

1 SONAL N. MEHTA (SBN 222086)

2 Sonal.Mehta@wilmerhale.com

3 WILMER CUTLER PICKERING

4 HALE AND DORR LLP

5 2600 El Camino Real, Suite 400

6 Palo Alto, California 94306

7 Telephone: (650) 858-6000

8 Facsimile: (650) 858-6100

9 DAVID Z. GRINGER (*pro hac vice*)

10 David.Gringer@wilmerhale.com

11 ARI HOLTZBLATT (*pro hac vice*)

12 Ari.Holtzblatt@wilmerhale.com

13 MOLLY M. JENNINGS (*pro hac vice*)

14 Molly.Jennings@wilmerhale.com

15 WILMER CUTLER PICKERING

16 HALE AND DORR LLP

17 1875 Pennsylvania Avenue, NW

18 Washington, DC 20006

19 Telephone: (202) 663-6000

20 Facsimile: (202) 663-6363

21 *Attorneys for Defendant*

22 FACEBOOK, INC.

23 UNITED STATES DISTRICT COURT

24 NORTHERN DISTRICT OF CALIFORNIA

25 SAN JOSE DIVISION

26 REVEAL CHAT HOLDCO, LLC, a Delaware
27 limited liability company, USA TECHNOLOGY
28 AND MANAGEMENT SERVICES, INC. (d/b/a
29 Lenddo USA), a Delaware corporation, and
30 BEEHIVE BIOMETRIC, INC., a dissolved
31 Delaware corporation,

32 Plaintiffs,

33 v.

34 FACEBOOK, INC., a Delaware corporation,

35 Defendant.

Case No. 5:20-cv-00363-BLF

**DEFENDANT FACEBOOK, INC.'S
MOTION FOR ADMINISTRATIVE
RELIEF TO CONSIDER WHETHER
CASES SHOULD BE RELATED
PURSUANT TO CIVIL L.R. 3-12**

Judge: Hon. Beth Labson Freeman

1 Pursuant to Civil Local Rule 3-12, defendant Facebook, Inc. respectfully moves the Court
2 to consider whether to relate *Sherman v. Facebook, Inc.*, No. 3:20-cv-08721-LB (“*Sherman*”),
3 *Kupcho v. Facebook, Inc.*, No. 4:20-cv-08815-JSW (“*Kupcho*”), and *Dames v. Facebook, Inc.*,
4 No. 3:20-cv-08817-TSH (“*Dames*”) to *Reveal Chat Holdco, LLC v. Facebook, Inc.*, No. 5:20-cv-
5 00363-BLF (“*Reveal Chat*”). The *Reveal Chat* plaintiffs agree that the cases should be related.
6 The *Sherman* and *Dames* plaintiffs do not agree that the cases should be related. The *Kupcho*
7 plaintiffs did not respond to Facebook’s inquiry regarding their position. A declaration from
8 David Z. Gringer accompanies this motion.

9 Under Civil Local Rule 3-12(a), actions are related “when: (1) The actions concern
10 substantially the same parties, property, transaction or event; and (2) It appears likely that there
11 will be an unduly burdensome duplication of labor and expense or conflicting results if the cases
12 are conducted before different Judges.” These putative antitrust class actions, like the recently
13 filed *Klein* case, all follow the highly-publicized antitrust lawsuits filed by the FTC and the
14 Attorneys General of 46 states, D.C., and Guam (collectively “the States”) against Facebook.
15 These putative antitrust class actions all proceed under a “monopoly broth” theory of
16 anticompetitive conduct, much like the one alleged in the *Reveal Chat* case. While the cases
17 vary slightly in the “ingredients” they challenge (and with respect to the putative classes
18 themselves), all focus on Facebook’s acquisitions of Instagram and WhatsApp, its purported use
19 of Onavo for “surveillance,” and its regulation of developer usage of Facebook APIs. As the
20 Court knows, these theories are also at the heart of the *Reveal Chat* case, which has been pending
21 in this Court for nearly a year. It is telling that *both* Facebook and the *Reveal Chat* plaintiffs
22 recognize that *Sherman*, *Kupcho*, and *Dames* are related to *Reveal Chat*. Similarly, both the
23 FTC and the States acknowledge that their recently-filed lawsuits, which are predicated on some
24 of the same conduct, are related to each of these private cases. Dispersing these largely identical
25 actions across the dockets of multiple judges on this Court would result in a significant
26 duplication of efforts and ultimately poses a risk of inconsistent judgments and other orders as
27 the litigation advances. These challenges and burdens can be easily avoided by relating the

1 cases.

