ER-242 ¶51, but also fails to allege imminent injury from the back-end integration—indeed, it does not even

purport to do so, admitting that the integration could only "potentially injur[e]" the company, Reveal Chat Br. 33-34 n.2. Plaintiffs have never plausibly alleged that enjoining the back-end integration would itself create viable alternative sources—or any independent source—for the data they claim to need. *See* Facebook Br. 24-25, 32-33. Nor could they, without alleging that Instagram or WhatsApp was providing that data prior to the integration, but stopped once the incremental integration began (which was not the case). Instead, Plaintiffs' theory of harm regarding the integration has always turned on the effects of the initial acquisitions—it was those transactions that created the "lack [of] any viable choices for the services Facebook provides[.]" ER-618 ¶¶445, 449. Relief relating to integration, on the other hand, was simply a means to preserve the potential of divestiture down the road. *See, e.g.*, ER-584 ¶294 (integration could "impair the ability of Plaintiffs to obtain necessary relief in this action"), ER-619 ¶451 (describing such relief as "preliminary"). So Plaintiffs' theory of injury with respect to the integration carries with it all of the defects identified in the discussion of the acquisitions above. It just adds a further speculative step, imagining that blocking the integration will somehow cause third parties to begin providing particular data to Plaintiffs. That sort of conditional conjecture based on "allegations of *possible* future injury [is] not sufficient" to confer standing. *Clapper*, 568 U.S. at 409, 414.

Plaintiffs' latest attempt at resuscitating their failed theory of injury—that the integration "will strengthen and is strengthening the Social Data Barrier to Entry … and also excluding Appellants from the Social Data market," Reply 16—suffers from similar defects. The defunct plaintiffs allege no plans to re-enter. And the sole remaining plaintiff has never plausibly alleged the supposed increase in the "Social Data Barrier to Entry" caused by the back-end integration has deterred any would-be entrant willing to share data with it. It is simply not plausible that the integration would cause these Plaintiffs any injury whatsoever.

II. PLAINTIFFS LACK ARTICLE III STANDING TO SEEK DAMAGES BASED ON CONDUCT AFFECTING THE "SOCIAL ADVERTISING" MARKET

Beyond the Article III infirmities in their claim for injunctive relief, Plaintiffs also lack standing to seek damages based on conduct affecting the "Social Advertising" market. Plaintiffs conceded that they did not participate in this market. ER-110. They thus did not allege any injuries taking place in it or fairly traceable to Facebook's alleged conduct.

A. Plaintiffs Were Not Injured In The Social Advertising Market

Courts typically analyze the sufficiency of an antitrust plaintiff's injuries in a specific relevant market through the doctrine of antitrust injury. This "is a substantive element of an antitrust claim" which requires "that 'the injured party be a participant in the same market as the alleged malefactors,'" *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013), and "the plaintiff to have suffered its injury in the

market where competition is being restrained," *American Ad Mgmt., Inc. v. General Tel. Co. of Calif.*, 190 F.3d 1051, 1057 (9th Cir. 1999).

Plaintiffs do not satisfy this requirement. They conceded in the district court that "they were not competitors in the Social Advertising Market," ER-181, and have not alleged that they were harmed as consumers in that market. Reveal Chat is the only plaintiff to have even alleged that it purchased an ad from Facebook, ER-237 ¶23, but never alleged that it paid a supracompetitive price. Plaintiffs were thus unaffected by the competitive harms Facebook supposedly visited upon this market.

Plaintiffs would fare no better by claiming that injuries they purportedly suffered in other markets are "inextricably intertwined" with Facebook's alleged conduct in the Social Advertising market. ER-330-331 ¶431. In the district court, Plaintiffs argued they were excused from the market participant requirement because a "necessary corollary" of Facebook's purported scheme—which allegedly injured them in the "Social Data" market—was "eliminat[ing] any actual or potential social advertising platforms." ER-182; *see Blue Shield of Va. v. McCready*, 457 U.S. 465, 483-484 (1982). But this does not help Plaintiffs. None of them were market competitors, ER-181, nor did they have any plausible path to become competitors. Only Reveal Chat claimed to have a "business model" for entering that market: by "providing match-making services" that would somehow "create a platform from which it could sell social advertising." ER-237 ¶21. Plaintiffs offered no plausible

explanation of how Reveal Chat would have accomplished this, and thus have not satisfied "the fundamental requirement" that they demonstrate injury. *Oregon Laborers-Employers Health & Welfare Tr. Fund v. Philip Morris Inc.*, 185 F.3d 957, 967 (9th Cir. 1999).

B. Any Injuries Plaintiffs Might Have Suffered In Social Advertising Are Not Fairly Traceable To The Challenged Conduct

Insofar as Plaintiffs' damages claim rests on conduct that occurred in the Social Advertising market, their alleged injuries are not sufficient to confer Article III standing. "[I]t hardly matters" for standing purposes whether some absent third party might have been harmed by Facebook's alleged conduct. *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 780 (9th Cir. 2018). As non-participants in the market, the alleged increased advertising prices and exclusion of Social Advertising competitors, ER-331 ¶433, "did not personally harm the plaintiff[s]" and are therefore "not grounds for Article III standing," *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205-2206 (2021).

To the extent Plaintiffs claim harm in their supposed capacity as potential entrants, "the line of causation between the illegal conduct and injury [is] too attenuated" to confer standing. *Allen v. Wright*, 468 U.S. 737, 752 (1984). Recognizing a potential-entrant theory here—for any of the plaintiffs—would require this Court to make an inferential leap that a plaintiff would have eventually converted its single-function app into a successful advertising platform. That leap

is not only unsupported, but contradicted by Plaintiffs' other allegations. According to Plaintiffs, competing in both the "Social Advertising" and "Social Data" markets required "significant amounts of investments," a "vast network," and "active social engagement on a massive scale." ER-252-253, 327 ¶¶95, 414. Plaintiffs had none of these.[4]

CONCLUSION

The judgment below should be affirmed for the reasons in Facebook's answering brief or, in the alternative, this Court should vacate the judgment as to Plaintiffs' claims insofar as they seek injunctive relief or damages in the Social Advertising market, and remand with instructions to dismiss for lack of jurisdiction.

[4] Plaintiffs acknowledge these alleged barriers to entry were in place well before any of the challenged conduct took place. *See* ER-254-257 ¶¶101-113 (describing how Google+ began failing "quickly" after its 2011 launch).

Respectfully submitted,

/s/ *Sonal N. Mehta*

SONAL N. MEHTA
WILMER CUTLER PICKERING
HALE AND DORR LLP
2600 El Camino Real, Suite 400
Palo Alto, CA 94306
(650) 858-6000

DAVID Z. GRINGER
ALEX W. MILLER
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

ARI HOLTZBLATT
MOLLY M. JENNINGS
PAUL VANDERSLICE
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave NW
Washington, DC 20006
(202) 663-6000

MARK C. HANSEN
AARON M. PANNER
ALEX A. PARKINSON
JULIUS P. TARANTO
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, PLLC
1615 M Street NW
Washington, DC 20036
(202) 326-7900

January 19, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 21-15863

I am the attorney or self-represented party.

This brief contains 2,786 **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.
- ◉ 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/ Sonal N. Mehta **Date** 1/19/2022

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Sonal N. Mehta*
SONAL N. MEHTA