

1 SONAL N. MEHTA (SBN 222086)

Sonal.Mehta@wilmerhale.com

2 WILMER CUTLER PICKERING

HALE AND DORR LLP

3 2600 El Camino Real, Suite 400

Palo Alto, California 94306

4 Telephone: (650) 858-6000

Facsimile: (650) 858-6100

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

David.Gringer@wilmerhale.com

6 WILMER CUTLER PICKERING

7 HALE AND DORR LLP

1875 Pennsylvania Avenue, NW

8 Washington, DC 20006

9 Telephone: (202) 663-6000

Facsimile: (202) 663-6363

10 *Attorneys for Defendant*

11 FACEBOOK, INC.

12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN JOSE DIVISION**

16 MAXIMILIAN KLEIN and SARAH GRABERT,
17 individually and on behalf of all others similarly
18 situated,

19 Plaintiffs,

20 v.

21 FACEBOOK, INC., a Delaware Corporation
headquartered in California,

22 Defendant.

Case No. 5:20-cv-08570-LHK

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

Judge: Hon. Lucy H. Koh

1 The *Klein* plaintiffs’ latest motion is little more than a thinly-veiled, procedurally-
2 improper attempt to avoid relation between this case and *Reveal Chat*. *Klein*—like all seven
3 antitrust cases pending against Facebook in this District—challenges Facebook’s acquisitions of
4 Instagram and WhatsApp, and its supposed imposition of restrictions on developer use of
5 Platform APIs, as violations of Section 2 of the Sherman Act. The *Klein* Complaint levels these
6 allegations in scores of paragraphs quoted *verbatim* from the operative Complaint in *Reveal*
7 *Chat*. *Reveal Chat* Dkt. No. 85 at 2-4 (also filed at *Klein* Dkt. No. 16-1 at 2-4).¹ Thus, the *Klein*
8 plaintiffs should not be able to avoid relation with *Reveal Chat*.

9 At the outset, relitigating the *Reveal Chat* motion in the guise of a motion to relate
10 different cases is procedurally improper, and this Court should not rule on plaintiffs’ motion,
11 unless and until Judge Freeman denies Facebook’s pending motions to relate *Klein*, *Kupcho*,
12 *Dames*, and *Steinberg* to *Reveal Chat*. See Civil L.R. 3-12(f)(2).

13 On the merits, the *Klein* plaintiffs’ position—that their case is unrelated to *Reveal Chat*,
14 and, more broadly, that the seven relevant cases should be grouped into two or possibly three
15 categories, Mot. at 1-2 (also filed at *Reveal Chat* Dkt. No. 105-1 at 1-2)—appears to rest on two
16 fundamentally incorrect premises. *First*, they assert that the cases are unrelated because the
17 plaintiffs in some of the cases are “consumers” and the plaintiffs in others are app developers or
18 advertisers (each of whom are also themselves likely “consumers”). Mot. at 1. This position
19 finds no support in the law. Though the “plaintiffs differ and their relationship to the defendant
20 also differs . . . , each case stems from the use of the exact same technology and the economics
21 regarding that same technology.” *Pepper v. Apple, Inc.*, 2019 WL 4783951, at *1 (N.D. Cal.
22 Aug. 22, 2019). In these circumstances, “Local Rule 3-12(a)(1) allows for relation of actions
23 even where plaintiff classes differ, including classes of consumers,” “content creators,” and,
24 here, app developers and advertisers. *Id.* The two sets of Google cases plaintiffs cite (at 1-2)
25 involve entirely different lines of business and thus, unlike the cases at issue here, do not involve

26
27 ¹ The Complaint in *Kupcho* does the same. Compare *Klein* Compl. ¶¶ 142-201 with *Kupcho*

1 the same technology or products, and as a result do not meet the requirements of the rule.