2 In light of the substantial factual and legal overlap, the threat of duplicative discovery,
3 and the real threat of inconsistent judgments, the cases easily exceed the relevant standard for
4 relation.

5 **First**, the cases all “concern substantially the same parties, property, transaction or
6 event.” Civil L.R. 3-12(a)(2)(1). Facebook is the defendant in all the cases. With respect to
7 legal theories, the cases all allege that Facebook unlawfully monopolized or attempted to
8 monopolize markets in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. And the
9 plaintiffs in all cases, like the plaintiffs in *Reveal Chat* (and *Klein*), all allege the following as
10 part of their unlawful monopolization theories:

- 11 • Facebook acquired Instagram (*compare Reveal Chat* Am. Compl. ¶¶ 287-299, *with*
12 *Sherman* Compl. ¶¶ 105-108, *Kupcho* Compl. ¶¶ 171-179, and *Dames* Compl. ¶¶ 59-63;
13 *see also* ECF No. 85-2 (“*Klein* Compl.”) ¶¶ 170-177), and WhatsApp (*compare Reveal*
14 *Chat* Am. Compl. ¶¶ 323-332, *with Sherman* Compl. ¶¶ 110-111, *Kupcho* Compl. ¶¶ 186-
15 188, and *Dames* Compl. ¶¶ 65-68; *see also Klein* Compl. ¶¶ 184-186), allegedly to
16 eliminate potential competition;
- 17 • Facebook allegedly imposed conditions on or restricted access to its Platform for third-
18 party developers, including through withdrawal of access to APIs (*compare Reveal Chat*
19 *Am. Compl. ¶¶ 247-261, with Sherman* Compl. ¶¶ 112, 114, *Kupcho* Compl. ¶¶ 165-167,
20 169, and *Dames* Compl. ¶¶ 74-81; *see also Klein* Compl. ¶¶ 164-166, 168); and
- 21 • Facebook allegedly acquired and used Onavo to collect user data and employed that data
22 to identify and target competitive threats (*compare Reveal Chat* Am. Compl. ¶¶ 266-286,
23 *with Sherman* Compl. ¶¶ 112-114, *Kupcho* Compl. ¶¶ 149-154, and *Dames* Compl. ¶¶
24 55-56; *see also Klein* Compl. ¶¶ 148-153).

25 Recognizing these similarities, both the FTC and the States listed *Reveal Chat*, *Sherman*, and
26 *Kupcho* as related to cases they respectively filed on December 9, 2020 in the United States
27 District Court for the District of Columbia challenging Facebook’s acquisitions of WhatsApp

1 and Instagram and its platform policies. The FTC stated that *Reveal Chat*, *Sherman*, and *Kupcho*
2 “involve[] common issues of fact” and “grow[] out of the same event or transaction” as the
3 FTC’s case. ECF Nos. 5, 10, 28, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-CRC (D.D.C.). The
4 States similarly told the court that *Reveal Chat* and *Sherman* “involve[] common issues of fact,”
5 and that *Kupcho* both “involves common issues of fact” and “grows out of the same event or
6 transaction.” ECF Nos. 6, 9, 14, *State of N.Y. v. Facebook, Inc.*, No. 1:20-cv-03589-JEB
7 (D.D.C.).¹ Indeed, the timing of the complaints makes it clear that these lawsuits were filed
8 either in anticipation of or in the wake of the FTC’s and the States’ lawsuits.

9 To be sure, the plaintiffs in the various cases do differ somewhat. However, “Rule 3-
10 12(a)(1) allows for relation of actions even where plaintiff classes differ, including classes of
11 consumers as opposed to content creators.” *Pepper v. Apple Inc.*, 2019 WL 4783951, at *1
12 (N.D. Cal. Aug. 22, 2019). In *Pepper*, Judge Gonzalez Rogers correctly held that the fact that
13 the plaintiffs in certain of the related cases were “app developers” while others were
14 “consumers” did not defeat relation because the “bases of plaintiffs’ complaints[] center around
15 the same technology and economic structure[].” *Id.* So it is here. The plaintiffs all challenge
16 Facebook’s supposed dominance over social networking (however denominated), the
17 competitive structure in that market, and the impact of similar or identical conduct on
18 competition in that industry.

19 Nor is relation defeated by the fact that the *Sherman*, *Kupcho*, and *Dames* complaints,
20 like the complaint in *Klein*, allege as one component of their monopoly broth theory that
21 Facebook deceived users about its data privacy practices, while that theory is currently absent
22 from the *Reveal Chat* complaint. Compare *Klein* Compl. ¶¶ 91-125, with *Sherman* Compl. ¶¶

23
24 ¹ The FTC and the States also listed *Klein* as a related case. The FTC indicated that *Klein* both
25 “involves common issues of fact” and “grows out of the same event or transaction.” ECF No. 4,
26 *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-CRC (D.D.C.). The States also indicated that *Klein*
27 “involves common issues of fact.” ECF No. 5, *State of N.Y. v. Facebook, Inc.*, No. 1:20-cv-

28 03589 JEB (D.D.C.)

92-100, *Kupcho* Compl. ¶¶ 93-101, and *Dames* Compl. ¶¶ 83-93. Relation does not require identical theories of liability. *See, e.g., Pepper*, 2019 WL 4783951, at *2. Were it otherwise, parties who wished to defeat relation could do so easily through creative pleading or strategic timing of amendments.

Second, given the substantial factual and legal overlap between the cases, it is “likely that there will be an unduly burdensome duplication of labor and expense ... if the cases are conducted before different Judges.” Civil L.R. 3-12(a)(2). Because all of these cases involve the same activity and substantially the same legal theories, any discovery, motion practice, trials, and potential remedies will substantially overlap. At the center of all of these cases will be an examination of the relevant markets in which Facebook operated, Facebook’s conduct in the relevant markets, including the competitive effects of the challenged acquisitions, the viability of app developers as emergent competitors to Facebook, how, if at all, Facebook used data from Onavo, and Facebook’s API practices. Substantial efficiencies will be available in discovery into each of these theories if these cases are related. Likewise, it would be inefficient and unduly burdensome to “hav[e] ... different judges govern discovery disputes.” *Financial Fusion, Inc. v. Ablaise Ltd.*, 2006 WL 3734292, at *3 (N.D. Cal. Dec. 18, 2006). Moreover, given the time and effort that the Court has already expended in assessing similar legal claims premised on a shared factual predicate, relating *Reveal Chat*, *Sherman*, *Kupcho*, and *Dames* would conserve judicial resources. Discovery in *Reveal Chat* has not yet begun, meaning that it is not far ahead of *Sherman*, *Kupcho*, or *Dames*. *Id.* at *4 (noting lack of delay as factor in favor of relation).

Third, absent relation, there is a serious risk “of conflicting results.” *See* Civil L.R. 3-12(a). Facebook anticipates raising similar defenses to the *Sherman*, *Kupcho*, and *Dames* allegations as it has raised in *Reveal Chat*, including that the claims are untimely and that the plaintiffs have failed to plausibly allege exclusionary conduct. If the cases are not related and related to *Reveal Chat*, there is the real prospect, for example, that different courts could reach different conclusions about whether fraudulent concealment theories can ever be resolved on motions to dismiss, whether Facebook owed any duty to any of the plaintiffs to disclose its plan

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.