2 Equally without support is the *Klein* plaintiffs' similar contention that different relevant
3 market allegations in some of the complaints render the cases unrelated. *Reveal Chat* Dkt. No.
4 86 at 3 (also filed at *Klein* Dkt. No. 16-2 at 3). This is particularly true because whatever label
5 the plaintiffs apply to the market at issue, each case involves "[the] same technology." *Pepper*,
6 2019 WL 4783951, at *1. A plaintiff cannot escape relation—and it remains unclear *why*
7 plaintiffs doth protest so much—simply by alleging that the same product is part of a different
8 relevant market.

9 *Second*, the *Klein* plaintiffs assert that some of the cases are unrelated simply because
10 they *also* challenge other conduct *in addition to* the Instagram and WhatsApp acquisitions and
11 Facebook's Platform policies. *Reveal Chat* Dkt. No. 86 at 3-4 (also filed at *Klein* Dkt. No. 16-2
12 at 3-4). This position is again without support in law or logic. As the Court knows, antitrust
13 cases that advance beyond the pleadings are "massive factual controvers[ies]." *Feitelson v.*
14 *Google Inc.*, 80 F. Supp. 3d 1019, 1025 (N.D. Cal. 2015) (quoting *Associated Gen. Contractors*
15 *of Calif., Inc. v. Carpenters*, 459 U.S. 519, 528 n. 17 (1983)). That is particularly true where, as
16 here, the challenged conduct includes two mergers and a purported scheme to exclude
17 competitors from an entire segment of the economy. It would certainly involve "an unduly
18 burdensome duplication of labor" for two or potentially three different Judges in this District to
19 preside over separate cases—potentially including separate summary judgment briefing and
20 trials—concerning the exact same complex "transaction[s] [and] event[s]," Civil L.R. 3-12(a),
21 just because some cases have an additional (but still related) theory of competitive effects.
22 Tellingly, plaintiffs cite no authority for their novel theory.

23 The best plaintiffs have been able to muster throughout their month-long campaign to
24 oppose relation of this case to *Reveal Chat* is their insistence that the "gravamen" of their
25 Complaint is alleged user deception. *Reveal Chat* Dkt. No. 86 at 3 (also filed at *Klein* Dkt. No.
26 16-2 at 3). Even setting aside that this is little more than a dressed-up state law consumer
27 protection claim, and not a cognizable antitrust theory, plaintiffs have consistently ignored the

28

1 *Reveal Chat*. Compl. ¶¶ 142-201. In light of these (often identically worded) allegations, the
2 *Klein* plaintiffs do not and cannot provide any explanation of why proceeding on separate tracks,
3 arbitrarily divided by plaintiff constituencies, is the more efficient method for resolving these
4 cases. Plainly, it is not.

5 The government plaintiffs who have brought lawsuits against Facebook have
6 acknowledged in filings in the District Court in Washington, D.C. that these cases—*Reveal Chat*
7 included—are related. Gringer Decl. Exs. 1-2. The *Reveal Chat* plaintiffs themselves and
8 Facebook agree as well. And relation is apparent on the face of the (at times identical)
9 complaints themselves.

10 **CONCLUSION**

11 *Klein, Kupcho, Dames, and Steinberg* (along with *Sherman* and *Affilious*²) are all related
12 to *Reveal Chat*. Because *Reveal Chat* is the lower-numbered related case, this Court should not
13 rule on the *Klein* plaintiffs’ instant motion unless and until Judge Freeman denies Facebook’s
14 pending motions to relate *Klein, Kupcho, Dames, and Steinberg* to *Reveal Chat*.

15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: January 6, 2021

Respectfully submitted,

By: /s/ Sonal N. Mehta
SONAL N. MEHTA (SBN 222086)
sonal.mehta@wilmerhale.com
WILMER CUTLER PICKERING HALE
AND DORR LLP
2600 El Camino Real, Suite 400
Palo Alto, CA 94306
Telephone: (650) 858-6000

DAVID Z. GRINGER (*pro hac vice*)
david.gringer@wilmerhale.com
WILMER CUTLER PICKERING HALE
AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 663-6000

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.